Australian Government
Anti-Dumping Review Panel

ADRP Report No. 99

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

June 2019

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
Commissioner	The Commissioner of the Anti-Dumping Commission
Decision	The decision of the Minister to give notice under s 269TL(1) of the *Act,* which decision was the subject of ADN 2019/17 published on 18 March 2019.
Donhad	Donhad Pty Ltd
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act, 1975*
Goods	The goods the subject of the investigation, which are more fully described at paragraph 9 of this report.
Original Investigation period	1 October 2015 to 30 September 2016
Minister	The Hon Karen Andrews MP, Minister for Industry, Science and Technology.
Moly-Cop	Commonwealth Steel Company Pty Ltd, trading as Moly-Cop
OneSteel	OneSteel Manufacturing Pty Ltd
REP 384a	The report published by the Commission in relation to Investigation 384 and dated 6 February 2019
Reviewable Decision	The decision of the Minister made on 13 March 2019.
Review Panel	Anti-Dumping Review Panel
SEF 384a	Statement of Essential Facts dated 13 November 2018.
Termination Decision	The decision of the Commissioner to terminate the Investigation made on 25 January 2018.

Summary

1. By an instrument dated 13 March 2019, the Hon Karen Andrews, Minister for Industry, Science and Technology gave notice under s 269TL(1) of the *Customs Act 1901* (Act) that she had decided not to declare that certain goods or goods of a like kind be goods to which section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applies (decision).[1]

2. OneSteel Manufacturing Pty Ltd (OneSteel), part of the Australian industry, applied for review of the decision pursuant to s 269ZZA(1)(b) of the Act.

3. The grounds on which OneSteel argued that the decision was not the correct and preferable decision may be summarized as follows:

    a. the Commissioner should have terminated the investigation under s 269TDA(13) of the Act without making a recommendation to the Minister;

    b. the notice under s 269TL(1) should have specified particular goods that were a subclass of the goods the subject of the Commissioner's investigation;

    c. the Minister's conclusions about material injury were not correct because they was based on allegation, conjecture or remote possibilities, and because the Minister disregarded past and present material injury and made factual errors; and

    d. the Minister failed to consider injury to the Australian industry in market sectors other than grinding bar.

4. I consider that:

    a. the Commissioner found that there had been injury to the Australian industry that was not negligible and could not thereafter terminate the investigation under s 269TAD(13);

[1] ADN 2019/17, published on 18 March 2019.

b. the description of the subject matter of the notice under s 269TL(1) was adequate;

c. the decision of the Minister not to make a declaration under s 269TG was the correct and preferable decision having regard to:

i. the changes in the grinding bar segment of Australian market since the end of the investigation period; and

ii. the relevant information about injury to the Australian industry in the other segments of the market for alloy steel bar.

5. The decision was the correct and preferable decision. I recommend that it be affirmed.

6. My more detailed reasons are set out below.

Investigation 384

7. OneSteel lodged an application for the imposition of dumping duties on alloy round bar imported into Australia from China on 15 November 2016. It produces alloy round bar.

8. The Commissioner initiated investigation no. 384 on 10 January 2017.

9. The goods the subject of the investigation were:

> *Hot-rolled solid sections of 'alloy steel', having round or near-round cross-sectional dimensions of not less than 9.5 millimetres (mm) and not greater than 98.5 mm, not in coil.*
>
> *For the purpose of the description of the goods the subject of this application, 'alloy steel' here means steel containing a chemical composition that at least meets or exceeds the minimum chemical element proportions specified in Note (f) "Other alloy steel" to Chapter 72 under Schedule 3 of the Customs Tariff Act 1995 (the Tariff) as appearing on the date of this application.*

Commonly identified as 'rod', 'round bar' 'engineering bar', 'spring steel' 'alloy bar', 'high alloy bar', 'silico-manganese bar, 'grinding rod' or 'bar used for the production of grinding media', the goods covered by this application include all round or near-round hot-rolled solid sections of alloy steel bar meeting the above description of the goods regardless of the particular grade, coating, or minor modification of bar-end finish (including but not limited to, painting or chamfering).

Goods excluded from this application are:

- *round or near-round hot rolled solid steel sections composed of:*
    - *stainless steel as defined under Note (e) Stainless steel" to the Tariff; or*
    - *high-speed steel as defined under Note (d) High speed steel" to the Tariff steel;*
- *reinforcing bar containing indentations, ribs, grooves or other deformations produced during the rolling process;*
- *steel rod in coil;*
- *chromium plated steel; and*
- *solid sections of steel which may be square, rectangular or hexagonal in cross- section.*

The goods are generally, but not exclusively, classified to the following tariff classifications in Schedule 3 of the Customs Tariff Act 1995:

Tariff subheading	*Statistical Code*
72282016	*44*
72282090	*47*
72283010	*70*
72283090	*41*

(operative since 1 July 2015)	
72286010	*72*
72286090	*55*

These tariff classifications and statistical codes may include goods that are both subject and not subject to this investigation. The listing of these tariff classifications and statistical codes are for convenience or reference only and do not form part of the goods description.

10. This description of the goods included but was not limited to 'grinding bar'. Grinding bar is used to produce grinding balls. Grinding balls are steel balls used as a grinding medium to break up various types of ore.

11. The original investigation period was 1 October 2015 to 30 September 2016. The injury period was from 1 July 2012.

12. Milltech Pty Ltd (Milltech), another part of the Australian industry, lodged an application dated 23 June 2017. It produces alloy steel bar, but not grinding bar.

13. Other parties interested in this application are:

    a. Commonwealth Steel Company Pty Ltd, trading as Moly-Cop (Moly-Cop); and

    b. Donhad Pty Ltd (Donhad).

14. On 27 October 2017, the Commissioner terminated the investigation in relation to Jiangsu Yonggang Group Co. Ltd.[2] The Commissioner found that the dumping margin of that exporter was negligible.

15. On 25 January 2018, the Commissioner terminated the balance of the investigation (termination decision).[3]

[2] ADN 2017/152.
[3] ADN 2018/17.

16. OneSteel applied to the Review Panel for review of the termination decision. The Panel considered that the termination decision of the Commissioner was not the correct or preferable decision and revoked it.

17. Section 269ZZT provides that, if the Review Panel revokes a termination decision the Commission must publish a statement of essential facts and the investigation of the application resumes.

18. The Commissioner gave notice dated 2 May 2018 resuming the investigation.[4] Representatives of the Anti-Dumping Commission (ADC) met with representatives of Moly-Cop and had a teleconference with OneSteel's representatives to discuss changes to the Australian market structure for alloy round bar. Moly-Cop and OneSteel made further submissions.

19. The Commissioner published a (further) Statement of Essential Facts on 13 November 2018 (SEF384a).

20. No preliminary affirmative determination was made during the investigation.

21. The Final Report (REP 384a) was made on 6 February 2019.

22. In making the decision the Minister accepted the recommendations of the Commissioner, the reasons for the recommendations and the material findings of fact and law on which the recommendations were based and the evidence relied on to support those findings in REP384a.[5]

Conduct of the Review

23. OneSteel applied for review of the decision on 17 April 2019.

24. The application for review identified 4 grounds, which were accepted. The grounds are summarised at paragraph 3 above and discussed below. Appendix B to the application (Elaboration) was an elaboration of the grounds.

[4] ADN 2018/73.
[5] AND 2019/17.

25. The Senior Member determined that the Review Panel should be constituted by me. The review was initiated on 26 April 2019.

26. Submissions were received from each of the Commissioner, OneSteel and Moly-Cop dated 24 May 2019.

27. In accordance with s 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision, if the Review Panel is satisfied that the decision is the correct or preferable decision, or revoke the reviewable decision and substitute a new specified decision. In undertaking the review, s 269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister and having regard to the considerations to which the Minister would be required to have regard if the Minister were determining the matter.

28. In conducting this review, I have had regard to the application/s and documents submitted with the application/s and to submissions received pursuant to s 269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 384a.

Ground 1: Termination under s 269TDA(13)

Introduction

29. This ground has two aspects.

30. The substance of the first aspect of this ground was that the Commissioner was obliged to terminate the investigation under s 269TDA(13) upon being satisfied that any injury to the Australian industry that may be caused [by the export of the goods] was negligible.

31. The second aspect deals with the scope of the Commissioner's recommendation to the Minister about s 269TL. I will deal with this aspect when I deal with the second ground relied on by OneSteel because the second aspect of this ground raises the same issues as the second ground.

Consideration

32. OneSteel contended[6] that the Commissioner found that he was not satisfied that material injury 'is being caused … to the Australian industry producing like goods due to the dumped goods'.

33. OneSteel argued that once this finding was made, the Commissioner was required to terminate under s 269TDA(13), which provides:

> *(13) Subject to subsection (13A), if:*
>
> *(a) application is made for a dumping duty notice; and*
>
> *(b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the Commissioner is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;*
>
> *the Commissioner must terminate the investigation so far as it relates to that country.*

34. In his submission, the Commissioner pointed to page 93 of REP 384a where he said:

> *The Commissioner is satisfied that:*
>
> - *the dumping of alloy round bar exported to Australia from China (except by Yonggang) has caused material injury to the Australian industry [producing] like goods during the investigation period.*

[6] Elaboration at [1].

35. The difference between OneSteel and the Commissioner appears to be about timing.

36. Section 269TDA(13) refers to injury that 'has been or may be' caused. Either one prevents termination under s 269TDA(13). The Commissioner found that there had been injury that was material, and therefore, not negligible. Having found that injury had been caused that was not negligible during the investigation period, it was not open to the Commissioner to terminate under s 269TDA(13).

37. The Commissioner also pointed out that a failure by the Commissioner to exercise his powers under s 269TDA(13) does not have the consequence that the subsequent decision of the Minister is invalid or incorrect. This was the effect of *Guardian Industries Corporation Ltd v Attorney General and Others*.[7]

38. OneSteel argued that the Commissioner's failure to terminate under s 269TDA(13) deprived it of the right to seek review a decision under s 269TDA(13). While it is true that there was no decision under s 269TDA(13) to review, the decision which the Minister did make was subject to review by the Review Panel and OneSteel has exercised its right to seek review of the decision.

39. This ground must be rejected.

Ground 2: Scope of s 269TL

Introduction

40. OneSteel's second ground relates to the scope of the notice under s 269TL.

41. Section 269TL of the Act provides:

> *(1) Where the Minister receives a recommendation from the Commissioner concerning the imposition of dumping duty, third country dumping duty, countervailing duty or third country countervailing duty on particular goods or on goods of a like kind to particular goods and the Minister decides, after having regard to that recommendation, not to declare*

[7] (1993) 213 FCR 507; [2013] FCA 780.

those goods to be goods to which section 8, 9, 10 or 11, as the case requires, of the Dumping Duty Act applies, the Minister must give public notice to that effect.

42. The operative part of the decision was:

> *Therefore, under subsection 269TL(1) of the Act, I have DECIDED to not declare that the goods or goods of a like kind be goods to which section 8 of the Customs Tariff (Anti-Dumping) Act 1975 applies.*[8]

The reference to the goods is a reference back to the description of the goods the subject of the investigation in the opening part of the Notice, which is set out at paragraph 9 above.

43. OneSteel contended in ground 2 that the Minister's power under s 269TL is limited to specifying particular goods that fall within the class of goods described throughout Part XVB of the Act generally, and in REP 384a in particular, as the goods the subject of the application.

44. OneSteel emphasised the use of the 'particular' in s 269TL. The purpose of s 269TL is not, OneSteel argued, to exclude all goods the subject of the application from the operation of a dumping duty notice. It argued that s 269TL does not provide an alternative mechanism to s 269TDA.

Consideration

45. I do not accept OneSteel's argument.

46. The final occasion on which the word 'goods' is used in s 269TL refers back to the earlier expression 'particular goods or goods or on goods of a like kind to particular goods'. Section 269TL therefore contemplates that the Minister's declaration will or may cover 'particular goods or goods or goods of a like kind to particular goods'. This covers both 'particular goods' and 'goods of a like kind to the particular goods'. It was, therefore, open to the Minister to make a declaration under s 269TL(1) in the terms adopted by her.

[8] ADN 2019/17.

47. I accept that s 269TL is not an alternative to s 269TDA of the Act. Section 269TL does not arise if an investigation is terminated under s 269TDA. It is conditioned on the receipt of a recommendation from the Commissioner concerning the imposition of dumping or countervailing measures. That will not occur where an investigation is terminated. Section 269TL is an alternative to s 269TG (and ss 269TH and 269TJ). If declarations are not made, a notice under s 269TL must be published. The purpose of s 269TL is to let persons concerned know the outcome of the investigation. It is appropriate that interested parties know the outcome of the investigation in relation to all the goods the subject of the investigation.

48. OneSteel referred to the remarks of Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*.[9] He said:

> *However, it is important to keep in mind that there is nothing in Part XVB of the Act (or the Anti-Dumping Agreement) that requires that duty be imposed upon goods within a relevant class (such as G1, G2 and G3) that are sold at or above normal value. On the contrary, pursuant to s 269TL of the Act, the Minister may decide, on the recommendation of the CEO, not to impose dumping duty on "particular goods or on goods of a like kind to particular goods". In a practical sense, the present issue therefore comes down to this: how high may the dumping duty for goods sold at less than normal value (such as G4 and G5) be set or, to put it slightly different, what is the maximum dumping margin that may be applied using the methods of calculation provided for by the Act?*

49. This passage does not assist OneSteel. Nicholas J was not addressing the operation of s 269TL. He was talking about dumping margins.

50. The second aspect of OneSteel's first ground raised the same issue as ground 2 but in relation to the scope of the Commissioner's recommendation to the Minister about the exercise of her powers under s 269TL. OneSteel contended that the Commissioner's recommendations operated under the same constraints as the Minister's power. I accept that the Commissioner should not recommend that the Minister make a declaration which is beyond the scope of s 269TL(1), but I do not

[9] (1994) FCR 64; [2013] FCA 870 at [145].

accept that s 269TL(1) was constrained in the manner for which OneSteel contended.

Ground 3: Material injury - grinding bar

Introduction

51. The effect of this ground, as it was set out in the application for review, was that the Minister wrongly relied on mere allegations, conjecture or remote possibilities when she found that the threat of injury was negligible. OneSteel particularly complained about statements of intent, which were made by Moly-Cop, a producer of grinding bar, about whether it would satisfy Donhad's grinding bar requirements in the future. OneSteel contended that this statement was not determinative of what would happen in the future.

52. In the Elaboration and its submissions, OneSteel made the following points:

    (a) the Commissioner was wrong to focus on whether material injury would continue into the future and ignored material injury that had been caused and was being caused to the Australian industry; and

    (b) the Commissioner reached incorrect conclusions about:

        (i) the toll rolling arrangement between Moly-Cop and OneSteel;

        (ii) OneSteel's capacity to produce alloy steel bar without Moly-Cop; and

        (iii) Moly-Cop's intention to supply Donhad with grinding bar.

53. Three issues arise in relation to this ground:

    (a) To what extent are present and future injury relevant to the making of declarations under s 269TG, where there has been a finding that there has been material injury during the investigation period?

    b) What sort of information may the Minister act on in forming views about present and future injury?

(c) Were the Minister's conclusions about present and future injury open to her?

54. I will address these issues in turn.

Past, present and future injury

55. Section 269TG(2)(b) enables the Minister to make a declaration where the Minister is satisfied that material injury:

    a. 'has been … caused'; or

    b. 'is being caused'; or

    c. 'is threatened'.

    This chronological division must operate by reference to the time at which the discretion under s 269TG is exercised ie the date of the Minister's decision.

56. Section 269TG(2)(b) does not require that material injury has occurred *and* is being caused *and* is threatened.

57. The Minister has a discretion whether or not to make a declaration under s 269TG(2) even if one or more of the material injury requirements of s 269TG(2)(b) is satisfied. This follows from the use of the word, 'may' in both subsections (1) and (2). There is nothing to suggest a contrary legislative intention.

58. Where there has been a finding of past material injury, as occurred here, the existence of one or both of the other material injury requirements would be a matter relevant to the exercise of the Ministerial discretion under s 269TG. If material injury was being caused or was threatened, that would buttress the case for the making of a declaration under s 269TG(2). Conversely, if material injury was not being caused at the time of the decision, and was not threatened either, the Minister would be entitled to take that into account in deciding whether to make a declaration under s 269TG(2).

59. The Commissioner drew a distinction between 'future' injury and injury which is 'threatened'.[10] This distinction is useful. Injury which is 'threatened' is injury which arises out of a change in circumstances. This requirement flows from s 269TAE(2B) which provides:

> (2B) In determining:
>
> (a) for the purposes of subsection (1), whether or not material injury is threatened to an Australian industry; or
>
> (b) for the purposes of subsection (2), whether or not material injury is threatened to an industry in a third country;
>
> because of the exportation of goods into the Australian market, the Minister must take account only of such changes in circumstances, including changes of a kind determined by the Minister, as would make that injury foreseeable and imminent unless dumping or countervailing measures were imposed.

60. 'Threatened injury' provides a separate justification for the Minister to act under s 269TG.

61. Future injury may be regarded as injury which might reasonably be anticipated, having regard to the ordinary course of events. It is the injury which flows if the situation continues unchanged. It is not 'threatened' injury.

62. Future injury is a matter which the Minister may take into account under s 269TG. As pointed out by the Commissioner, the imposition of dumping measures under s 269TG(2) is directed to goods that are to be imported into Australia in the future. OneSteel's letter to the Commissioner dated 3 October 2018 asserted that the Minister must be satisfied that there is a threat of injury from future dumped imports before publishing a dumping duty notice under s 269TG(2).[11]

63. The weight to be given to 'future injury' in the exercise of the discretion under s 269TG will depend on all the circumstances of the case. If it was shown that

[10] Submissions at [34].
[11] EPR 74, at p2.

injury has been caused in the past, is occurring at the time of the decision, and will likely continue into future, the case for a declaration would be strengthened. The opposite is also true, of course. If it were apparent that material injury would not continue into the future, the case for a declaration would be diminished.

'Based on facts'

64. Ground 3 complained that the Minister wrongly relied on 'mere allegations, conjecture or remote possibilities. This reflects s 269TAE(2AA):

> (2AA) A determination for the purposes of subsection (1) or (2) must be based on facts and not merely on allegations, conjecture or remote possibilities.

65. Section 269TAE(2AA) applies to the making of findings by the Commissioner in relation to whether injury 'is being caused' and whether injury is 'threatened'.

66. Section 269TAE(2AA) does not impose an onus of proof on the parties. But if facts do not exist which can form the basis for a conclusion about material injury, the Minister cannot reach that conclusion.

67. Section 269TAE(2AA) must be applied in the context that the Minister is not obliged to have regard to information beyond the report of the Commissioner under s 269TEA.[12] The report of the Commissioner will focus on the investigation period. and must only include information about events up to 20 days after publication of the statement of essential facts to the extent that it is practicable to do so.[13] The investigation period will have come to an end before the Commissioner's report is completed. When determining whether dumping has occurred in the past, the Minister is confined to dumping that occurred during the investigation period.[14] The Minister is not obliged to make inquiries beyond the report provided by the Commissioner under s 269TAE.[15]

[12] *Pilkington (Australia) Ltd v Minister for Justice and Customs and Another* (2002) 127 FCR 92; [2002] FCAFC 423 (Full Court) (Pilkington) at [125].
[13] Section 269TEA(2).
[14] *Pilkington*.
[15] *Pilkington*.

68. However, the Minister is not proscribed from informing himself or herself of matters beyond or after the Commissioner's report.[16] Similarly, the Commissioner may include in a report under s 269TAE information relevant to the exercise of the powers under s 269TG dealing with events after the end of the investigation period.

69. The Commissioner in the report and Minister in making the decision may infer that material injury which has been caused to the Australian industry by dumping during the investigation period will continue, so that the Minister would be satisfied that material injury 'is being caused' in the present. Given the limitations on Commissioner's reports and the Minister's obligation to make independent inquiries, this would ordinarily occur. Whether this inference would be drawn in any case depends, of course, on all the circumstances of the case. A finding that dumping during the investigation period caused material injury does not give rise to an irrebuttable presumption that material injury will continue thereafter.

70. Inferences may also be drawn in relation to future injury. The perspective adopted would likely be different because the inference is whether the injury being caused at the time of the decision would likely continue into the future. In some cases, the Commissioner's views about the present would be formed entirely by information relating to the investigation period. In other cases, and this is one of them, information about events and circumstances after the end of the investigation period may be gathered by the Commissioner.

71. The Minister is not entitled to take the approach of drawing inferences when considering whether material injury is 'threatened'. Section 269TAE(2B) requires material which evidences a change in circumstances.

72. The Commissioner said:

> *Having made a finding that dumping is likely to continue in the future, the question that next presents itself for consideration by the Commission is whether the factual circumstances established during the investigation period remain relevant in the post investigation period, such that the Commission*

[16] *Pilkington* at [125].

can make credible assumptions about present or future injury caused by dumping based on those facts.[17]

73. OneSteel complained about this passage. This statement broadly reflects the principles set out above.

74. In the present case, the Commission did not find that material injury 'is being caused'. (I will consider OneSteel's challenge to this 'non-finding' later.) But in considering whether the future would look like the present, the Commissioner was entitled to start from his view of the present, that is to say, he was not satisfied that the Australian industry was (at the time of REP 384a) suffering material injury. There was no need for him to be satisfied that there would be a change in circumstances in the future such that injury being suffered at the time of the report would stop at some time in future. The Commissioner was entitled to infer that the then current 'non-injury' would continue.

75. This is not a case where information came to light after the investigation period or after the report which tended to falsify the conclusions about past injury reached in REP 384a. The information that was obtained after the resumption of the investigation did not go to the events during the period 1 October 2015 to 30 September 2016.

76. There does not appear to be any error in the general approach taken by the Commissioner in his consideration of present and future material injury.

77. In the Elaboration, OneSteel complained that the Commissioner appeared to rely on statements by Moly-Cop that it intends to supply Donhad's grinding ball requirements into the future. This is not an 'allegation, conjecture or remote possibility', bearing in mind that Donhad was a wholly owned subsidiary of Moly-Cop and may be taken to have some role in Donhad's buying decisions. The Commissioner was entitled to have regard to statements to this effect from Moly-Cop, although he was not obliged to accept them uncritically. Moly-Cop's intentions are discussed substantively below.

[17] REP 384a at p79.

Past, present and future injury

Introduction

78. OneSteel contended that the conclusions reached about present and future injury were incorrect.

79. The issues raised by this ground relate to the market for grinding bar. The question of material injury associated with other the types of alloy steel bar was raised by ground 4 and is dealt with later.

80. It is necessary to set out the situation giving rise to the finding that there had been material injury during the investigation period before turning to consider whether injury was being caused at the time of the decision and whether there was 'future injury'.

Past injury - the investigation period

81. The Commissioner summarized his findings about the Australian market for alloy round bar during the investigation period in the REP 384a:

> *that the Australian market is divided into four distinct market segments (grinding bar, engineering bar, spring steel and strata bar or rockbolt);*
>
> - *alloy round bar is generally not substitutable between the different market segments;*
> - *over 95 per cent of imported alloy round bar from China during the investigation period was grinding bar;*
> - *the volume of strata bar sold in the market is insignificant (less than 2 per cent of … the market); and*
> - *the size of the spring steel market segment remained consistent during the investigation period, while the size of the engineering bar*

segment of the market increased slightly over the investigation period.[18]

82. The grinding bar segment was by far the largest segment of the Australian market for alloy round bar.

83. The Commissioner found that 'during the investigation period the dumped goods caused injury to the Australian industry producing like goods as a whole, and that the injury was material' (emphasis in original).[19]

84. The Commissioner said:[20]

- *During the investigation period, Moly-Cop and OneSteel were both wholly owned subsidiaries of Arrium. Moly-Cop produced alloy round bar, though most of its production did not enter the Australian market. Under an arrangement with OneSteel, Moly-Cop also rolled OneSteel's billet into grinding bar (and other alloy round bar).*

- *OneSteel was the largest supplier of grinding bar into the grinding bar segment of the Australian market for alloy round bar during the investigation period. Moly-Cop and Donhad competed in the downstream market for grinding balls. Donhad maintained diversified supply arrangements and purchased alloy round bar from both OneSteel and overseas suppliers. Donhad was wholly owned by Valmont Industries Inc, a public company based in the USA*.

85. The toll-rolling arrangement between OneSteel and Moly-Cop was not reduced to a formal contract, although documentation setting out some terms was provided by OneSteel.[21]

86. Donhad also purchased grinding bar from Chinese producers who sold alloy steel bar into the Australian market at dumped prices.

[18] REP 384a, p80.
[19] REP 384a, at p91, and at 93.
[20] REP 384a at p 80.
[21] EPR 72, Confidential Attachment 1.

87. The dumping margins of the Chinese exporters was 35.3% for Suzhou Suxin Special Steel Ct. Ltd, 21.9% for Daye Special Steel Co. Ltd and 73.7% for the uncooperative and all other exporters.

88. During the investigation period, Moly-Cop also produced grinding bar from scrap which it used to make grinding balls.

89. The Commissioner found that the dumped goods caused price and volume injury to OneSteel and price injury to Milltech during the investigation period. There had been material injury to the Australian industry as a whole.[22]

90. However, the Commissioner also concluded that 'a significant portion' of the injury experienced by OneSteel during the investigation period was 'in respect to quality concerns and normal commercial behaviours rather than by the dumped goods.[23]

91. These aspects of the Commissioner's analysis were not challenged in this review.

Present injury: injury that 'is being caused'

92. The Commissioner said that he was not satisfied that material injury 'is being caused' to the Australian industry.[24] That conclusion arose from a substantial restructuring of the industry which occurred after the end of the investigation period.

93. The Commissioner described the changes to the Australian industry as follows:

- ln 2016, Arrium, the parent company that owned both OneSteel and Moly-Cop, was placed into voluntary administration. On 3 January 2017, Moly-Cop was acquired by American Industrial Partners (AIP) from Arrium's administrators. Moly-Cop and OneSteel are thus no longer related entities.

- ln August 2017, AIP and Valmont lndustries lnc agreed to the sale of Donhad to Moly-Cop.

[22] REP 384a at p77.
[23] REP 384a at p73.
[24] REP 384a at p93.

- ....The acquisition of Donhad by Moly-Cop was completed in April 2018.[25]

94. The restructuring was a two-stage process. First, Moly-Cop was sold by Arrium, then Moly-Cop bought Donhad. During the period between these transactions, from January 2017 to April 2018, Moly-Cop and Donhad must be treated as independent businesses. The situation in that period is significantly different from the position after April 2018.

95. OneSteel contended that it continued to be a participant in the grinding bar market, that it had the capacity to produce its own grinding bar and that, consequently, the Australian industry continued to suffer material injury.

96. Moly-Cop said that in the 2017 calendar year Donhad purchased [redacted] tonnes of steel of which [redacted] tonnes were purchased from OneSteel having been toll rolled by Moly-Cop.[26] OneSteel evidenced a sale of [redacted] tonnes of grinding bar in [redacted], a time when, it contended that the price of alloy steel from China was high. However, the period [redacted] was prior to the completion of Moly-Cop's purchase of Donhad in April 2018. [redacted] but materials provided by OneSteel did not reveal [redacted].[27] [redacted] Moly-Cop (now the parent of Donhad) pointed out that, following Moly-Cop's purchase of Donhad, OneSteel's 'supply to the grinding bar market in Australia was negligible'.[28] That appears to be accurate.

97. OneSteel provided an email exchange in May 2018 between OneSteel and Donhad about a price to supply grinding bar. There was a dispute between OneSteel and Moly-Cop about whether OneSteel's price was unsolicited or solicited. The email exchange did not result in a sale.

[25] REP 384a at p81.
[26] EPR 65, Letter from Moly-Cop to the Commissioner dated 1 June 2018, p3.
[27] EPR 72 – confidential attachment 3. [redacted]
[28] Moly-Cop submissions at p3.

98. There was also a dispute about whether the toll rolling agreement was at an end. The Commission said:

> *'…factual circumstances have significantly shifted following the investigation period. It is possible that Moly-Cop will continue to roll grinding bar for OneSteel that Donhad could then purchase from OneSteel. However, that arrangement (a pre-requisite if OneSteel is to supply Donhad) is no longer a commercially stable arrangement between related entities and is subject to the broader corporate goal of Moly-Cop and Donhad operating as related entitled. OneSteel's ability to supply the grinding bar segment is considerably less certain than it was during the investigation period*.[29]

99. OneSteel contended that it continued to use Moly-Cop to toll roll alloy steel. OneSteel provided information which backed up this contention. [redacted]

100. However, [redacted] of grinding bar was toll rolled by Moly-Cop during that period.[31] [redacted] There was no material which suggested that OneSteel had the capacity to produce grinding bar other by than using Moly-Cop's facilities.

101. Moly-Cop indicated that it intended to divert its grinding bar production facilities to the supply of grinding bar to Donhad[33] and that steel procurement by Donhad would occur through Moly-Cop.[34] OneSteel disputed Moly-Cop's intentions. It pointed out that Donhad continued to buy grinding bar from Chinese exporters after the period after April 2018, when the Moly-Cop/Donhad transaction went ahead.

102. The fact that Moly-Cop had toll rolled only very limited quantities of grinding bar for OneSteel since April 2018 backs up its statement of intent. Moly-Cop accepted that Donhad purchased from Chinese exporters after April 2018, but said this was because it was necessary to trial whether its production of grinding suited Donhad's

[29] REP 384a at p85.
[30] EPR 72.
[31] EPR 72.
[32] EPR 72, Confidential attachment 3.
[33] REP 384a at p82.
[34] REP 384a at p83.

needs. OneSteel was sceptical about the need for Moly-Cop to trial production of grinding bar, but the Commissioner pointed out the trials were of production of grinding bar by Moly-Cop from scratch, rather than of Moly-Cop's toll rolling of bar produced by OneSteel.[35] It would have been in the interests of the 'Moly-Cop/Donhad group' for Moly-Cop to sell grinding bar to Moly-Cop. Moly-Cop's statements reflect this. The Commissioner was entitled to accept Moly-Cop's explanation and statements of intent.

103. The thrust of OneSteel's complaint was that the Commissioner's consideration of future material injury caused the Commissioner to disregard information led by OneSteel that material injury was being caused or was threatened. The fundamental difficulty with this argument is that, because of the change in the structure of the industry, events during the investigation period and, indeed, during the period between Arrium's sale of Moly-Cop and Moly-Cop's purchase of Donhad, were not reliable guides to whether material injury was being suffered at the time of the Report and the decision. It was a whole new ball game, or, as REP 384a put it, the significant changes to the structure of the industry 'impact the relevance of the Commissioner's injury findings in the investigation period'.[36]

104. The sharp decline in OneSteel's sales of grinding bar is not readily explicable by the continued dumping of alloy steel by Chinese exporters. It is better able to be explained by the change in the commercial relationships between OneSteel, Moly-Cop and Donhad.

105. These matters support the conclusion that Australian injury was not suffering material injury in relation to grinding bar as a result of dumped goods.

Injury in the future

106. As discussed above, injury that might be anticipated to occur in the future includes both 'threatened injury' and injury which may be anticipated to occur as a result of a continuation into the future of circumstances prevailing at the time of the decision.

107. In its submissions to the Review Panel, OneSteel did not point to material falling within s 269TAE(2B) showing a change in circumstances so that the future (as at

[35] Commission Submission at [39].
[36] REP 384a at p92.

the date of the decision) would be significantly different from the present (as at the date of the decision) and which might justify the conclusion that material injury was 'threatened'.

108. OneSteel referred to the commercial rolling arrangements with Moly-Cop, its own rolling of 'like goods' (not grinding bar), negotiations and sales of grinding bar to Donhad, and Donhad's continued importation of dumped like goods.[37] However, these were matters that were in train before the Report and the decision. Although they were relevant to whether material injury that was being suffered at the time of REP 384a and of the decision, and were considered in that context, they do not fall readily within s 269TAE(2B).

109. In REP 384a, the Commissioner dealt with the threat of material injury at 9.7.1. The Commissioner referred to s 269TAE(2B) and he decided not to make a finding that material injury was threatened.[38]

110. One Steel had contended that there was a threat of material injury because exporters can produce round bar across the range of goods.[39] The Commissioner considered this argument but did not accept it. The Commissioner referred to information that justified the Commissioner not being satisfied that injury was threatened.[40]

111. OneSteel complained in particular about the Commissioner's statement that 'there is no evidence before the Commission that the imports are entering at prices which have a significant effect on domestic prices that would likely increase demand for further imports.'[41] OneSteel said that there was no support for this proposition. However, it sought to contradict the proposition by referring to conclusions expressed by the Commissioner[42] in relation to the investigation period, not events after the restructuring of the industry. The material relied on by OneSteel did not deal with the effect of dumping on demand for imported goods.

[37] Submissions, at p 6.
[38] REP 384a at p93.
[39] REP 384a at p88.
[40] REP 384a at p88.
[41] Submissions at 6.
[42] At REP 384a at p67, section 8.5.3.

112. In so far as the Commissioner dealt with 'future injury', in the second sense, he proceeded from his assessment of the present situation, namely that he was not persuaded that material injury was being suffered. For the reasons given above, I consider that conclusion was open to the Commissioner.

113. I consider the Commissioner's decision not to find that material injury was occurring was the correct and preferable decision. Having reached the position that he was not persuaded that the Australian industry was suffering material injury in the grinding bar sector of the market, the Commissioner was entitled to infer that that situation would continue. He was entitled to conclude that there was no 'threat' of injury.

Conclusion

114. I consider that the Commissioner was correct to decline to find that the Australian industry was suffering material injury, at the time of REP 384a. I also consider that the Commissioner was correct to decline to find that the situation at the time of Report 384a would change into the future.

Ground 4: the 'non-grinding bar' market

115. OneSteel's argument in relation to ground 4 is that:

    a. transfers of grinding bar from Moly-Cop should not be treated as sales to unrelated customers, but should, instead, be treated as captive production;

    b. Moly-Cop should not, therefore, be treated as having entered the market sector of the Australian industry producing like goods;

    c. there should have been an assessment of market injury on this basis, which:

        i. would have focused on the non-grinding bar market; and

        ii. have lead to the conclusion that material injury was suffered by the Australian industry.

OneSteel argued that a declaration under s 269TG(2) should have been made in relation to 'non-grinding bar' alloy steel.

116. This ground does not establish that the decision was not the correct and preferable decision.

117. It was reasonable for the Commissioner to accept that sales of grinding bar were made by Moly-Cop to Donhad and were made on terms referenced to benchmarks, with the consequence that it was reasonable to not treat those sales as captive production or work in progress. It was reasonable, therefore, to treat Moly-Cop as part of the Australian industry.

118. The Commissioner pointed out that the injury in the non-grinding sectors of the market was negligible even when Moly-Cop was not treated as a participant in the market.[43] The non-grinding bar segment of the market was not restructured.

Conclusion

119. My views may be summarised as follows.

120. The Commissioner was not able to terminate the investigation because he had concluded that the injury that had been caused to the Australian injury was not negligible.

121. The description of the goods in the decision reflect the language of s 269TL and were unobjectionable.

122. The Commissioner's approach to material injury that was being caused at the time of the Report and to future injury was in accordance with the requirements of the legislation. The findings which the Commissioner made and did not make about material injury reflected the material before him and, in particular the changes in the market for grinding bar. It was reasonable to conclude that material injury was not being caused in the 'non-grinding bar' sector of the market.

[43] Submissions, at [42].

123. A preliminary determination had not been made, so there was little point making a declaration under s 269TG(1). Section 269TG(2) applies to goods exported to Australia after the date of publication the notice. However, the Commissioner was not satisfied that dumped goods exported to Australia in the future would cause material injury.

124. In such circumstances, it was open to the Commissioner to recommend that no declaration be made under s 269TG. It was open to the Minister to accept that recommendation.

Recommendation

125. Pursuant to s 269ZZK(1)(a) of the Act and for the reasons given above, I consider that the reviewable decision was the correct and preferable decision.

126. I recommend that the decision be affirmed.

DS Ellis
Panel Member
Anti-Dumping Review Panel
14 June 2019