Australian Government

Anti-Dumping Review Panel

ADRP DECISION No. 85

Steel Reinforcing Bar exported from the Republic of Korea

August 2018

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADC	Anti-Dumping Commission
AND	Anti-Dumping Notice
Assistant Minister	Assistant Minister to the Minister for Jobs and Innovation
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
FIS	Free into Store
FOB	Free on board
Goods	Steel reinforcing bar
IDD	Interim dumping duty
OneSteel	OneSteel Manufacturing Pty Ltd
Original Investigation period	1 July 2013 to 30 June 2014
Minister	Minister for Jobs and Innovation
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science
Rebar	Steel reinforcing bar
REP 452	The termination report published by the ADC in relation to Steel Reinforcing Bar and published on 26 April 2018
Review Panel	Anti-Dumping Review Panel

Reviewable Decision	The decision of the Commissioner made on 24 April 2018

Summary

1. A review has been conducted of the decision of the Commissioner to terminate an anti-circumvention inquiry into imports of steel reinforcing bar (rebar) by Stemcor (SEA) Pte Ltd (Stemcor) from the Republic of Korea (Korea). The result of the review is to affirm the decision.

Introduction

2. OneSteel Manufacturing Pty Limited (OneSteel) has sought a review of the decision by the Commissioner of the Anti-Dumping Commission (ADC) to terminate the anti-circumvention inquiry in relation to rebar exported from Korea. The decision by the Commissioner was a termination decision as defined by s.269ZZN of the *Customs Act 1901* (the Act) and is reviewable by the Anti-Dumping Review Panel (the Review Panel).

3. The termination decision was made by the Commissioner on 24 April 2018 and notified by publication of an Anti-Dumping Notice on 26 April 2018.[1] The application for review was received by the Review Panel 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 of the Act, notice that the Review Panel intended to conduct a review was published on the Review Panel's website on 6 June 2018.

5. Pursuant to s.269ZZT 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 No. 2018/52.

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

Background

7. On 19 November 2015, anti-dumping measures in the form of an anti-dumping notice were imposed on rebar exported to Australia from Korea and certain other countries.[2] OneSteel is the sole Australian producer of rebar. Daehan Steel Co. Ltd (Daehan) is an exporter of rebar from Korea. Stemcor imported rebar into Australia from Daehan.

8. On 27 October 2017, OneSteel lodged an application under s.269ZDBC(1) of the Act for the conduct of an anti-circumvention inquiry in relation to the original anti-dumping notice in so far as it related to imports from Daehan. The circumvention activity was alleged to be the avoidance of the intended effect of the duty within the meaning of s.269ZDBB(5A) of the Act. OneSteel alleged that Stemcor imported and sold the rebar in Australia without increasing the price commensurate with the total amount of dumping duty payable. It was able to do this, OneSteel alleged, because Daehan lowered its export price following the imposition of the measures. OneSteel also alleged that Stemcor reduced the margin between the export price it paid Daehan and its free into store (FIS) selling price.

9. On 20 November 2017, the ADC initiated an anti-circumvention inquiry into the alleged circumvention activity.[3] The inquiry period for the purpose of assessing whether a circumvention activity had occurred was 1 April 2016 to 31 March 2017. On 26 April 2018, the Commissioner terminated the anti-circumvention inquiry and the ADC published the Termination Report setting out the findings and reasons for the termination.[4] The ADC found that:

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[2] ADN 2015/133.

[3] ADN 2017/163.

[4] Termination Report No. 452 (TER 452).

- following the imposition of measures, Daehan's export price had been lowered;
- Stemcor's FIS selling prices in Australia for the inquiry period were influenced by the lower export price from Daehan and were lower than those for the original investigation period;
- Daehan's lower export price and Stemcor's lower FIS selling prices in Australia were explainable by external factors; and
- Stemcor was profitable on its sales of the rebar during the inquiry period and had not reduced its margins from the original investigation period.

10. Based on the above findings, the Commissioner was satisfied that no circumvention activity in relation to the original dumping notice had occurred.

Conduct of the Review

11. 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.

12. In making a decision under s.269ZZT(1), the Review Panel must, with limited exceptions[5], 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.

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

13. Section 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.

14. Section 269ZZRA of the Act allows the Review Panel to hold conferences for the purpose of obtaining further information in relation to the application or review. A conference was held under s.269ZZRA with representatives of the ADC on 17 July 2018. A summary of the information obtained at the conference was published on the Review Panel website as required by s.269ZZX(1)(a)(iv).

Grounds for Review

15. 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 failed to accurately examine and assess, whether the importer of the circumvention goods had increased its selling prices in Australia by an amount not less than the amount of dumping duty payable as required under s.269ZDBB(5A)(d) of the Act. Instead the Commissioner had regard to a number of irrelevant factors not authorised under the provisions of the Act. Regard to these irrelevant factors formed the basis of the decision to terminate Inquiry No. 452.
    - Alternatively, if the Commissioner did correctly examine and assess whether the importer sold the circumvention goods in Australia at prices that satisfy the circumstances of s.269ZDBB(5A)(d), then his assessment that the condition under s.269ZDBB(5A)(e) is not met was incorrect because he failed to assess the existence of the condition of s.269ZDBB(5A)(d) in relation to each sale of the circumvention goods over

a reasonable period. Instead, the Commissioner performed his assessment on a weighted average basis. This failure prevented a proper examination of the degree, distribution and recurrence of the conditions under s.269ZDBB(5A)(d) 'over a reasonable period' as required by s.269ZDBB(5A)(e).

- To the extent (if any) that the Commissioner relies on the profitability of the importer's sale of the circumvention goods in Australia as a basis for his decision to terminate the inquiry, then that calculation is in error.

Consideration of Grounds

Failure to accurately examine and assess whether prices increased

16. OneSteel disputes the Commissioner's finding that Stemcor did increase its prices commensurate with the total amount of dumping duty. It contends that the Commissioner could not have reasonably reached this conclusion because he did not in fact determine an amount that constituted the price commensurate with the total amount of dumping duty payable on the rebar.

17. OneSteel's submission appears to be based on an approach which would have the ADC calculate a hypothetical selling price at which the rebar should be sold in order to be at a price "commensurate with the total amount of duty payable" and then compare this with the prices at which the rebar was in fact sold. While in some cases it may be possible to examine individual transactions to determine what the price at which the imported goods should have been sold and compare that with the price at which the imported goods were sold, in many cases it will not.

18. During the inquiry period, there may be numerous importations and different factors affecting the selling prices in Australia. It would be impractical and unreasonable to require that the ADC examine all of the transactions and determine what each of the prices should in theory have been to compare those prices with the actual prices.

19. OneSteel argues that the ADC was wrong to consider the external factors to which it attributed the decrease in Stemcor's selling prices. It argues that the ADC erroneously relied on paragraph 53 of the Explanatory Memorandum.[6] That paragraph relevantly states:

> "If external factors, for example such as currency fluctuation, have caused the circumstance where the selling price of the importer has not increased in accordance with the duties, the circumvention activity will not be determined to have occurred."

According to OneSteel's submission this was an erroneous recourse to extrinsic material in interpreting the legislation as it was made without first considering whether consideration could be had to such material under s.15AB of the *Acts Interpretation Act 1901*.

20. OneSteel argues that there is nothing in the text of s.269ZDBB(5A)(d) of the Act which is ambiguous and nothing which directs the ADC to have regard to external factors which may have influenced the selling prices in Australia. The correct interpretation according to OneSteel is that the question to be asked is whether an importer has increased its selling price by an amount less than the amount of dumping duty payable. OneSteel argues that the term "increased" implies that a comparison is required to a comparative selling price.

21. The first principle of statutory interpretation is to have regard to the text of the legislation and the ordinary meaning of the words used. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* French CJ. stated:

> "The Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself.

[6] Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013 and the Customs Tariff (Anti-Dumping) Amendment Bill 2013.

Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (Citations omitted and emphasis in original)"[7]

22. Further, the context in which the legislation has to be considered includes extrinsic material such as the Explanatory Memorandum, although such material cannot displace the meaning of the text.[8] OneSteel submits that there is no ambiguity with the text of s.269ZDBB(5A)(d). However, I note that a narrow concept of ambiguity has been rejected by the High Court.[9]

23. The relevant text of s.269ZDBB(5A) is that the importer of the circumvention goods (in this case the rebar) "sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods". OneSteel's submission emphasises the reference to an increase in the price. However, this invites the question of what is intended by the reference to an increase in the price. The price being referred to is the sale of the goods by the importer and the legislation refers to that price not being increased commensurate with the amount of duty. This, sensibly read, must mean that the price has not been increased above what it would have otherwise been in the absence of the duty. This means that the prices can decrease so long as they are increased over what they would have been in the absence of the duty.

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[7] (2009) 239 CLR 27 at [47].

[8] *Commissioner of Taxation v Consolidated Media Holdings* [2012] HCA 55 at [39].

[9] *Minister for Immigration & Ethnic Affairs v Teoh* [1995] HCA 20.

24. When read this way, the requirement in s.269ZDBB(5A) does not mean that the price at which the importer sells the goods always has to increase once duties are imposed. This is a more sensible reading as, in trade and commerce, prices will go up and down for reasons unassociated with the avoidance of duty. This reading of the legislation is also consistent with the purpose and object of the anti-circumvention legislation and addresses the mischief which it is intending to remedy, namely to address the avoidance of the intended effect of the imposition of the dumping duty.

25. To read the legislation in the way OneSteel contends it should be, would mean that the importer's prices must always increase once a dumping duty is imposed. While this would usually be the outcome, in the absence of circumvention activity, it may not always be so. As noted above, prices will increase or decrease over time due to different factors, and the decrease in price may not be due to circumvention activity but market forces. Not only does OneSteel's submission ignore the reality of such market forces but it is also not consistent with the object or purpose of the anti-dumping legislation. This purpose is to protect Australian industry from the anti-competitive effects of dumping by the imposition of dumping duty[10]. It does not do this by setting a floor for the price at which the imported goods are sold in Australia.

26. Consistent with the above construction of the legislation, the ADC needs to look at whether the importer's prices have increased subsequent to the imposition of the duty. If they have not increased to a price at least commensurate with the amount of the dumping duty, then there should be an inquiry into whether this is as a result of factors other than the intended avoidance of duty. Such factors would be those which normally affect the prices at which imported goods are sold, such as the export price. Obviously, if the reason prices have not increased is because the export price has decreased, then an examination would be

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[10] *ICI Australia Operations Pty Ltd v Donald Fraser, the Anti-Dumping Authority and the Minister for Small Business and Customs* [1992] FCAFC 564 at page 14.

needed of why the export price has decreased. Again, this would include a consideration as to whether market forces have caused the decrease.

27. If the legislation is construed in this way, it is consistent with the Explanatory Memorandum. Accordingly, I consider it is a permissible approach in undertaking the task required by s.269ZZDB(5A) to look at the factors which have affected the importer's prices in the way the ADC did. However, I also consider that there is sufficient ambiguity for regard to be had to the Explanatory Memorandum which supports a construction consistent with the ADC's approach.

28. OneSteel's submission is that the ADC must calculate a comparative selling price to which the importer's prices should be compared. The submission does not elaborate on how this comparative selling price is to be determined. I do not consider that such an exercise is mandated by the legislation. It seems to me that an examination of the importer's profit margin, such as that done by the ADC in this case, will in many cases be a preferred way in which to test whether prices have increased commensurate with the amount of duty imposed. If an importer is maintaining the same profit margin, and excluding the exporter reducing the export price to avoid the intended effect of the duty, it is likely that the circumvention activity has not occurred. In order to cover the cost of the dumping duty to maintain the profit margin, the importer will have had to increase the price at which the goods are sold over the price at which they would otherwise have been. This achieves the purpose of the legislation.

Consideration on an individual sales basis over a reasonable period

29. OneSteel submits that the ADC did not consider whether the conditions of s.269ZDBB(5A)(d) occurred over a "reasonable period" as required by s.269ZDBB(5A)(e). The submission does not however provide any detail as to what would be a reasonable period. The ADC examined Stemcor's FIS selling prices over the inquiry period. It seems to me that a twelve month period is a reasonable period over which to examine those prices.

30. The submission also argues that the ADC failed to test the condition in s.269ZDBB(5A)(d) against each sale of rebar by the importer and that instead, the ADC made its assessments on a weighted average basis. It is also contended that this approach may favour an importer who did not meet the condition under s.269ZDBB(5A) in one large consignment imported and sold in the first quarter of the inquiry period, but who did meet it in the latter half of the inquiry period with smaller more frequent sales of the circumvention goods.

31. There is no submission by OneSteel that the pattern of imports by Stemcor met the above description. If such evidence did appear in an inquiry, presumably the ADC could take it into account in its approach. As noted above, I held a conference with representatives of the ADC under s.269ZZRC. During this conference, the confidential material provided by the ADC regarding the export prices and FIS prices was discussed. The ADC representatives confirmed that there was no pattern to the importations such as that described in the OneSteel submission.

32. With respect to the export price of the rebar, the ADC did determine a weighted average price under s.269TAB(1) for the purpose of comparing this price to the export price determined during the original investigation[11]. The ADC used the average FIS price for the inquiry period to compare those prices to that found during the original investigation.[12] This seems a reasonable approach to take to determine whether export prices or FIS prices have increased. I do not consider it is necessary for an examination of each consignment to be examined in order to conduct the inquiry into whether a circumvention activity under s.269ZDBB(5A) has occurred. In many cases this would be impractical and unnecessary.

[11] REP 452 at section 5.5.3, page 15 and Confidential Attachment 1.

[12] REP 452 at section 5.6.2, page 16 and Confidential Attachments 6 and 5 (Table 4).

Profitability of Sales

33. OneSteel's submission takes issue with a statement made in the Termination Report regarding the profitability of Stemcor's Australian sales of rebar. As part of the verification of Stemcor's financial information, the ADC examined 16 sales of the goods imported to assess the profitability of those sales. In the Verification Report it stated:

    > "Although certain individual Australian sales transactions were found to be marginally unprofitable, the verification team observed that overall, the 16 Australian sales transactions were profitable after taking into account necessary deductions for the cost of the goods and selling, general and administration costs."[13]

34. OneSteel submits that the above quote means that the ADC has incorrectly applied the "costs of the goods and selling, general and administration costs" to reduce the unprofitable nature of a number of the Australian sales. I am not sure how applying the cost of goods and SG&A could reduce the unprofitability of the Australian sales. In any event, I have reviewed the confidential material and the Australian sales over the inquiry period were profitable. I think that what the ADC team were trying to say was that while certain of the 16 sales were marginally unprofitable, when considering the 16 sales overall, they were profitable.

35. It is important to note in considering the submission by OneSteel that an examination of Stemcor's financial information established that Stemcor's profit margin on sales of rebar imported from Daehan was slightly higher than that found during the original investigation period.

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[13] EPR 452 No. 7 at section 3.6.1, page 6.

Recommendations/Conclusion

36. I do not consider that OneSteel has established that the reviewable decision was not the correct or preferable decision. Pursuant to s.269ZZT(1) of the Act, I affirm the reviewable decision.

37. Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.

Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
6 August 2018