Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 34

STEEL REINFORCING BAR EXPORTED FROM THE REPUBLIC OF KOREA, SINGAPORE, SPAIN AND TAIWAN

4 March 2016

Review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science to publish a dumping duty notice in relation to steel reinforcing bar exported to Australia from the Republic of Korea, Singapore, Spain and Taiwan.

Contents

Introduction

1. The following companies have applied pursuant to s.269ZZC of the *Customs Act 1901* (the Act) for review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to publish a dumping duty notice in respect of steel reinforcing bar exported to Australia from the Republic of Korea, Singapore, Spain and Taiwan:

    - OneSteel Manufacturing Pty Ltd (OneSteel)
    - Nervacero S.A. (Nervacero)
    - Best Bar Pty Ltd (Best Bar)

2. The applications for review were accepted and notice of the proposed review as required by s.269ZZI was published on 6 January 2016. As acting Senior Member of the ADRP (Review Panel) I have directed in writing pursuant to s.269ZYA that the Review Panel for the purpose of this review be constituted by me.

Background

3. On 8 August 2014 OneSteel lodged an application under s.269TB of the Act with the Commissioner of the Anti-Dumping Commission (the ADC) for the publication of a dumping duty notice in respect of steel reinforcing bar (rebar) exported to Australia from Korea, Malaysia, Singapore, Spain, Taiwan and the Kingdom of Thailand. The application by OneSteel was not rejected by the ADC and on 17 October 2014 notice of the initiation of the anti-dumping investigation was published by the ADC.

4. The notice initiating the investigation stated that the investigation period would be 1 July 2013 to 30 June 2014. The injury analysis period was stated to be from 1 July 2010.

5. A Preliminary Affirmative Determination was made by the ADC on 13 March 2015 with securities being taken with respect to rebar exported from the countries under investigation after 13 March 2015. After a number of extensions of time were granted by the Parliamentary Secretary, the Statement of Essential Facts (SEF) was published on 2 September 2015 by the ADC.

6. Numerous submissions were made in response to the SEF. On 19 October 2015 the ADC terminated the investigation in relation to exports from Malaysia, Thailand and Turkey and Power Steel Co. Ltd from Taiwan. At the same time the ADC made the final report on the investigation to the Parliamentary Secretary under s.269TEA (the ADC Report).[1] The ADC recommended to the Parliamentary Secretary that the Parliamentary Secretary determine that a dumping duty notice be published in respect of rebar exported to Australia from Korea, Singapore, Spain and Taiwan (except by Power Steel Co., Ltd).

7. On 11 November 2015 the Parliamentary Secretary accepted the recommendation of the ADC and made declarations under s.269TG of the Act that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applied to exports of rebar from Korea, Singapore, Spain and Taiwan (except by Power Steel Co., Ltd). The decision of the Parliamentary Secretary was published on 19 November 2015.

Conduct of the Review

8. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister (in this case the Parliamentary Secretary to the Minister for Industry, Innovation and Science) either affirm the decision under review or revoke it and substitute a new specified decision. However, in a review of a decision under s.269TG, the Review Panel may only recommend that the reviewable decision be revoked and substituted with a new specified decision if the new decision is materially different to the reviewable decision[2].

9. In undertaking the review, s.269ZZ (1) 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.

10. 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 s.269ZZK(6). For the purpose of this review, the relevant information is that to which the ADC had, or was required to have, regard when making the findings set out in the report to the Minister[3]. In addition to relevant information, the Review Panel is only to have regard to conclusions based on relevant

[1] ADC Report No. 264
[2] S.269ZZK(1A)
[3] S.269ZZK(6)(a)

information that is contained in the application for review and any submissions received under s.269ZZJ[4].

11. The Review Panel may, in making a recommendation under s.269ZZK also have regard to further information to the extent it relates to relevant information obtained at a conference held under s.269ZZHA (1) and to conclusions reached at such a conference based on that relevant information.[5] No conference was held under s.269ZZHA(1).

12. Unless otherwise indicated, in conducting this review, I have had regard to the applications (including documents submitted with the applications or referenced in the applications) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have also had regard to the ADC Report, and information relevant to the review which was referenced in the ADC Report and to information created during the investigation, such as visit reports.

13. The ADC provided copies of confidential documents which were referenced in the ADC Report or were created during the investigation. This correspondence with the ADC and the documents provided by the ADC were not made publicly available as they dealt with confidential information.

14. Submissions were received within the 30 days required by s.269ZZJ of the Act from the following parties:

- Nervacero
- NatSteel Holdings Pte Ltd
- Best Bar
- the ADC.

15. Non-confidential versions of the submissions were made publicly available on the Review Panel's website.

[4] S.269ZZK(4).
[5] S.269ZZHA(2)

Grounds for Review

OneSteel

16. There are five grounds for review relied upon by OneSteel. The first three relate to the ascertainment of the normal value for an exporter of rebar from Singapore, Natsteel Holdings Pte Ltd (Natsteel). These grounds are as follows:

- The Parliamentary Secretary could not have reasonably found that the information supplied by Natsteel was reliable within the meaning of s.269TAC(7) of the Act.
- The Parliamentary Secretary erred in her determination of the normal value under s.269TAC(2)(c) by accounting for a normalisation adjustment to Natsteel's cost of production or manufacture of rebar.
- The Parliamentary Secretary erred in working out an amount of profit on the sale of the rebar for the purpose of s.269TAC(c)(ii) under regulation 45(3) of the *Customs (International Obligations) Regulation 2015* (the Regulation).

17. The remaining two grounds relied upon by OneSteel relate to adjustments to the normal value for an exporter from Taiwan, Wei Chih Steel Industrial Co., Ltd (Wei Chih). These grounds are:

- The Parliamentary Secretary erred in her calculation of the amount of profit on the sale of rebar by Wei Chih in the Taiwanese domestic market.
- The Parliamentary Secretary has failed or refused to make necessary adjustments to the normal value determined for Wei Chih under s.269TAC(9).

Nervacero

18. Nervacero is a manufacturer and exporter of rebar from Spain to Australia. It relies on two grounds for its belief that the reviewable decision is not the correct or preferable decision. These can be summarised as:

- The level of dumping determined for Nervacero should have been less than 2% and hence "negligible" and not 3% as it was not permissible for the ADC to determine a single dumping margin for Nervacero and its sister company, Compania Espanola de Laminacion, S.L. (Celsa Barcelona).

- The exports by Nervacero of rebar with particular dimensions could not have caused material injury to the Australian industry as it only exported such rebar to OneSteel.

19. As the actual dimensions of the rebar which Nervacero sells to OneSteel are confidential, I will refer to the product as the N/OS rebar.

Best Bar

20. Best Bar is an importer of rebar and the sole importer of rebar from Singapore. The ground for Best Bar's belief that the reviewable decision was not the correct or preferable decision is that the imports of rebar from Singapore did not cause material injury to the Australian industry.

21. In particular, Best Bar asserts that there are four findings made by the ADC which it claims when reconsidered will support its contention that the imports of rebar from Singapore did not cause material injury. These four findings are:

- that rebar from Singapore caused the Australian industry to lose sales volume and market share;
- that rebar from Singapore caused the Australian industry to suffer injury in the form of price suppression;
- that the volume and prices of imported like goods that were not dumped did not cause injury to the Australian industry; and
- that it was appropriate to consider the cumulative impact of imports from Singapore with imports from Korea, Spain and Taiwan.

Consideration of Grounds

OneSteel

Reliability of Natsteel Information

22. Natsteel sold in its domestic market both rebar which it manufactured and also rebar which it imported. In its accounting records, Natsteel assigned identical codes to imported rebar and to rebar which it manufactured. As a result the ADC was unable to determine the exact volume of like goods sold in the ordinary course of trade and considered that the prices paid in respect of domestic sales were unsuitable in establishing normal values pursuant to s.269TAC(1) of the

Act. To establish the normal value for Natsteel's exports, the ADC used the relevant costs and an amount for profit.[6]

23. OneSteel asserts that because Natsteel's costs included the cost of the imported rebar they are unreliable and should not have been used. The first argument is that the first and second limbs of Regulation 43(2) of the Regulation were not met. Regulation 43(2) states:

> "If:
>
> (a) an exporter or producer of like goods keeps records relating to the like goods; and
>
> (b) the records:
>
> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
>
> the Minister must work out the amount by using the information set out in the records."

It should also be noted that Regulation 43(8) states that the Minister may disregard any information that he or she considers to be unreliable.

24. OneSteel argues that the first limb of Regulation 43(2) is not met as Natsteel's accounting system does not keep records of costs relating to like goods sold into the domestic Singapore market as Natsteel cannot with any degree of accuracy determine the costs of production or manufacture of the rebar. It is also argued that this is a pre-requisite for determining the normal value under s.269TAC(2)(c). The argument in relation to the second limb is that Natsteel's records do not reflect "costs associated with the production or manufacture of like goods".

25. The determination of normal value for Natsteel's exports was made under s.269TAC(2)(c) which includes an amount for the cost of production or manufacture. S.269TAC(5A) provides that the cost of production or manufacture is to be worked out in such manner, and taking account of such factors as the regulations provide. Regulation 43 is the relevant regulation.

---

[6] ADC Report 264, section 6.7.1, page 34

26. OneSteel's argument that the Parliamentary Secretary erred in determining the normal value under s.269TAC(2)(c) is to the effect that s.269TAC(2)(c)(i) requires the Parliamentary Secretary to determine "the cost of production or manufacture of the goods in the country of export" which the ADC was not able to do. OneSteel asserts that at best the costs reflect the costs of imported product, later sold, and possibly the costs of producing rebar.

27. OneSteel's argument was made in a submission to the ADC during the investigation. The response by the ADC was that:

> "the Commission notes that whilst Natsteel was unable to differentiate in its accounting system which domestic sales involved imported or self-manufactured rebar, the Commission was satisfied, pursuant to subsection 43(2) of the Regulations, that the cost information gathered at the verification visit reasonably reflected competitive market costs associated with the manufacture of like goods and could therefore be relied upon to establish constructed normal values for comparison with export prices. The Commission was further satisfied that Natsteel's SG&A expenses were appropriately allocated."[7]

28. I have reviewed the confidential version of the Visit Report for Natsteel and, from the information in that report, I consider the approach taken by the ADC to be reasonable. There appears to have been reliable material detailing the cost and expenses incurred by Natsteel in manufacturing the rebar for the calculation to be made under s.269TAC(2)(c). I therefore do not consider that there has been any error by the Parliamentary Secretary in using the records of Natsteel to determine the costs of production or manufacture under s.269TAC(2)(c).

Natsteel Normalisation Adjustment

29. The second ground relied upon by OneSteel is that the Parliamentary Secretary erred in making an adjustment to the normal value under paragraph 269TAC(2)(c) by accounting for a "normalisation adjustment". Onesteel argues that there was no statutory or WTO[8] jurisprudential foundation for the adjustment as it was not made under s.269TAC(9), it did not satisfy the requirements of Regulation 43(2)(b)(i) and could not be made under Article 2.2.1.1 of the WTO Anti-Dumping Agreement.[9]

---

[7] ADC Report No. 264, section 6.7.1, page 36
[8] World Trade Organisation
[9] WTO Agreement on the Implementation of the General Agreement on Tariff and Trade 1994

30. The ADC response in the ADC Report was that the adjustment was made for the reasons set out at section 7.2.3 of the Visit Report for Natsteel[10] and that it was an adjustment to Natsteel's cost to make and not an adjustment to Natsteel's normal value. In its submission, the ADC responded that the adjustment was required to exclude certain abnormal production costs for certain months of the investigation period in determining whether the cost to make and sell (CTMS) reasonably reflected competitive market costs associated with the production or manufacture of like goods.

31. The adjustment made by the ADC to exclude the abnormal production costs was not an adjustment to the normal value of those exports as determined under s.269TAC(2)(c). Such an adjustment would only be made under s.269TAC(9) for the purpose of a proper comparison between the normal value and the export price.

32. The normal value determined under s.269TAC(2) is a constructed amount which includes "such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export"[11]. In determining this amount, the ADC (and consequently the Parliamentary Secretary) included in the calculations an adjustment for certain abnormal production costs. Hence it was part of the calculation of the cost of the production or manufacture of the rebar.

33. OneSteel submits that the normalisation adjustment must satisfy the requirement under Regulation 43(2)(b)(i) that it be in accordance with generally accepted accounting principles in the country of export.

34. Regulation 43 sets out the manner in which the Minister must work out the cost of production or manufacture for the purpose of s.269TAC(2)(c)(i). Regulation 43(2)(b)(i) refers to the exporter's records being in accordance with generally accepted accounting principles in the country of export and the effect of Regulation 43(2) is that if the exporter's records comply with those accounting standards then the Minister must work out the amount using the information set out in the records. For Regulation 43(2) to apply the records also have to reasonably reflect competitive market costs associated with the production or manufacture of like goods.[12]

[10] Verification Report EPR 069
[11] S.269TAC(2)(c)(i)
[12] Regulation 43(2)(b)(ii)

35. In its submission, NatSteel pointed to the evidence that was before the ADC to show that its records were in accordance with the generally accepted accounting principles of Singapore. NatSteel also submits that the adjustment was done using the financial records of NatSteel.

36. I have read the explanation of the adjustment in the Visit Report for Natsteel. It seems to me that the adjustment was reasonable and was based on information in NatSteel's records which were kept in accordance with the relevant accounting principles. I also note that the adjustment may have been required under Regulation 43(7). However, no submission was made on that sub-regulation and the ADC did not refer to it.

37. OneSteel also refers to Article 2.2.1.1 of the Anti-Dumping Agreement. This however does not add anything to the above analysis. The provisions of that article are reflected in Regulation 43.

Calculation of Natsteel Profit

38. OneSteel contends that the Parliamentary Secretary erred in working out the amount of profit for Natsteel under Regulation 45(3)(a) of the Regulation. Instead, OneSteel argues that the amount should have been determined using the methodology under Regulation 45(3)(c). The difference between Regulation 45(3)(a) and (c) is that under (a) the amount of profit is determined by identifying the actual amounts realised by the exporter from the sale of the "same general category of goods" in the domestic market of the country of export whereas under (c) any reasonable method can be used having regard to all relevant information.

39. The ADC Report states that the ADC considered that Regulation 45(3)(a) could be used and it calculated the profit by comparing the domestic selling prices of the rebar sold by Natsteel, irrespective of whether it was imported or manufactured, to the verified CTMS of rebar manufactured by Natsteel. For this purpose, the ADC treats sales of the imported rebar by Natsteel as goods in the same general category of goods as the locally manufactured rebar. It seems to me that the methodology used by the ADC is a reasonable one to use. Given this, it is not necessary for me to consider whether or not Regulation 45(3)(c) could have been used.

Wei Chih Profit calculation

40. Wei Chih is a Taiwan based manufacturer and exporter of rebar to Australia. OneSteel takes issue with the reduction made by the ADC at the time of the ADC Report to the profit margin applied to the constructed normal value determined for Wei Chih's exports. This reduction was made following a submission by Wei Chih concerning the delivery terms of the profitable sales used in the profit calculation. The ADC Report states that the ADC adjusted the CTMS to account for the delivery costs.

41. In its application OneSteel refers to the following statement in the Visit Report for Wei Chih:

> "Inland transport charges for the investigation period, when allocated over all sales, were less than NTD /tonne. We consider that this is an insignificant adjustment and has no material effect on the dumping margin calculation."[13]

42. OneSteel points out that when the profit was reduced by the delivery charges it resulted in a reduction of the dumping margin from 4.7% to 2.8%. This must mean, according to OneSteel's submission, that inaccurate, unreliable, irrelevant or incomplete information has been taken into account by the ADC.

43. In its submission in response to OneSteel's application, the ADC has explained how it made the calculation of profit for the two sales. The approach taken was reasonable given the information provided by Wei Chih. The Review Panel is not in a position itself to investigate the reliability of the information relied upon by the ADC. I have reviewed the relevant material and there is nothing which indicates that the Wei Chih information should be considered unreliable, incomplete or inaccurate.

Adjustments to Wei Chih Normal Value

44. OneSteel contends that the ADC should have made an upward adjustment under s.269TAC(9) to the normal value determined for Wei Chih to take into account physical differences between the rebar exported to Australia and the like goods sold into the Taiwanese market. The submission by Onesteel is that there is a price premium for the grade SD 490 which is sold domestically in Taiwan (and which most closely compares to the grade 500N exported to Australia) compared to the grade SD 420 which is the grade most commonly sold in Australia.

---

[13] Verfication Report EPR 061, page 28

45. Another adjustment which OneSteel argues should have been made is to take into account the different production costs involved with the rebar exported to Australia which was micro alloyed with either niobium or vanadium. Wei Chih manufactured like goods by the cheaper process of water-quenching.

46. These arguments were made by OneSteel to the ADC and the response by the ADC was:

> "The Commission notes that normal values for Wei Chih were constructed using the cost to make of the exported goods and an amount for SG&A and profit on the assumption that the exported good was sold on the domestic market.
>
> Given that normal values were constructed, adjustments for differing grades and production methods are not necessary. "[14]

47. The explanation given by the ADC seems to me to be correct and I do not agree with OneSteel's submission that those adjustments should have been made to the constructed normal value.

48. For the reasons given above, I do not consider that OneSteel has established that the decision of the Parliamentary Secretary was not the correct or preferable decision.

Nervacero

Nervacero dumping margin

49. Nervacero S.A. and Celsa Barcelona are part of the same Spanish group of companies. They were both the subject of the anti-dumping investigation of exports of rebar from Spain to Australia. Both in its application for review and in its submission to the ADC in response to the SEF, Nervacero submitted that the investigation should have been terminated as against it on the basis that its level of dumping was negligible. The dumping margin determined for it was 3.0%. Nervacero points out that this level of dumping was determined by including the normal value and the export price determined for Celsa Barcelona's exports.

50. The submission by Nervacero is, in essence, that Australian law does not allow the "collapsing" of separate corporate entities so as to determine a single dumping margin for them. Considerable analysis of the legislation and law was provided in support of its submission by Nervacero's lawyers, Moulislegal.

---

[14] ADC Report 264, section 6.11.2, page 52

51. In the ADC Report, the ADC refers to the argument by Nervacero. The ADC notes that Nervacero and Celsa Barcelona are separate legal entities but due to the close structural and commercial relationships between the individual companies, the ADC "has treated the two companies as a single exporter for the purpose of calculating a dumping margin".[15] The ADC also notes that the legislation does not specifically provide for the collapsing of entities for the purpose of calculating a single dumping margin and that the term "exporter" is not defined. The "collapsing" of related exporters is stated to be an administrative practice of the ADC.

52. In further support of its approach in collapsing the two entities, the ADC refers to s.269TAA(4)(b) of the Act and the circumstances specified for treating bodies corporate as associates of each other. The ADC was of the view that Nervacero and Celsa Barcelona could be considered to be associates of each other. The main purpose of collapsing is stated to be to protect the integrity of any anti-dumping measures. The ADC also refers to a WTO Panel decision as support for its approach. This is the decision in *Korea-Anti-Dumping Duties on Imports of Certain Paper from Indonesia.*[16]

53. In its submission to the Review Panel, the ADC referred to an earlier report of the Review Panel[17] in support of its position and to section 5.4 of the Visit Report for Nervacero and Celsa Barcelona. The ADC did not however respond to the specific arguments made by Moulislegal on this issue in support of Nervacero's application for review.

54. It is not clear why the ADC has relied upon s.269TAA(4)(b) in its explanation for "collapsing" the Spanish exporters. Applying the terms of s.269TAA(4)(b), Nervacero and Celsa Barcelona are associates of each other but nothing seems to flow from that fact. As the ADC Report acknowledges, "the Act does not specifically address the collapsing of associated entities"[18]. In the absence of such a legislative provision, the fact that Nervacero and Celsa Barcelona are associates is irrelevant in determining the dumping margin for the exports of rebar from Spain to Australia.

---

[15] As above, section 6.10.1 at page 45
[16] WT/DS312/R
[17] ADRP Report No 25, Certain Polyvinyl Chloride Flat Electric Cable exported from the People's Republic of China at paragraph 25
[18] ADC Report 264, section 6.10.1, page 45

55. The ADC referred to the main purpose in collapsing the entities being to protect the integrity of any anti-dumping measures. However, the exercise which the ADC was undertaking with the anti-dumping investigation and the report to the Parliamentary Secretary was to determine whether or not rebar imports at dumped prices were causing material injury to the Australian industry. It is only if the Parliamentary Secretary is satisfied that there has been such injurious dumping that anti-dumping measures are taken. The protection of the integrity of anti-dumping does not seem to me to be an appropriate consideration when investigating whether injurious dumping has occurred given that at that stage there has been no decision by the Minister to impose such measures.

56. In any event, Division 5A of Part XVB of the Act provides for anti-circumvention inquiries and remedial action. The definition of "circumvention activity" in s.269ZDBB(5) could possibly cover the situation which concerns the ADC. If those provisions are not adequate, then it is for Parliament to amend the legislation.

57. WTO law may allow for the collapsing of legal entities or rather for the treating of separate companies as a single exporter and subject to a single dumping margin. I note that the WTO Appellate Body has not ruled on the issue. WTO jurisprudence may assist in interpreting Australia's anti-dumping law. In *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423 the Full Court stated:

> "To the extent that the Parliament has passed (as it has) legislation dealing with the subject matter of the Implementation Agreement, that legislation will be interpreted and applied, as far as its language permits, so that it is in conformity, and not in conflict, with Australia's international obligations. Where a statute is ambiguous (the conception of ambiguity not being viewed narrowly) the court should favour a construction consistent with the international instrument and the obligations which it imposes over another construction: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 384 at [97]."

58. The Implementation Agreement is a reference to the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade commonly referred to as the Anti-Dumping Agreement. The important point is that Australia's anti-dumping legislation should be interpreted so as to be consistent with the Anti-Dumping Agreement "as far as its language permits". There also

needs to be some ambiguity in order to have recourse to the terms of the Anti-Dumping Agreement.

59. S.15AB of the *Acts Interpretation Act* 1901 also allows recourse to extrinsic material in interpreting Commonwealth legislation. S.15AB provides that consideration may be given to such material

> "(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable."

60. Again, there are certain conditions which need to be met before consideration of the extrinsic material is permitted under s.15AB.

61. The starting point then must be the position under Australian law and whether or not it permits the ADC's approach to determining the dumping margin in the case of Nervacero. This question was not raised by the applicant before the Review Panel in the previous review referred to by the ADC. In that review the Review Panel examined a factual issue relating to the inclusion of the particular entities in the single "exporter" identified by the ADC and did not consider the legality of the practice under Australian law. The submissions by Nervacero require that I have to come to a view on that question.

62. It is well established in Australian law that the separate legal personality of companies in a corporate group has to be recognised.[19] There exists legislation which in certain circumstances allows for the grouping of companies and some of these instances are listed by Nervacero in its submission. However, absent such legislative provision it is only in very rare circumstances that the "corporate veil" can be lifted and the corporate structure ignored[20].

---

[19] Walker v Wimbourne (1976) 137 CLR 1; Industrial Equity Ltd v Blackburn (1977) 137 CLR 562; Commissioner of Taxation v Tasman Group Services [2009] FCAFC 148

[20] Adams v Cape Industries plc [1990] 1 Ch 433, considered in Australian Competition and Consumer Commission v Yazaki Corp (No2) [2015] FCA 1304.

63. Of course, related companies in a corporate group can be found to be acting as agents for each other or for the parent company. This may mean that in effect the parent or another company in the group is acting as the exporter for the corporate group. There would however need to be something more than the indirect legal and commercial capacity of the parent company to control and direct the subsidiaries to support a finding that the parent, rather than the subsidiary, is the exporter and the subsidiary was engaging in all of its commercial activities on behalf of, and therefore as agent for, the parent.[21]

64. It is not clear to me that the limited circumstances in which the corporate veil can be lifted under Australian law exist in the case of Nervacero and Celsa Barcelona. The ADC recognises that the companies are separate legal entities. However, for the reasons provided at 5.4 of the Visit Report for the two companies[22] the ADC decided to treat the companies as a single entity for the purpose of determining a single dumping margin. The reasons are largely confidential and so I will not summarise them. The factors listed by the ADC do not appear to be the type of circumstances outlined in cases such as *Bray v Hoffman-La Roche Ltd* or *Australian Competition and Consumer Commission v Yazaki (No2)* which would support ignoring the separate legal entities.

65. The ADC has not however ignored the separate corporate identity of the two Spanish companies. The companies appear to have been treated as separate legal entities and as exporters for certain purposes. The Visit Report for the two companies shows:

- the export price for each company was determined separately for each company under s.269TAB(1)(a);
- the normal value for the exports of each company was determined separately under s.269TAC(1);
- different amounts were used for each company when adjustments were made to the normal value to ensure comparability to the export price; and
- a separate dumping margin for each company was calculated before then determining a single dumping margin for both.

[21] Bray v Hoffman-La Roche Ltd [2002] FCA 243
[22] Verification Report Document 071, EPR

66. The two companies were also treated as separate legal entities for the purpose of imposing the anti-dumping measures on their exports. In the recommendations to the Parliamentary Secretary set out in the ADC Report, the ADC recommends that anti-dumping measures be imposed on a list of exporters[23]. This list identifies Nervacero and Celsa Barcelona separately and provides a 3% dumping margin for each of them. Similarly, in the public notice of the Parliamentary Secretary's decision, the two Spanish companies are separately listed as exporters.

67. So, it seems the ADC (and consequently the Parliamentary Secretary) has identified Nervacero and Celsa Barcelona as each an exporter of rebar exports from Spain to Australia which were the subject of the anti-dumping investigation.

68. The identity of the exporter of the goods the subject of the investigation is crucial to the determination of a dumping margin and hence whether the exports are being exported at dumped prices. For the purpose of determining the export price of the goods under s.269TAB(1)(a) (which was used by the ADC in this case) it is necessary to identify the exporter as it is the price paid or payable by the importer to the exporter for the goods which, when adjusted for post-exportation costs, is the export price of those goods.

69. When determining the normal value of the exports, s.269TAC(1) (which was used in this case) provides that it is "the price paid or payable for like goods in the ordinary course of trade for home consumption in the country of export in sales that are arms length by the exporter or, if like goods are not sold by the exporter, by other sellers of like goods". It is necessary to identify the exporter to identify the sales which can be used for the determination of the normal value of the exports.

[23] ADC Report 264, section 12, page 109

70. S.269TACB provides the methodology which is to be used to work out whether or not dumping has occurred and the levels of dumping. Subsection (1) provides:

> "If:
>
> (a) application is made for a dumping duty notice; and
>
> (b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and
>
> (c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;
>
> the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred."

71. Different methods for the comparison are provided in subsections (2), (2A) and (3). If the Minister uses the method described in subsection (2), then s.269TACB(4) is relevant. That subsection provides:

> "If, in a comparison under subsection (2), the Minister is satisfied that the weighted average of export prices over a period is less than the weighted average of corresponding normal values over that period:
>
> (a) the goods exported to Australia during that period are taken to have been dumped; and
>
> (b) the dumping margin for the exporter concerned in respect of those goods and that period is the difference between those weighted averages."

72. The words "the dumping margin for the exporter concerned in respect of those goods" are also used in the following subsections which apply when other methods of comparison are used.

73. When regard is had to this legislation, the need to identify the exporter in relation to the specific goods exported to Australia and determine a dumping margin for that exporter with respect to those goods is clear. The Minister (in this case the Parliamentary Secretary) must determine the dumping margin for the exporter in respect of the goods it exported to Australia. This dumping margin has to be based on the export price of those goods determined under s.269TAB and the normal value of the exported goods determined under s.269TAC.

74. It is true, as the ADC notes, that there is no definition of exporter in the legislation. There are though cases in which this term has been considered. In *Companhia Votorantuim de Cellulose e Papel v Anti-Dumping Authority*[24] Northrop J stated:

> "Neither the words 'export' nor 'exporter' are defined in the Customs Act. Each word is in common use. It was not suggested that either word has a technical or commercial meaning apart from its common meaning. In the Shorter Oxford English Dictionary the meaning of the word 'export' relevant for present purposes is 'To send out (commodities) from one country to another'. An exporter is one who exports."

75. When referring to s.269TAB of the Act, the majority stated that "it is necessary to identify the 'exporter' and then to examine whether that is the party from whom the importer has purchased. It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements of truly being the exporter."[25]

76. Nothing in the case law or in the legislation would indicate that the exporter could be other than the legal entity which has truly exported the goods. In theory, it is possible that there could be two entities which are together exporting the goods. For example, you could have two entities trading as a partnership who were jointly exporting the goods. However, the ADC has not found this to be the case with Nervacero and Celsa Barcelona.

77. The ADC Report states that the ADC has determined a single dumping margin for both legal entities[26]. What it seems the ADC has done when it refers to collapsing the two entities is to treat the two companies as exporters for the purpose of the determination of the export price of their respective exports and similarly with the determination of their normal value. Having done this, it was obliged under s.269TACB to determine a dumping margin for each exporter by comparing the weighted average of the export prices with the weighted average of the corresponding normal values. As noted above, it did do this exercise but then went a step further with the single dumping margin.

---

[24] [1996] FCAFC 1048
[25] Per Wilcox and Nicholson JJ
[26] ADC Report 264 section 6.10.1, pages 45 to 46

78. I do not believe that the further step of determining a single dumping margin for both legal entities is allowed under Australian anti-dumping law. That law requires that there be an exporter identified for the specific goods which have been exported to Australia and a dumping margin determined for that exporter with respect to those goods.

79. There is nothing in the legislation which allows for a dumping margin to be determined by combining dumping margins calculated for different exporters. If on the facts Nervacero was the exporter of rebar to Australia during the investigation period, then the dumping margin for Nervacero has to be calculated in accordance with s.296TACB in respect of those rebar exports, comparing the export price for those goods with their normal value.

80. One difficulty with an interpretation of the legislation to allow the approach taken by the ADC is that it would mean giving different interpretations to the term "exporter" for different purposes. It would mean, for example, that Nervacero is an exporter for the purpose of s.269TAB but not for s.269TACB. Under Australian law, legislation must be construed so far as possible to give the same meaning to the same words wherever they appear in a statute.[27]

81. The position under Australian law on this issue is neither ambiguous nor obscure such as to need recourse to extrinsic material such as the Anti-Dumping Agreement or WTO jurisprudence. Nor would giving the term "exporter" its ordinary meaning lead to a result that is manifestly absurd or unreasonable.

82. To the extent that the WTO panel decision allows an investigating authority in certain circumstances to treat multiple companies as a single exporter, it does not meant that not to do so would be inconsistent with the Anti-Dumping Agreement. What the WTO Panel decision means is that if Australian law allowed the ADC to treat multiple companies as a single exporter in the circumstances of this case, then Australia would not be acting inconsistently with its obligations under the Anti-Dumping Agreement.

83. Finally, I note that the reasoning in the WTO Panel decision relied on Article 9.5 of the Anti-Dumping Agreement and in particular the exclusion from a new exporter review of exporters who are related to exporters already covered by a dumping duty notice. Division 5 of Part XVB implements Australia's obligations under Article 9.5 and s.269ZE(2) provides for the exclusion of related exporters. S.269ZE(2) relevantly provides:

---

[27] Registrar of Titles(WA) v Franzon (1975) 132 CLR 611 at 618 per Mason J

" If the Commissioner is satisfied that:

…

(b) the exporter is related to an exporter whose exports were examined in relation to the application for publication of that notice;

the Commissioner may reject the application."

84. To me, the reference to different exporters within the same corporate group in this section would mitigate against an interpretation that allows the approach taken by the ADC in this case. An exporter is related to another exporter if they are associates of each other under s.269TAA(4).[28] The legislation specifically recognises that associates within a corporate group are still separate exporters and subject to different anti-dumping measures.

85. The approach taken by the ADC to the determination of the dumping margin for the Spanish exports of rebar is not authorised by Australian law. As the ADC calculated a separate dumping margin for Nervacero and that margin is less than 2%, the investigation against it should have been terminated under s.269TDA. Given this, the decision of the Parliamentary Secretary with respect to the exports by Nervacero cannot be the correct or preferable decision.

Nervacero N/OS rebar

86. Given the conclusion I have reached with respect to the decision to impose anti-dumping duties on Nervacero's exports, I do not need to consider the second ground raised by Nervacero.

Best Bar

Sales volume and market share injury

87. Best Bar is an importer of rebar from Singapore. It uses the imported rebar to manufacture reinforcing products. Best Bar submits that these products do not compete with OneSteel's sales of rebar as Best Bar does not sell non-fabricated rebar.

88. Best Bar also argues that a significant proportion of OneSteel's sales volumes are not subject to import competition as these sales are to related entities who do not purchase from any other source. To the extent that the loss of sale

[28] S.269ZE(4)

volumes occurred in relation to sales by OneSteel to its related entities, Best Bar submits that this loss cannot be caused by the imports of rebar from Singapore given that the related entities will not source rebar from Singapore.

89. In support of its submission that the loss of sales volumes occurred in sales by OneSteel to its related entities, Best Bar relies on statements made by OneSteel in its Annual Reports for 2012/2013 and 2013/14. These statements it is argued show that the 4.3% loss in sales volumes identified in the ADC Report must have occurred in OneSteel making sales to its related entities.

90. These arguments by Best Bar were put to the ADC in a submission from NatSteel in response to the SEF. In the ADC Report, the ADC responded by noting evidence that a significant factor in Best Bar's decision to cease purchasing from OneSteel was in relation to price.[29] In its submission to the Review Panel, the ADC referred to this response.

91. I am not in a position to know whether or not the loss of sales volumes suffered by OneSteel was confined to the sales to related entities as alleged by Best Bar. The ADC did not investigate this issue as it considered that a separate injury analysis was not necessary. The ADC Report concluded when considering whether dumping had caused material injury that the analysis relating to volume, price, profit and profitability should be completed at the aggregated level in the Australian market. [30]

92. The reason given by the ADC for not applying any segregated market analysis was the assessment that sales to OneSteel's related entities were arms length, that OneSteel and its related entities were competing in the same Australian market and sales to related entities were not sheltered from import competition. NatSteel in its submission criticises the reasoning by the ADC in that it is not clear how the related retail entities are not sheltered from import competition. Nor is the relevance of the arms length nature of the sales to the related entities clear.[31]

93. The approach by the ADC would seem to be consistent with the policy expressed in the ADC Anti-Dumping Policy Manual.[32] In any event, the facts before the ADC were that NatSteel exports of rebar competed with sales of rebar by OneSteel to Best Bar, that Best Bar reduced its purchase of rebar from OneSteel, that the reason for this was the price of the rebar offered by OneSteel

---

[29] ADC Report 264 section 7.4.3, page 64
[30] As above, section
[31] Letter fron Moulislegal to the Review Panel dated 5 February 2016, page 11
[32] Section 4.3

and Best Bar was the sole importer of rebar from Singapore. In those circumstances, there was sufficient evidence for the ADC to find that imports of rebar from NatSteel had contributed to the loss of sales injury suffered by OneSteel.

Price suppression injury

94. The ADC Report found that OneSteel suffered injury in the form of price suppression. Best Bar contends that this could not have been caused by imports of Singaporean rebar. This appears to be on the basis of a misunderstanding by Best Bar of the basis upon which the ADC performed its price undercutting analysis. Best Bar appears to have taken a reference in the ADC Report to the "importer sales of dumped rebar coils" to mean that the ADC used Best Bar's sales to compare with those of OneSteel.

95. This is not what the ADC in fact did. While it could perhaps have been better explained in the ADC Report, it is still clear from the explanation given of the price undercutting analysis that the comparison was between the price of imports of rebar and OneSteel's sales of like goods. In any event, the ADC in the submission made to the Review Panel has confirmed that the analysis with respect to the imports of Singaporean rebar was done based on a constructed selling price for the Singaporean rebar using the invoice sale price between NatSteel and Best Bar.

96. A further submission is made by Best Bar that given the dumping margin of the imports from Singapore, OneSteel's prices would still be undercut if there was no dumping. However, the fact that dumping may not be the only cause of injury to the Australian industry does not mean that anti-dumping measures cannot be taken.

Injury caused by non-dumped goods

97. In its submission, Best Bar alleges that the ADC failed to take proper account of the value and volume of non-dumped exports of rebar as is required by s.269TAE(2A) of the Act. In the ADC Report consideration was given to both the volume and the price of non-dumped goods at Section 8.8 and the ADC concluded that those imports were either unlikely to have influenced overall market prices or were in insufficient volumes to have had a material effect on prices of rebar.

98. The first criticism made by Best Bar of the analysis made by the ADC was that it separately considered the impact of imported like goods that were not dumped and imports from countries not subject to the investigation. Presumably, this was because it had investigated the imports in the former category and had more information on those imports. Those exports had also specifically been found not to have been dumped, whereas no investigation had been done with respect to the other exports.

99. In any event, I am unable to discern any problem with the approach by the ADC in this regard. Both categories of imports were analysed and the fact that they were done under different headings does not seem to have affected the analysis. In this respect I consider that the ADC has complied with the obligation in s.269TAE(2A).

100. Best Bar alleges that the volume of imported non-dumped rebar was one third of all imported goods and half the volume of the dumped imports and that this volume was not considered. It reaches this conclusion by adding together the combined volumes of the imports from countries not the subject of the investigation with those imports which were found not to have dumped. I do not consider that this calculation adds anything to the analysis of the cause of the injury.

101. Given the different market shares and the different trends in increasing or decreasing that market share over the injury analysis period and the investigation period, the approach by the ADC is to be preferred to one which looks at the volume of imports on an aggregated basis. In any event, the fact that those exports found to have been dumped are twice the volume of undumped imports gives support to the ADC's conclusion on their likely influence on prices in the Australian market.

102. Best Bar also alleges that the ADC only considered the price of rebar from Turkey and not the price of rebar from any other source when considering whether non-dumped goods had caused injury. The ADC Report specifically refers to the price of the Turkish exports as those exports, in contrast to others, increased in volume during the investigation period.

103. The further criticism which Best Bar makes with the finding of causation with respect to the exports of rebar from Singapore appears to be based on a misreading of the ADC Report. The ADC looked at a comparison of the prices of rebar exported from Singapore with those for rebar exports found not to have been dumped. That finding was that over a three month period the price of

exports of rebar from Singapore were lower than those from two of the three countries whose exports were found not to have been dumped.

104. From this finding, Best Bar presumes that Singaporean export prices were at all times the highest prices amongst the exports from those countries found to have been dumped. This is not correct. A review of the material supporting the undercutting analysis performed by the ADC shows clearly that exports from Singapore were not the lowest priced exports. At times they were higher than others but at other times they were considerably lower than those of the other exporters.

105. Given the evidence before the ADC, I believe that it was reasonable to conclude that dumped exports of rebar from Singapore were contributing to injury in the form of price suppression suffered by the Australian industry.

Cumulative impact of imports

106. S.269TAE provides for Minister to consider the cumulative effect of goods exported to Australia from different countries if certain conditions are met. One of those conditions is that the Minister is satisfied that it is appropriate to consider the cumulative effect of the exported goods having regard to the conditions of competition between those goods and between those goods and domestically produced like goods.

107. The ADC found that the conditions of competition between imported and domestically produced rebar were such that it was appropriate to consider the cumulative effect of the dumped imports from Korea, Singapore, Spain and Taiwan. Best Bar's submission is that the effect of exports from Singapore should not have been considered in this way.

108. The first point made by Best Bar is that the conditions of competition in so far as they relate to exports from Singapore were hugely different to those that pertained to other imports during the investigation period. This is because Best Bar did not sell rebar. This however is to misunderstand the level at which the relevant competition is being considered. The competition is that between imports of rebar and the like goods being sold by OneSteel.

109. The next criticism made by Best Bar is that any competition between OneSteel and imports of rebar from Singapore occurs at the wholesale level and OneSteel has not lost sales volume or market share at that level. I am not sure that this argument is relevant to whether or not the conditions for considering the cumulative effect of exports exist. In any event, as noted above, the ADC did not conduct a sectorial analysis of the Australian industry.

110. One of the conditions of competition relied upon by the ADC was price competition. The ADC found that because rebar is a commodity product and due to the degree of price competition in the market, price competition is a major condition of competition between the imported goods and the domestically produced like goods. Best Bar takes issue with this reasoning with respect to the imports from Singapore.

111. The first point Best Bar makes is that the ADC found that the Singaporean rebar was overwhelmingly priced higher than the rebar from countries found not to be dumped. I am not sure that this accurately reflects the finding of the ADC but in any event the conclusion reached by Best Bar that there was some layer of non-dumped exports between the dumped exports and the higher prices of Singaporean rebar is not correct. As noted above, the prices of rebar from Singapore were both higher and lower than other dumped exports.

112. Best Bar also puts forward the argument that it sells fabricated rebar which does not compete with OneSteel's sales of rebar. Again, this argument mistakes the level at which the relevant competition takes place for the purpose of s.269TAE(2C), namely between NatSteel's exports of rebar, other dumped exports and the rebar produced by OneSteel.

113. Best Bar also argues that OneSteel sells rebar at a lower price to its related customers and that the price of rebar offered to Best Bar by OneSteel increased significantly over the period just prior to the period of investigation such that it would have effectively locked Best Bar out of the downstream fabricated market. As noted by Best Bar in its submission, the ADC did an analysis of OneSteel's pricing to related and non-related customers. The analysis conducted by the ADC did not support Best Bar's contention. In any event the arguments by Best Bar related to the downstream market are not relevant to the competition analysis for the purpose of s.269TAE(2C).

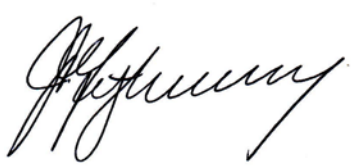
114. Again, Best Bar also argues that the loss suffered by OneSteel was at the retail level and not the wholesale level. As any sales to it would have been at the wholesale level, the loss of sales volume cannot be attributed to Singaporean rebar. This argument has been dealt with elsewhere in this report.

115. For the reasons given above, I do not consider that Best Bar has established that the decision of the Parliamentary Secretary with respect to it was not the correct or preferable decision.

Recommendations/Conclusion

116. For the above reasons, the decision of the Parliamentary Secretary was the correct or preferable decision except in relation to Nervacero. Given the dumping margin determined by the ADC for Nervacero, the investigation in so far as it related to its exports should have been terminated pursuant to s.269TDA(1).

117. Accordingly, pursuant to s.269ZZK(1) I recommend to the Parliamentary Secretary that she revoke the reviewable decision and substitute another decision, namely to issue a dumping duty notice in the same terms as that issued on 11 November 2015 but amended so as to exclude from the notice exports of rebar from Spain by Nervacero.



Joan Fitzhenry

Acting Senior Member

Anti-Dumping Review

4 March 2016