Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 84

Steel Reinforcing Bar exported from the People's Republic of China

August 2018

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADA	Anti-Dumping Agreement
ADN	Anti-Dumping Notice
Commission	The Anti-Dumping Commission
Goods	Steel reinforcing bar
Hunan	Hunan Valin Xiangtan Iron & Steel Co., Ltd
Minister	Assistant Minister to the Minister for Jobs and Innovation
OneSteel	Liberty OneSteel
Original investigation period	1 July 2014 to 30 June 2015
REP 411, 412, and 423	The report published by the Commission in relation to Steel Reinforcing Bar and dated March 2018.
Reviewable Decision	The decision of the Minister made on 19 April 2018
Review period	1 April 2016 to 31 March 2017
Shagang	Jiangsu Shagang Group Co., Ltd
Yonggang	Jiangsu Yonggang Group Co., Ltd

Summary

1. Applicants challenged the Commission's determination of a timing adjustment to their export prices, whereby the Commission compared the simple average of export prices from China to Australia over the investigation period, with the simple average of export prices for the goods reported by Platts over the review period.

2. As this method captured export prices from exporters other than the Applicants and for periods prior to the Applicants' exports to Australia, I requested the Commission recalculate the weighted average of the Applicants' export price over the investigation period and compare those prices with the Platts simple average over the review period. This resulted in a reduction in the dumping margins for each of the Applicants.

Introduction

3. Jiangsu Shagang Group Co., Ltd (Shagang), Hunan Valin Xiangtan Iron & Steel Co., Ltd (Hunan) and Jiangsu Yonggang Group Co., Ltd (Yonggang), hereinafter collectively referred to as the Applicants, have each applied to the Anti-Dumping Review Panel (Review Panel) for a review of the decisions (the reviewable decisions) of the Assistant Minister for Science, Jobs and Innovation (Minister) made on 19 April 2018 under section 269ZDB(1)(a)(iii) of the *Customs Act 1901*[1] that the dumping duty notice currently applying to Steel Reinforcing Bar (the goods) exported to Australia from the People's Republic of China (China) was to be varied and different variable factors in respect of each of the Applicants were determined.

4. The Review Applications were accepted and a notice of the Review Panel's review, as required by section 269ZZI, was published on 6 June 2018. The

[1] Unless otherwise specified, all legislative references are to the *Customs Act 1901*.

Senior Member of the Review Panel has directed in writing that the Review Panel for the purposes of this review be constituted by me.

Background

5. The Applicants are Chinese manufacturers and exporters of the goods exported by them from China to Australia and have been the subject of interim dumping duties since April 2016.

6. In 2017, each of the Applicants applied for a review of the variable factors relevant to the determination of the amount of interim dumping duty under Division 5 of Part XVB of the Act (Division 5 Applications).

7. A review was initiated in response to the Division 5 Applications. A joint Statement of Essential Facts (SEF) with respect to all applications was published on 21 December 2017. Each of the Applicants responded separately to the SEF.

8. The Commission's final report (REP 411, 412 and 423) which dealt with the three Division 5 Applications, acknowledged a change in the variable factors and recommended to the Minister that Hunan's and Yonggang's export price be determined under section 269TAB(2A), and that Shagang's export price be determined as the average of Hunan's and Yonggang's new export prices.

Conduct of the Review

9. In accordance with section 269ZZK(1), the Review Panel must recommend that the Minister either affirm the decision under Review, or revoke it and substitute a new specified decision. The Review Panel may recommend revocation of the Reviewable decision and substitution of a new decision only in circumstances where the new decision is materially different from the Reviewable Decision.

10. In undertaking the Review, section 269ZZ requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if

it was the Minister, having regard to the considerations to which the Minister would be required to have regard, if the Minister was determining the matter.

11. Subject to the limited exceptions provided for in subsections 269ZZK(4A) and (5), in carrying out its function, the Review Panel is not to have regard to any information other than to *"relevant information"* as that expression is defined in section 269ZZK(6)(c), that is, information to which the Commissioner had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant information that is contained in the application for Review and any submissions received under section 269ZZJ.

12. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information.

13. Conferences were held with representatives of the Commission on 19 June and on 29 June 2018, for the purpose of clarifying information contained within the relevant Commission Reports. A conference was held with the Applicants' representative on 22 June 2018 to clarify matters I had raised with the Applicants in a letter and an email dated 19 June 2018. A non-confidential summary of each conference was placed on the ADRP website.

14. The Commission also provided relevant documents containing confidential information. These documents and the correspondence with the Commission, concerning them, was not made publicly available.

15. Written submissions were received on 27 June 2018 from each of the Applicants. On 6 July 2018, written submissions were received from the Australian manufacturer, Liberty OneSteel (OneSteel) and from the Commission. All submissions were received within the 30 day period specified in section 269ZZJ.

16. Unless otherwise indicated in conducting these Reviews, I have had regard to the applications (including documents submitted with the applications), insofar as it contained conclusions based on relevant information. I have also had regard to REP 411, 412, 423, 418 and 300, to documentation provided by the Commission, to the written submissions received and to the matters discussed in conferences.

Grounds for Review

17. Each of the review applications raised four common Grounds of Review. The common Grounds for Review were expressed as follows:

    Ground 1: The Minister erred in retrospectively applying new legislative amendments to the review of measures.

    Ground 2: The Minister made incorrect assessments and determinations with respect to the Applicants' exports, pursuant to subsection 269TAB(2A).

    Ground 3: The Minister erred by determining an external billet benchmark price which does not properly compare with the Applicants' integrated production and manufacturing costs.

    Ground 4: The Minister erred by incorrectly calculating the timing adjustment in determining the Applicant's export prices.

18. On 26 June 2018, Shagang's representative advised the Review Panel that his client was withdrawing Grounds 1 and 2 of its application.

19. In a conference convened on 22 June 2018, the representative for Hunan and Yonggang narrowed the scope of Ground 3 of Hunan and Yonggang's application for review to the alleged failure on behalf of the Commission to include, in the steel billet benchmarking calculations, cost data from an integrated Vietnamese producer, which had been verified and accepted by the Commission in another investigation, the investigation period for which was identical to the review period for the Applicants' Division 5 Applications.

20. It was noted in conference, that if Hunan and Yonggang prevailed on Ground 3 of their respective applications for review, as Shagang's export prices were based upon the average export prices ascertained for Hunan and Yonggang, Shagang's export price would also be impacted.

Consideration of Grounds

21. Each of the Applicants, in support of Grounds 1 and 2 of their respective applications to the Review Panel, placed considerable reliance upon the Explanatory Memorandum to the *Customs Amendment (Anti-Dumping Measures) Bill 2017* (the Amending Act). In particular, the Applicants quoted extensively from the Explanatory Memorandum relating to that Bill to support their interpretation as to the operation of subsections 269TAB(2A) and (2B), which were introduced into the legislation upon commencement of the Amending Act.

22. In these circumstances, it is appropriate that I comment upon the Applicants' reliance upon the Explanatory Memorandum. I acknowledge, in certain circumstances reliance upon an Explanatory Memorandum can provide assistance in interpreting legislative provisions. That said, recourse to Explanatory Memoranda, to aid in interpretation, is not automatic, as there are conditions which attach to the use of extrinsic materials, such as Explanatory Memoranda.

23. The modern approach to statutory interpretation is that an Act of Parliament is to be read as a whole. The object of statutory construction is to construe the meaning of words used in a section, in the context of the language and the legislation as a whole, to try to discern the intention of the legislature.[2] The starting point of any construction is to first look to the meaning of the words used and the context within which they appear.

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[2] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28.

24. Section 15AB of the *Acts Interpretation Act 1901* (Interpretation Act), does authorise, in two limited circumstances, recourse, to any material not forming part of an Act, if it is capable of assisting in the ascertainment of the meaning of the provision. The first circumstance is that such material may be used to confirm the meaning conveyed by the text, taking account of its context in the Act, and the purpose and object of the Act. The second, is that extrinsic material may be considered when the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose of all object of the underlying Act, leads to a result that is manifestly absurd or unreasonable. The section goes on to prescribe that Explanatory Memoranda are documents of a kind, which are extrinsic and not forming part of an Act, but which may be referred to confirm the ordinary meaning of the text or to resolve ambiguity or avoid an unreasonable interpretation.

25. Put another way, if the language used in an Act is clear, unambiguous and on its face reasonable, having regard to its context and the object and purpose of the legislation, an Explanatory Memorandum cannot be referenced to introduce another meaning.

Ground 1: The Minister erred in retrospectively applying new legislative amendments to the review of measures.

26. Item 4 of Schedule 1 of the Amending Act provides:

4 Application of amendments

The amendments made by this Schedule apply in relation to the following:

(a) a review under Division 5 of Part XVB of the *Customs Act 1901* for which an application is lodged, or request is made, on or after the commencement of this Schedule;

(b) such a review that was being undertaken immediately before the commencement of this Schedule but for which a declaration in

accordance with subsection 269ZDB(1) of that Act had not been made at that time;

(c) an application for such a review that was lodged, or a request for such a review that was made, before the commencement of this item but for which a notice of a review under subsection 269ZC(4), (5) or (6) of that Act had not been made at that commencement.

27. The issue raised by Ground 1 of each of the applications to the Review Panel[3] is whether Item 4(b) applied to the Division 5 Applications, such that the Minister could have recourse to the recently introduced subsections 269TAB(2A) to (2G) when making the Reviewable Decisions. Each of the Applicants did not argue that either Item 4(a) of 4(c) applied.

28. Each of the Applicants advanced two primary arguments:

(a) Item 4(b) was not applicable because the amendments should only be applied to those reviews that were "undertaken immediately before the commencement of this schedule".[4] They argued that the word "immediately" should be given the meaning of "at once, instantly" and "without any intervening time or space"; and

(b) The amendments should only be applied to "reviews initiated after the Government had announced its intention to amend the Act by introducing the Bill into Parliament on 13 September 2017". It was said that this approach should be adopted to avoid the retrospective application of the legislation. The amendments should not be given retrospective effect because interested persons have reasonable expectations that would be observed if the amendments applied only to "reviews commenced immediately prior to the commencement of the schedule" and that the law "should be capable of being known in order to comply".

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[3] As noted above, Shagang has withdrawn this Ground for Review.

[4] Emphasis in original.

29. In its written submission to the Review Panel, OneSteel challenged the Applicants' arguments with respect to their retrospective arguments. OneSteel noted that had the Parliament intended the Amending Act to apply only to reviews "initiated" immediately before commencement of the legislation, the ordinary rules of statutory interpretation would have demanded that some means of referencing the instruments of initiation be drafted into the language of item 4 (B) of the amendment Act. OneSteel noted that item 4 (C) expressly references the instruments of initiation ("a notice of review under section 269ZC(4),(5) or (6)"), where it is there the Parliament's intention to apply the amendments to application lodged prior (but not initiated) to the commencement date.

30. OneSteel's argument has merit and I do not accept either of the Applicant's two arguments for the reasons outlined below.

31. First, Item 4(b) refers to "a review that was being undertaken immediately before the commencement of this Schedule" rather than to reviews that "were undertaken". The expression "was being undertaken" conveys the idea of a process that had started before the commencement of the Schedule and was continuing up to the commencement of the Schedule. This is apt to describe the circumstances pertaining to the Division 5 Applications.

32. In respect of Shagang and Hunan, the Division 5 Applications were initiated on 19 May 2017 and Yonggang's Division 5 Application was initiated on 29 June 2017.[5] The reviews were not completed until 19 April 2018, when the Reviewable Decisions were made. The reviews were being undertaken throughout the whole of the period from 19 May 2017 to 19 April 2018, including 30 October 2017, so that the Division 5 Applications were "being undertaken immediately before the commencement of [the] Schedule" on 31 October 2017.

[5] ADN No. 2017/68 and ADN No. 2017/91 respectively.

33. The intention of Item 4(b) was to apply the amendments to Division 5 Applications that were on foot at the commencement date but had not been determined. I accept that meaning must be given to the word, “immediately,” but in my view it was used emphatically, so as to put beyond doubt that the amendments would have no effect upon any Division 5 Application which had been completed prior to 31 October 2017, by a declaration of the Minister made under section 269ZDB(1).

34. The Applicants second argument was that Item 4(b) only applied the amendments to reviews initiated after the Government announced its intention to amend the Act by introducing into Parliament the Bill, which eventually became the Amending Act. This occurred on 13 September 2017.

35. The Applicants’ second argument requires reading into the Amending Act additional words to the effect that the operation of Item 4(b) applied only to Division 5 Applications made after the introduction of the Amending Act, namely 12 September 2017. The Applicants contended this interpretation was required so that the amendments would not have retrospective effect.

36. The operation of amending legislation is dealt with by section 7 of the Interpretation Act. Section 7(2) of the Interpretation Act provides:

> (2) If an Act, or an instrument under an Act, repeals or amends an Act (the *affected Act*) or a part of an Act, then the repeal or amendment does not:
>
> (a) …
>
> (b) affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or
>
> (d) …

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.

37. Section 7(2) of the Interpretation Act applies subject to a contrary intention.[6]

38. Section 7(2) expresses the general principle that amendments will not operate retrospectively, unless a contrary intention is apparent. The critical component of section 7(2) is paragraph (c) which refers to "such right, privilege, obligation, liability, penalty, forfeiture or punishment."

39. It is necessary, therefore, to determine whether:
    - the Amending Act affected any "right, privilege, obligation or liability acquired, accrued or incurred" under the pre-amendment Act; and
    - if it did, whether it is possible to infer that there was an intention to have that effect, notwithstanding section 7(2).

40. The Applicants did not acquire or accrue any relevant right or privilege or incur any relevant liability or obligation prior to the Amending Act by virtue of the Division 5 Applications and their acceptance by the Commission. The Applicants had made the Division 5 Applications and reviews 411, 412 and 423 had been commenced. They were not entitled to any particular outcome from the reviews, other than an expectation that the applications would eventually be determined in accordance with the applicable law.

[6] Interpretation Act, section 2(2).

41. The outcome of a Division 5 Applications is prospective. Subject to the operation of section 269ZDB(6)(a), the review determines the dumping measures that will be applicable to exports by a Division 5 Applicant in the future. Subject, again, to section 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 section 269ZDB is made.

42. Section 269ZDB(6)(a) does permit the Minister to make a declaration which has limited retrospective effect. The Minister may only "back date" the declaration to the date of publication of the notice under section 269ZC. I accept the Act contemplates that the outcome of a review might be to impose dumping measures on goods entered into Australia which were different from the rates applicable at the time of entry.

43. However, the possible prejudice that might be suffered by fixing a date in the past under section 269ZDB(6)(a), is a matter that may better be accommodated by recognising that the Minister may consider any prejudice when fixing a date under section 269ZDB(6)(a). That is, it would be open to the Minister to fix 31 October 2017 as the date under section 269ZDB(6)(a).

44. In this case, the Reviewable Decisions did not have any retrospective effect. The Reviewable Decisions had only prospective effect: goods which were entered into Australia after 19 April 2018 would be subject to dumping duty at the rates resulting from the Reviewable Decisions.

45. For these reasons, I consider that there is no basis for the proposition that the Minister failed to make the correct or preferable decision because he applied the provisions of the Amending Act, rather than the version of the Act as it was before 31 October 2017.

Ground 2: The Minister made incorrect assessments and determinations with respect to the Applicants' exports, pursuant to subsection 269TAB(2A).

46. As noted above, Shagang has withdrawn this Ground from its application for review.

47. Section 269TAB(2A) relevantly provides that export price may be determined by the Minister in accordance with subsection 269TAB(2B) if the Minister determined that there is insufficient or unreliable information to ascertain the price due to an absence or low-volume of exports of those goods to Australia by that exporter having regard to three factors:

    i. previous volumes of exports of those goods to Australia by that exporter;

    ii. patterns of trade of like goods; and

    iii. factors affecting patterns of trade for like goods that are not within the control of the exporter.

48. The legislation is silent as to whether the decision regarding the insufficiency and unreliability of the information could be informed by factors beyond the three stipulated.

49. I will deal with each of these factors insofar as they relate to Yonggang and Hunan.

i. previous volumes of exports of those goods to Australia by that exporter (Yonggang);

50. Yonggang notes although the legislation does not specify the previous period which is to be compared with the review period, Yonggang takes issue with the fact that rather than comparing its export volumes during the two nominated periods (i.e. the investigation period and the review period), the Commission

compared the volumes during the review period to the volumes during the period 12 months immediately prior to the commencement of the review period.

51. Yonggang notes during the original investigation period it exported [redacted] metric tonnes of the goods to Australia, whilst during the review period it had exported [redacted] metric tonnes. It therefore argues that it cannot be said that the export volumes during the original investigation period were not "much higher" and therefore in no way indicative of an intended strategy to exploit the dumping framework.

52. Further, Yonggang argues the Commission's comparison is unreasonable as the legislation precluded it from seeking a review for 12 months from the date of the Minister's decision to impose measures.

53. OneSteel in its written submission challenged Yonggang's argument regarding the relevant periods. OneSteel is of the view that the exporters are incorrectly interpreting the legislative framework, which broadly requires consideration of "previous volumes of exports", not (narrowly) volumes confined it to the "original investigation period", as the Applicants assert.

54. Yonggang also argued that its level or volume of exports during both the investigation period and the review period represent negligible portions of the total Australian market for the goods and its own production capacity.

55. I agree the legislation does not define, what "the previous volumes" to be examined and compared with an Applicant's exports during the review period are. Whilst I can see the earlier investigation period could be considered, the legislation does not so confine the Commission. The phrase "previous volumes" is not confined in a temporal sense. The more recent the volumes, relevant to the review period, would be more contemporaneous and therefore the more relevant. The Commission, in REP 423 at page 19, noted the volume of exports

made by Yonggang in the 12 months immediately prior to the review period were 28 times greater than the volume during the review period.

56. In its written submission OneSteel referred to the Commission's comments in REP 300 which indicated significant export volumes in the period immediately following the investigation period:

> "the Commission notes that the total import volume of Rebar from China was approximately 22,500 tonnes during the investigation period but the total imports of Rebar from China adds up to approximately 46,700 tonnes in the eight months following the end of the investigation period. That would be approximately 70,000 tonnes of export volumes at pro rata basis for the next 12 months following investigation period. This shows more than 300% increase in Rebar import volumes from China".[7]

57. Such a difference is significant, and the legislation did not preclude consideration of it. Therefore, it was appropriate for the Commission to have regard to the earlier period, being the 12-month period immediately prior to the review period.

58. The Commission noted the focus of the legislation is upon the pattern of trade of the exporter and that the relative volume of Yonggang's exports compared to both the Australian market of the goods and Yonggang's production capacity are irrelevant. I do not share this interpretation. Consideration of "the patterns of trade" is not confined to the Division 5 Applicant, as such patterns would be captured by consideration of the Applicant's "previous volumes" referred to in the first of the three factors.

59. The critical determination, which is the focus of section 269TAB(2A), is one to be made by the Minister regarding the sufficiency or reliability of information to enable ascertainment of export prices due to the absence or low-volume of

[7] REP 300 – Steel Reinforcing Bar – China, p. 70.

exports during the relevant review period. Prior to making such a determination the legislation requires the Minister to have regard to three factors referred to above. However, the legislation provides no guidance as to how a consideration of each factor helps inform the determination as to sufficiency or reliability of information. It is apparent that the significance of or weight to be attributed to each factor is one to be determined by the Minister and although, on its face unfettered, it nevertheless must be exercised having regard to the purpose and object of the legislation.

i. previous volumes of exports of those goods to Australia by that exporter (Hunan)

60. At page 11 of its application to the Review Panel, Hunan quoted the following passage from REP 412:

> "Hunan has previously exported the goods prior to the review period, during both the original investigation period (1 July 2014 to 30 June 2015) and subsequently. Hunan has not exported the goods to Australia since the September 2016[8] quarter."[9]

Hunan then went on to allege that the Commission had not undertaken any further assessment or consideration of the relative volumes as expressed in the Explanatory Memorandum.

61. At page 12 of its application, Hunan states,

> "exports to Australia by Hunan during the original investigation total [redacted] metric tonnes. It then goes on to allege that the export volumes during original investigation period could not be said to be "much higher".

[8] In a Conference conducted on 19 June 2016, Commission representatives confirmed that the reference to 2016 was incorrect and the Commission had intended to refer to the 2015 September quarter.

[9] In a Commission document provided to the Review Panel I note although Hunan had not imported the goods during the review period, it had imported [redacted] metric tonnes in 2015.

62. Quoting from the Explanatory Memorandum, Hunan argues section 269TAB(2A) required the Commission to consider whether the previous volumes of imports were "much higher than the volumes of exports during the period being examined by the review." Hunan alleges the Commission had not undertaken any such assessment or consideration and went on to state,

> "a reasonable assessment of the data would conclude that the export volumes during the original investigation period were not 'much higher', and in no way indicative of an intended strategy to exploit the dumping framework."

63. I agree that at page 12 of REP 412 the Commission has not expressly compared the lack of imports throughout the review period with the volume imported during original investigation period. The Commission was confronted by zero imports during the review period compared with a relatively small volume of imports from Hunan during the investigation period. In the circumstances, I have difficulty in identifying any further comparison was necessary or required.

64. The task before the Commission, and ultimately the Minister, was to determine an export price for Hunan for the review period, a period in which it had not exported. To do so, the Commission had to determine whether the information before it was insufficient or unreliable due to, in this case, an absence of exports during the review period from Hunan. The Minister's determination was to be informed by consideration of Hunan's "previous volumes of exports" of the goods to Australia, which includes Hunan's 2015 export volumes.

65. It is important to appreciate that the Commission, and ultimately the Minister's determination regarding the sufficiency or reliability of the information on the record, requires a broad judgement and does not take place in isolation but is made in the context of all available information. Such a determination must be made in the context of the circumstances pertaining to exportations and to the Applicants themselves. Prior occurrence of export prices which had been less

than comparable normal values may suggest that normal values may not be a reliable guide to the ascertainment of export price.

66. Hunan's and Yonggang's responses to the Exporter Questionnaires regarding their significant production capacity[10] and their apparent capability to re-enter the Australian market at any time, a market which, as Applicants have acknowledged, is driven by price, also provides context to the determination.

67. The Commission's recommendation, and the Minister's determination, were therefore made in the context of exporters with significant production and export capacity, and in Hunan's case who had exported significant volumes of the goods to Australia in the past, but who had made no exports in the period for which it had made application for a review of its export price (a variable factor,) on the basis that its export price had varied from that determined in the investigation period.

68. I am satisfied that the Commission and Minister appropriately had regard to Hunan's "previous volumes of exports" when considering the significance of Hunan's cessation of exports during the review period.

ii. patterns of trade of like goods: Yonggang and Hunan

69. Yonggang and Hunan (referred to collectively as the Applicants when considering this factor) made similar arguments when addressing this factor. They contend the Commission's assessment and consideration of the patterns of trade for like goods was not an objective examination of the evidence.

70. The Applicants note in REP 412 and 423, the Commission highlighted in Figure 1, exports from China had been almost non-existent during the review period,

[10] As noted in Hunan's application to the Review Panel, the [redacted] metric tons it had exported during the investigation period represents a mere [redacted]% of its production capacity.

having declined markedly around the time securities were implemented. The Commission nevertheless noted, concurrent with this decline, exports from other countries increased substantially. This in turn suggested to the Commission that the general market or demand for the goods in Australia remained consistent and that the Applicants' relatively small volume of exports to Australia during the review period[11] was not caused by or due to a general lack of exports or low volumes of exports of the goods to Australia. In essence, the Commission's position was that following the imposition of measures, the Applicants' and other Chinese exporters' share of the Australian market had been replaced by exports of the goods from countries not subject to measures.

71. The Applicants argue the Commission was wrong in focusing wholly on, or attributing entire weight to the export volume of like goods from other exporting countries. The Applicants argue this is in direct contrast to the example and guidance contained in the Explanatory Memorandum. The Applicants argue paragraph 15 of the Explanatory Memorandum makes clear the assessment of the patterns of trade is to be undertaken in the context of the "Exporter in question" or "the pattern of trade generally among exporters of goods from the country of export." I do not except that interpretation.

72. Paragraph 15 of the Explanatory Memorandum states:

> 15. New paragraph 269TAB(2A)(b)(ii) requires consideration of the patterns of trade for those goods. For example, some goods are specialty or custom products that are consistently exported in low volumes. Considering patterns of trade may involve an examination of the previous patterns of trade for the Exporter in question, or the pattern of trade generally among Exporters of goods from the country of export. The Minister may also consider the pattern of trade in other ways. For example, if a decline in the pattern of trade from the

[11] In Hunan's case there were no exports.

> Exporter reflects a similar decline in the pattern of trade from the country of export generally, during the period being examined by the review, this may demonstrate that low volumes are indicative of broader market trends, rather than a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may weigh in favour of the Minister determining that the information (if any) provided by the Exporter is sufficient and/or reliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should not be applied.

73. I do agree that the focus of section 269TAB(2B)(b) is upon an absence or low-volume of export of those goods to Australia by the exporter the subject of the review. The assessment of the impact of an absence, or low volume, of exports upon the sufficiency and reliability of the information before the Commission, and the Minister, is to be undertaken having regard, into alia, to the "patterns of trade for like goods." The legislation does not condition or constrain that pattern only to exports from, in this case China.

74. Paragraph 15 of the Explanatory Memorandum is not as restrictive or limited as portrayed by the Applicants. The Memorandum suggests consideration of the patterns of trade may involve examination of the previous patterns of trade from the exporter in question. However, it goes on to state, "the Minister **may** also consider the pattern of trade **in other ways**" [emphasis added]. It then goes on to provide an example, where a decline in the pattern of trade from of the exporter reflects a similar decline in the pattern of trade from the country of export generally. It suggests such a decline could demonstrate broader market trends rather than a deliberate strategy on the part of the exporter. The Explanatory Memorandum suggests that by allowing the Commissioner, and Minister, to consider "other ways," it leaves open to the Commission, and Minister, to consider the patterns of trade in other ways which could include, as was done in the case of the Applicants, the patterns of trade of other exporters of

like goods, such exporters being located in countries other than China and currently not the subject of measures.

75. More to the point, in relation to the three factors to be considered under section 269TAB(2A)(b), the language used in referring to the second factor differs from that used for the other two factors. Those other factors include the phrases “by that exporter” and “the exporter”. As noted above, meaning must be given to the language used. Had the legislature intended to limit the scope of the second factor it could have adopted the approach used in reference to the first factor, namely by inserting the phrase “by that exporter”.

76. The Applicants’ reliance upon the Explanatory Memorandum seeks to read into the legislation additional language. It is not as if the language used gives rise to an absurdity, ambiguity or unreasonable interpretation. The words used can operate effectively and their ordinary meaning ought to be applied. Accordingly, it was appropriate for the Commission to have regard to the patterns of trade for like goods, being goods, which were not the subject of measures.

iii. factors affecting patterns of trade for like goods that are not within the control of the exporter

77. In their respective applications, the Applicants[12] pointed to another concurrent dumping investigation in relation to Steel Reinforcing Bars exported from Greece, Indonesia, Spain, Taiwan and Thailand, which culminated in REP 418. The Applicants note the investigation period in relation to that report mirrored that of REP 411, 412 and 423 and therefore the Commission’s findings with respect to REP 418 were said to be directly relevant and pertinent to understanding the Australian market for the goods and the consequential impact upon the Applicants’ patterns of trade.

[12] Hunan and Yonggang.

78. The Applicants note the Commission found in REP 418 that exports of the goods from countries, the subject of that investigation, ranged from having margins of dumping from 4.4% to 42%, and throughout the review period none of those exporters were subject to measures.

79. The Applicants noted, the Australian industry, in REP 418, highlighted the goods are “a commodity product which, when having similar grade and dimensions, are interchangeable regardless of origins” and “competes primarily on the basis price.” In REP 411, 412 and 423, the Commission also found the commodity nature of the goods indicated a willingness by parties to switch between import sources “due to the degree of price sensitivity in the Rebar market, price competition is a major condition of competition between the imported goods.”

80. The Applicants’ argument is that as their exports were subject to measures, in a price sensitive market, they would not be competitive with the exports, the subject of REP 418, who were able to export to Australia at prices subsequently determined to have a dumping margin of up to 42%. Such exporters were undercutting the Applicants and it was this undercutting, by those exporters not subject to measures, which was preventing the Applicants from reentering the Australian market and, as such, the pricing decisions of those other exporters ought to have been treated by the Commission as a factor beyond the control of the Applicants.

81. In a conference with the Commission on 19 June 2018. Commission representatives commented on the Applicants’ argument on this point, noting the imposition of measures did not prevent the Applicants from exporting to Australia [at whatever price was agreed with their customers]. Such customers could then exercise their right to lodge Division 4 Applications, if appropriate.

82. The Applicants note the factors, “not within the control of the exporter” are not defined in the legislation. In the conference with the Commission on 19 June 2018, Commission representatives noted the two examples provided in the

Explanatory Memorandum, namely, supply disruption and natural events, suggests the focus is upon external matters impacting upon the exporter's production. I agree that the factors "not within the control of the exporter" are not defined in the legislation but the examples referred to in the Explanatory Memorandum are not exhaustive and cannot be used to read into the legislation a limitation which is not express or at least implied.

83. In its written submission, OneSteel asserts the suggestion by the Applicants that the "low volume" of exports during the review period is "beyond its control" defies belief. OneSteel argues the Applicants compete on price, and they may overcome their absence from the Australian market by adjusting their price to Australian market conditions. Further, to suggest that low volume exports to the Australian market on the basis of export price offers by other exporters constitutes a factor "beyond its control" denies the new statutory regime of any purpose when the ordinary meaning of the text is taken as a whole.

84. In REP 411, 412 and 423, the Commission dismissed the Applicant's view stating,

> "the Commission considers that anti-dumping measures in place in relation to the Applicants' exports to Australia are not a result of factors outside their control. In fact, the measures directly resulted from the behaviour of the Applicants during the original investigation period, in the sense that the goods were priced and sold by the Applicants willingly at that time, and were found to have been dumping ... the behaviour of other exporters in no way prevents the Applicants from exporting Rebar to Australia."[13]

85. In conference with Commission representatives on 19 June 2018 they stated, "consideration ought to be given to the purpose of the legislation, in that if the imposition of measures was considered to be an external factor there

[13] REP 412 and 423 at page 13.

would never be a circumstance in which the legislative amendments would be able to operate."[14]

I agree with the Commission on this point.

86. The Commission representatives went on to state, as the Division 5 Applications were lodged prior to the Amending Act,

> "the Applicants would have assumed that the applications would have been assessed and export prices determined under the previous regime or practice and that this would have been of benefit to them in a market in which prices were increasing. The Applicant's intent would have been to secure a floor price based upon the low point in the price cycle, which would be ineffective in a market in which the prices were now increasing[15]."

87. Notwithstanding the Explanatory Memorandum's emphasis upon the intent of the exporter which motivated the cessation or substantial reduction in export volumes during the review period, the legislation enables the Commission and ultimately the Minister's determination to have regard to all or any of the three factors, none of which require the Commission or the Minister to form a view as to the intent of the Applicants.

88. As noted by OneSteel in its written submission, neither the amending Act nor the Explanatory Memorandum point to a hierarchy[16] when considering the three factors, or that the presence of all three are necessary to satisfy the Commissioner, and ultimately the Minister, that the absence or low volume of exports renders the information available to the Commission, or Minister, to determine export price, to be unreliable or insufficient. I agree with OneSteel on this point.

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[14] Summary of conference with Commission on 19 June 2018 and published on ADRP web site.

[15] Ibid.

[16] "The method above are not hierarchical. The Minister would have regard to the method that most of appropriately applied to the circumstances in the case." Explanatory Memorandum at page 17.

89. In conclusion, section 269TAB(2A)(b) required the Commission, and ultimately the Minister, to determine if there was insufficient or unreliable information to ascertain the Applicants' export price during the review period, due to an absence or low volume of exports. In making that determination the Commission, and Minister, had regard to three factors. There is no hierarchy amongst those factors and the Commission and Minister need not be satisfied that each supported a determination that the evidence available was insufficient or unreliable. The Commission and ultimately the Minister need only be satisfied that one such factor supported such a determination.

90. In reviewing the Commission, and Minister's determination, the subject of the Applicants' Ground 2 for review, in circumstances where each of the factors was addressed by the Commission, I am not persuaded that the alternative outcome argued for by the Applicants is sufficient to persuade me that the Commission, and Minister's, determination in relation to this ground of review was not the correct or preferable one. Accordingly, I reject this ground for review in all applications for review.

Ground 3: The Minister erred by determining an external billet benchmark price which does not properly compare with the Applicants' integrated production and manufacturing costs.

91. It will be recalled, in a conference with the Applicants' representative on 22 June 2018, the Applicants agreed to narrow Ground 3 of their respective applications to the Review Panel. Accordingly, Ground 3 now limits the Applicants' challenge to the Commission's failure to include, in the benchmark calculation, an integrated Vietnamese producers' cost of billet.

92. In calculating the billet benchmark cost, the Commission in Rep 411, 412, and 423 had regard to verified or relevant information from investigations 416 and 418 and used those verified costs of steel billet of integrated manufacturers in

Indonesia, Spain and Taiwan for the purposes of replacing the Applicants' steel billet cost.[17]

93. In their applications to the Review Panel the Applicants are critical that the Commission provided no justification for its decision to exclude the verified billet costs of the Vietnamese cooperating exporter. The Applicants argue the Commission was under an obligation to ensure that the determined benchmark costs reflect a comparable cost to their costs which were to be substituted by the benchmark costs. Further, to the extent possible, adjustments may be required to ensure proper comparison. To that end, the Applicants argued, the correct benchmark costs should rely only on the verified billet costs of the known integrated exporters, which would include the Vietnamese producer. The Applicants alleged the Commission incorrectly excluded the billet costs of the Vietnamese producer from the benchmark price.

94. In a conference on 19 June 28, the Commission's representative stated that whilst the integrated Vietnamese producer's billet cost was examined and verified during INV 416, the Commission found the data relating to the billet costs was not separately available on a monthly or quarterly basis, but had only been presented in an aggregated form. The Commission representative stated that it was for this reason that the Commission did not include the integrated Vietnamese producers cost in the determination of the billet benchmark cost.

95. In a conference with the Applicant's representative on 22 June 2018, the representative confirmed that he had represented the integrated Vietnamese producer in INV 416 and that the relevant data relating to that company's billet cost had been produced to the Commission and had been verified.

[17] Refer pages 24 and 25 of Rep 411, 412, and 423.

96. In written submissions dated 27 June 2018 each of the Applicants submitted the billet costs for the integrated Vietnamese producer on a monthly basis. Each submission contained the following statement:

> "There is no explanation or reason as to why the Commission would hold the view that Hoa Phat is not an integrated steel producer given Hoa Phat's confirmation of its integrated operations and the level of detailed costing information submitted and verified. To ensure that the correct steel billet costs are included in the benchmark, the spreadsheet at **Confidential Attachment H** summarises the total volume and value of steel billet manufactured by Hoa Phat in each month of the investigation period. [The Applicants] contends that these steel billet costs are the most comparable to its steel billet costs given the similarity of manufacturing operations, and therefore should be included in the weighted average benchmark cost used to replace [the Applicant's] actual steel billet costs."

These submissions called into question the comments of the Commission representatives in the conference held on 19 June 2018.

97. The Applicants misunderstand the Commission's position. The Commission accepts the Vietnamese producer, Hoa Phat, is "an integrated producer" but the producer could not produce its billet cost data in the form reasonably required by the Commission. To the extent that the Applicants seek now to introduce that data on a monthly basis, this new information does not fall within the definition or relevant information as it was not available to the Commission in this format at the time of the reviewable decisions.

98. OneSteel's written submission of 6 July 2018 provided clarification. OneSteel noted in its written submission, in response to SEF 411, 412 and 423, it had cautioned the Commission not to include the integrated Vietnamese producers costs within the billet benchmark, as the Commission had stated in SEF 416, with respect to Vietnam, a material amount of the cost of making billet comprises electricity costs and the level of control exercised by the government of Vietnam on electricity prices has artificially suppressed the price of electricity. In

OneSteel's view the use of cost of production information from the Vietnamese exporter concerning billet would have failed the test under section 43(2) of the *Customs (International Obligations) Regulations 2015*, that costs of production when used in the construction of normal values, under section 269TAC(2)(c), must reasonably reflect competitive market costs. It was therefore appropriate that the Commission exclude the cost of production of Vietnamese exporter from the determination of normal values for the review Applicants.

99. OneSteel argued it was entirely untrue and a misleading characterisation for the Applicants to claim that the Commission provided no justification for the exclusion of the Vietnamese exporter's data from the benchmark for billet. OneSteel went on to quote the following from Rep 411, 412 and 423:

> "The Australian industry raised concerns that artificially low electricity prices in Vietnam, as discerned in Investigation 416, might make it unsuitable to include Vietnamese producers in the Commission's calculation of billet cost. The Commission confirms that no producers from Vietnam are included in the calculation of its billet benchmark costs".[18]

100. The Commission, in its written submission of 6 July 2018, detailed the reasons why the integrated Vietnamese producer's cost of billet data had not been included in the benchmark calculation. The Commission stated:

> "The Commission did not include the Vietnamese producer, Hoa Phat Group, in its benchmark calculation intended for raw material replacement, as the producer's steel billet cost information was only available on an annual basis and not on a quarterly basis. Hoa Phat Group provided cost data on a quarterly basis for the production of various models of steel reinforcing bar, which included the cost of the individual raw materials for the production of steel (iron ore, coking coal, scrap etc). It could not provide the cost of production for steel billet on a quarterly basis.

[18] Rep 411, 412 and 423 at page 25.

> The Commission believes that it would be inappropriate to include this annual billet cost in its quarterly based steel billet benchmark, as considerable movement in steel prices between quarters would not be accurately reflected as part of this methodology".[19]

101. I am satisfied the Commission's decision to exclude the integrated Vietnamese producer's billet cost data from the benchmarking excise was the correct or preferable decision.

Ground 4: The Minister erred by incorrectly calculating the timing adjustment in determining the Applicant's export prices.

102. In a conference with Hunan's representative, held on 22 June 2018, I pointed out that at pages 8 and 9 of Hunan's application to the Review Panel, four Grounds for Review were notified. Ground 4 was expressed as follows:

> "the [Minister] erred by incorrectly calculating the timing adjustment in determining Hunan's export prices."

I went on to also point out, in the body of the application to the Review Panel, Hunan did not advance any argument in support of Ground 4, nor was Ground 4 referenced in Sections 3 and 4 of the Application to the Review Panel, which dealt with the correct and preferable decision, and the reasons why the preferred decisions are materially different from the reviewable decision.

103. On 25 June 2018, Hunan's representative wrote to the ADRP Secretariat advising the argument, with respect to Ground 4, had been mistakenly omitted from the application to the Review Panel and confirmed, Hunan's arguments with respect to Ground 4 corresponded with those advanced by Shagang and Yonggang.

[19] Commission written submission to the Review Panel dated 6 July 2018.

104. I have determined that it is appropriate that I consider Ground 4 of Hunan's application to the Review Panel notwithstanding that no argument was advanced in support. The timing adjustment was clearly identified as a Ground for Review within Hunan's Application and the arguments in support of that Ground could be reasonably inferred from the other Applications. I am not performing a judicial review, it is an administrative one, and I am charged with identifying the correct or preferable decision in the circumstances. Accordingly, I do not consider it appropriate to deny Hunan the benefit of relief.

105. Shagang's and Yonggang's arguments, advanced in support of Ground 4 were expressed in similar terms. Shagang's interest in this Ground for Review lies in the fact as it was not subject to verification, its export price for the review period was based on the average of the export prices determined for Hunan and Yonggang. In addressing this Ground for Review I will collectively refer to Shagang and Yonggang as the Applicants.

106. The Applicants noted, section 269TAB(2G)(a) requires that where the export price of goods exported to Australia has been ascertained under section 269TAB(2B), adjustment is necessary due to those exports (on which the export price is based) having occurred in an earlier period. The Applicants alleged the Commission has incorrectly compared the simple average of published SBB Steel Reinforcing Bar prices over the original investigation period (1 July 2014-30 June 2015) to the simple average of equivalent prices during the current review period (1 April 2016-31 March 2017). As a result, all export prices from the original investigation period have been adjusted downwards, taking account of the calculated decrease in Steel Reinforcing Bar prices between the two specific periods.

107. The Applicants note the Commission's method disregards and ignores the actual timing and volume of the Applicants' exports during the original investigation period, in estimating an adjustment, which currently reflects the movement in

prices between the date of original exports and the contemporary export prices for the current review period.

108. It is noted, one of the Applicants made no exports to Australia during the highest priced quarter of the original investigation period and that the majority of an Applicant's exports occurred in those periods when prices were lower than the calculated simple average for the current review period. This suggests, rather than the adjustment decreasing the prices, export prices should have been adjusted upwards.

109. I note section 269TAB(2G) provides, where an exporter's export price has been ascertained under subsection (2B) that price may be subject to adjustment. Hunan and Yonggang's export prices were determined under subsection (2B)(a) by reference to their earlier export prices in the investigation period. In doing so, particular transactions had been identified, occurring at specific times and at specific prices.

110. When undertaking the timing adjustment, the Commission,

> "used published steel pricing data from Platts, specifically the simple average of the price of Rebar exported [from all exporters] from the original investigation period compared to the simple average price of the same for the review period".[20]

111. 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

[20] REP 411, 412 and 426 at page 15.

decisions pre-dated the date of the Applicants' first export transaction during the investigation period.

112. Further, the Anti-Dumping Agreement places great emphasis upon ensuring a proper comparison, between an exporter's export price and that exporter's normal value, is undertaken when determining a dumping margin. This requires adjustments for differences in timing and volume. The Agreement, and the Commission's practice, therefore encourage the adoption of a weighted average methodology to account for the impact of varying volumes. I was concerned that a simple average of prices over the initial investigation period would not give effect to the obligation regarding proper comparison. That is to compare, as far as possible, contemporaneous export and domestic sales and if this is not possible to adjust for any differences in the timing of the respective transactions which had an impact on prices. I therefore asked the Commission to calculate the weighted average of the Applicants' export prices over the investigation period and to compare those prices with the simple average of the Platts prices over the review period.

113. On 29 June 2018, the Commission provided spreadsheets[21] reflecting the recalculations. The recalculations had the effect of reducing Hunan and Shagang's dumping margins to 11.8% and 3.6% respectively. Yonggang's dumping margin was recalculated to a negative margin of -3.3%. By this method the relevant Applicants' export prices were determined under section 269TAB(2A) having regard to their actual sales during the investigation, albeit subject to a timing adjustment.

114. In light of the above, I find that each of the Applicant's Ground 4 has been made out. I adopt the Commission's recalculation of the Applicants' dumping margin. In

[21] The spreadsheets were headed, "ADRP84-411 Shagang – Appendix 5 – DM cleaned.Xlsx", "ADRP84-411 Yonggang – Appendix 5 – DM cleaned.Xlsx", and "ADRP84-411 Hunan – Appendix 5 – DM cleaned.Xlsx".

doing so, I am satisfied the outcome of the recalculation is materially different to that determined by the Commission and the Minister.

Conclusion

115. In accordance with section 269ZZK(1)(b), I hereby revoke each of the reviewable decisions made by the Minister on 19 April 2018, as far as they relate to the determination of the export prices for each of the Applicants and consequential dumping margins. In doing so, I acknowledge the Minister's determination in respect to the other variable factors, normal values and non-injurious prices, remain in place and are not impacted by my recommendations.

Recommendations

116. I recommend that the Minister ascertain each of the Applicants' export prices in accordance with the recalculations undertaken by the Commission and provided to the Review Panel on 28 June 2018.[22]

117. I also recommend that the Minister give effect to the consequential dumping margins which flow from the recalculation of each of the Applicants' export price, namely that:

    Hunan's dumping margin is 11.8%;
    Shagang's dumping margin is 3.6%; and
    Yonggang's dumping margin is -3.3%.

Paul O'Connor
Panel Member
Anti-Dumping Review Panel
6 August 2018

[22] As noted in paragraph 111, the recalculations were submitted in the form of spreadsheets headed "ADRP84-411 Shagang – Appendix 5 – DM cleaned.Xlsx", "ADRP84-411 Yonggang – Appendix 5 – DM cleaned.Xlsx", and "ADRP84-411 Hunan – Appendix 5 – DM cleaned.Xlsx".