Australian Government
Anti-Dumping Review Panel

Application for review of a Commissioner's decision

Customs Act 1901 s 269ZZQ

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Commissioner of the Anti - Dumping Commission.

Section 269ZZO *Customs Act 1901* sets out who may make an application for review to the ADRP of a review of a decision of the Commissioner.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after the applicant was notified of the reviewable decision.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel begins to conduct a review (by public notice in the case of termination decisions and by notice to the applicant and the Commissioner in the case of negative prima facie decisions, negative preliminary decisions and rejection decision). Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after the Panel begins to conduct a review. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZQA(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application, refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: OneSteel Manufacturing Pty Limited

Address: Level 6, 205 Pacific Highway, St Leonards NSW 2065

Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: [redacted]

Position: [redacted]

Email address: [redacted]

Telephone number: [redacted]

3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO

The applicant for review was the applicant in relation to an application under section 269ZDBC of the *Customs Act 1901* that led to the making of the reviewable decision – being the sole member of the Australian industry producing like goods, which considered that the circumvention activity had occurred.

4. Is the applicant represented?

~~Yes~~ **No**

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under

☐ Subsection 269TC(1) or (2) – *a negative prima facie decision*

☐ Subsection 269TDA(1), (2), (3), (7), (13), or (14) – *a termination decision*

☐ Subsection 269X(6)(b) or (c) – *a negative preliminary decision*

☐ Subsection 269YA(2), (3), or (4) – *a rejection decision*

☒ Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

6. Provide a full description of the goods which were the subject of the reviewable decision

The circumvention goods (those currently subject to the original notice) are fully described in ADN No. 2014/100 as follows:

> *Hot-rolled deformed steel reinforcing bar whether or not in coil form, commonly identified as rebar or debar, in various diameters up to and including 50 millimetres, containing indentations, ribs, grooves or other deformations produced during the rolling process.*
>
> *The goods covered by this application include all steel reinforcing bar meeting the above description of the goods regardless of the particular grade or alloy content or coating.*
>
> *Goods excluded from this application are plain round bar, stainless steel and reinforcing mesh.*

7. Provide the tariff classifications/statistical codes of the imported goods

The circumvention goods are classified to the tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995* specified below:

- 7214.20.00 (statistical code 47);
- 7228.30.90 (statistical code 40);
- 7213.10.00 (statistical code 42);
- 7227.90.10 (statistical code 69);
- 7227.90.90 (statistical code 01, 02 and 04);
- 7228.30.10 (statistical code 70); and
- 7228.60.10 (statistical code 72).

8. **If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

   Anti-Dumping Notice (ADN) No. 2018/052.

9. **Provide the date the applicant received notice of the reviewable decision**

   26 April 2018.

Attach a copy of the notice of the reviewable decision to the application

A copy of the notice of the reviewable decision is attached as Appendix A to this application.

PART C: GROUNDS FOR YOUR APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

A. The reviewable decision was not the correct or preferable decision because the Commissioner failed to accurately examine and assess, whether the importer of the circumvention goods had increased its selling prices in Australia by an amount not less than the amount of dumping duty payable as required under s 269ZDBB(5A)(d) of the *Customs Act 1901*. Instead the Commissioner had regard to a number of irrelevant factors not authorised under the provisions of the Act. Regard to these irrelevant factors formed the basis of the decision to terminate *Inquiry No. 452*.

B. Alternatively, if the Commissioner did correctly examine and assess whether the importer sold the circumvention goods in Australia at prices that satisfy the circumstances of s 269ZDBB(5A)(d), then his assessment that the condition under s 269ZDBB(5A)(e) is not met was incorrect because he failed to assess the existence of the condition of s 269ZDBB(5A)(d) in relation to each sale of the circumvention goods over a reasonable period. Instead, the Commissioner performed his assessment on a weighted average basis. This failure prevented a proper examination of the degree, distribution and recurrence of the conditions under s 269ZDBB(5A)(d) 'over a reasonable period' as required by s 269ZDBB(5A)(e).

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

Elaboration of these grounds can be found at Appendix B attached.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10

The correct or preferable decision would have been for the Commissioner to find that:

- the importer of the circumvention goods, whether directly or through an associate or associates, sold those goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act; and
- the sales of the circumvention goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act occurred over a reasonable period.

12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision

Only answer question 12 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act.

Not applicable.

PART D: DECLARATION

The applicant~~/the applicant's authorised representative~~ *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* beginning to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: [redacted]

Position: Manager Trade Development

Organisation: OneSteel Manufacturing Pty Limited

Date: 25/05/2018

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative:

Organisation:

Address:

Email address:

Telephone number:

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....
(Applicant's authorised officer)

Name:

Position:

Organisation:

Date:

APPENDIX B

PART C: GROUNDS FOR YOUR APPLICATION

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision

A. INTRODUCTION

1 Section 269ZDBEA(2) of the *Customs Act 1901*[1] provides:

> If:
>
> (a) the Commissioner publishes a notice under subsection 269ZDBE(4); and
>
> (b) subparagraph 269ZDBE(6)(d)(ii) applies; and
>
> (c) the Commissioner is satisfied that no circumvention activity, in relation to the original notice, within the meaning of subsection 269ZDBB(5A), has occurred;
>
> the Commissioner may terminate the anti-circumvention inquiry concerned.

2 In reaching his decision to terminate anti-circumvention inquiry 452 the Commissioner has found that no circumvention activity of the kind described by s 269ZDBB(5A) has occurred.

3 The sub-heading to s 269ZDBB(5A) titles the form of circumvention activity defined in that provision as 'avoidance of intended effect of duty', and provides:

> (5A) Circumvention activity, in relation to the notice, occurs if the following apply:
>
> (a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;
>
> (b) the exporter is an exporter in respect of which the notice applies;
>
> (c) either or both of sections 8 and 10 of the Dumping Duty Act apply to the export of the circumvention goods to Australia;
>
> (d) the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act;
>
> (e) the circumstances covered by paragraphs (a) to (d) occur over a reasonable period.[2]

4 In his summary of findings, the Commissioner claims that he is:

> [S]atisfied that the importer of the goods (Stemcor), whether directly or through an associate or associates, sold the goods in Australia by increasing the price commensurate with the total amount of duty payable under the Dumping Duty Act.[3]

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[1] All legislative references are to the *Customs Act 1901* unless stated otherwise.
[2] Subsection 269T(1) defines the 'Dumping Duty Act' as the *Customs Tariff (Anti-Dumping) Act 1975.*
[3] Termination Report No. 452, p. 5.

5 OneSteel Manufacturing Pty Limited (**Liberty OneSteel**) disputes that finding and contends that the Commissioner could not have reasonably reached that conclusion because he did not in fact determine an amount that constitutes "the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act". Without determining this comparative price, the Commissioner cannot reasonably or factually conclude that "the importer of the circumvention goods, whether directly or through an associate or associates, sells those goods in Australia" at a "price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act" and that this occurs "over a reasonable period".

6 Liberty OneSteel further disputes the Commission's finding that the conditions of s 269ZDBB(5A)(e) have not been met. The Commission has entirely failed to consider, whether or not the circumstances covered by paragraph (d) have occurred over a reasonable period. To do so, the Commission must identify the conditions of paragraph (d) on a sale-by-sale basis by the importer of the circumvention goods in Australia. There is no evidence that the Commission has done this, with all its analysis occurring on a weighted average basis comparison between the original investigation period and the inquiry period.

7 Finally, Liberty OneSteel submits that the Commission's consideration of the profitability of the importer's[4] sales of the circumvention goods in Australia is flawed by concluding that the "deductions for the cost of the goods and selling, general and administration costs"[5] improved profitability, rather than eroded it as a matter of fact.

B. THE ANTI-CIRCUMVENTION INQUIRY

8 In Anti-dumping Notice No. 2017/163 of 20 November 2017, the Commissioner announced the initiation of an inquiry following receipt of an application from Liberty OneSteel alleging in relevant part:

> Liberty OneSteel claims that the intended effect of the measures have been avoided because Stemcor sold the circumvention goods, which it imported from Daehan, in Australia without increasing the price of the goods commensurate with the total amount of duty payable under the Dumping Duty Act.[6]

9 Having found that the importer, Stemcor, lowered its FIS selling prices in Australia for the inquiry period and that these lower FIS selling prices were influenced by the lower export price from the exporter, Daehan, the Commission then erroneously proceeded to apply the

[4] The importer was identified as the Singaporean domiciled entity, Stemcor (S.E.A.) Pte Ltd. (**Stemcor**)
[5] EPR Folio 452/007 (*Steel Reinforcing Bar – Importer Visit Report – Stemcor (S.E.A.) Pte Ltd*), p. 6.
[6] Termination Report No. 452, p. 11.

wrong test. Rather than testing whether the importer's FIS selling prices in Australia were at levels "without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act", the Commission instead concluded:

> [T]he relative changes are explainable by external factors. In particular, the Commission has found that scrap metal prices, which are a main raw material input used in the production of the circumvention goods, have led to a significant reduction in Daehan's export price and Stemcor's FIS selling prices in Australia for the inquiry period.[7]

10 Without any attempt to calculate the amount that would constitute a "price commensurate with the total amount of duty payable under the Dumping Duty Act" the Commission then concludes:

> After taking into account external factors, the Commission is satisfied that the importer, Stemcor, has increased its FIS selling prices in Australia by an amount commensurate with the total duty payable under the Dumping Duty Act.[8] [emphasis added]

11 The Commission cannot reasonably or accurately deduce that the importer "has increased its FIS selling prices in Australia by an amount commensurate with the total duty payable"[9] by reference to "relative changes… explainable by external factors".

12 Without calculating the amount or value of the price on individual sales commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act, the Commission then reaches two conclusions it cannot factually or reasonably make:

- the importer "has not engaged in, a circumvention activity which avoids the intended effect of the duty within the meaning of subsection 269ZDBB(5A)(d)";[10] and
- "the requirements of s 269ZDBB(5A)(e) are also not met".[11]

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[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.

C. COMMISSION'S APPROACH TO ASSESSING CIRCUMVENTION ALLEGATIONS

13 The Commission's stated approach to assessing circumvention activity is flawed as it does not at any time assess what the price for an individual sale commensurate with the total amount of duty payable on the circumvention goods in fact is, and then whether or not the importer selling the 'circumvention goods' into the Australian market, has done so without increasing the price commensurate with the total amount of duty payable. This is the test prescribed by s 269ZDBB(5A)(d) as evaluated over a "reasonable period" under s 269ZDBB(5A)(e).

14 Instead the Commission advised that it focussed "on comparing Daehan's export prices and Stemcor's FIS selling prices in Australia for the original investigation period and the inquiry period".[12] Relevantly, the Commission reaches a number of conclusions concerning movements in export price and changes in the importer's profit margin,[13] and then finds:

> To the extent that Stemcor's FIS selling prices have not increased following imposition is attributable to external factors as outlined below.[14]

15 Those "external factors" were variously identified as:[15]

- Exchange rates fluctuations;
- Export price trends;
- Global rebar price trends;
- Scrap metal price; and
- Nature of the relationship between the importer and exporter.

16 The Commission erroneously relies on paragraph 53 of the Explanatory Memorandum[16] to contend that:

> Where the Commission finds, as part of an anti-circumvention inquiry, that selling prices in Australia have been influenced by one or more of these external factors, the Commissioner may determine that a circumvention activity has not occurred.[17]

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[12] Termination Report No. 452, pp. 13 – 14.
[13] Termination Report No. 452, p. 18.
[14] *Ibid*.
[15] Termination Report No. 452, p. 20.
[16] *Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 201*3 and the *Customs Tariff (Anti-Dumping) Amendment Bill 2013*
[17] Termination Report No. 452, p. 18.

17 In fact, it is the existence of these 'external factors' (as the Commissioner sees them) that forms the basis of his decision to terminate the inquiry:

> Whilst Stemcor's FIS selling prices in Australia have reduced in the inquiry period from those observed during the original investigation period, the Commission concludes that Stemcor's FIS selling price in Australia was influenced by external factors, namely a reduction in scrap metal prices. Those external factors also affected Liberty OneSteel.
>
> Once external factors are taken into account, the Commission is satisfied that Stemcor's FIS selling prices in Australia have increased commensurate with the total duty payable under the Dumping Duty Act. Based on the available evidence, the Commissioner is satisfied that Daehan have not contributed to, or that Stemcor have not engaged in a circumvention activity which seeks to avoid the intended effect of the duty.
>
> The Commissioner considers that the conditions of subsection 269ZDBB(5A)(d) and (e) are not met.[18]

Statutory interpretation of subsection 269ZDBB(5A)(d)

18 The Commission has erroneously had recourse to extrinsic material in interpreting s 269ZDBB(5A)(d), namely, the Explanatory Memorandum, without properly first considering under s 15AB of the *Acts Interpretation Act 1901* whether consideration may be given to such material. As a matter of law there needs to be some ambiguity in order to have recourse to the terms of extrinsic materials such as the Explanatory Memorandum.[19] Consideration may be given to that material where it is necessary:

> (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.[20]

19 Therefore, there are certain conditions which need to be met before consideration of the extrinsic material is permitted under s 15AB.[21]

20 Applied here, the ordinary meaning of the text of s 269ZDBB(5A)(d) does not appear ambiguous, it refers to the *act* of the importer (or associate) of selling the 'circumvention goods' into the Australian market, 'without increasing the price commensurate with the total amount of duty payable' that established the circumvention activity. There is nothing in the

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[18] Termination Report No. 452, p. 22.

[19] Under s 15AB(2)(e), *Acts Interpretation Act 1901*: Extrinsic materials include "any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted"

[20] Subsection 15AB(1), Acts Interpretation Act 1901

[21] *Acts Interpretation Act 1901*

text that directs the Commission to have regard to 'external factors', as the Commission concludes:

> Where the Commission finds, as part of an anti-circumvention inquiry, that selling prices in Australia have been influenced by one or more of these external factors, the Commissioner may determine that a circumvention activity has not occurred.[22] [emphasis added]

21 It is this incorrect reasoning that led the Commission to not make the correct or preferable decision:

> Once external factors are taken into account, the Commission is satisfied that Stemcor's FIS selling prices in Australia have increased commensurate with the total duty payable under the Dumping Duty Act. Based on the available evidence, the Commissioner is satisfied that Daehan have not contributed to, or that Stemcor have not engaged in a circumvention activity which seeks to avoid the intended effect of the duty.
>
> The Commissioner considers that the conditions of subsection 269ZDBB(5A)(d) and (e) are not met. [23]

22 The correct or preferable interpretation of the text; in the overall context of Part XVB; is that the right question in relation to a particular consignment of goods subject to a dumping duty notice is whether an importer has increased its selling price by an amount not less than the amount of dumping duty payable. The term "increased" implies that a comparison is required to a comparative selling price.

23 Applied here, the Commission has not only failed to calculate the comparative selling price, against which the importer's prices of the alleged circumvention goods were sold into the Australian market, but has in fact found that the importer's "FIS selling prices in Australia have reduced in the inquiry period from those observed during the original investigation period". The Commission's error is then that rather than comparing this to the comparative price, it instead, reached an irrelevant conclusion, namely that the importer's "FIS Selling price in Australia was influenced by external factors, namely a reduction in scrap metal prices. Those external factors also affected Liberty Onesteel."[24]

24 The satisfaction of the Commissioner as to the absence of the circumvention activity required by the terms of s 269ZDBEA(2) must be based on reasonable grounds. Failure to interpret the alleged circumvention activity within the meaning of the text of s 269ZDBB(5A), and to have regard to matters irrelevant to that assessment, such as a number of 'external factors', undermines the integrity of the termination decision. In the absence of any reasonable grounds Liberty OneSteel submits that the decision to terminate the inquiry was neither the correct nor preferable decision and should be revoked by the Panel.

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[22] Termination Report No. 452, p. 18.
[23] Termination Report No. 452, p. 22.
[24] *Ibid*.

D. CONSIDERATION OF THE CIRCUMVENTION ACTIVITY ON AN INDIVIDUAL SALE BASIS OCCURRING OVER A 'REASONABLE PERIOD'

25 The Commission has not considered whether or not the conditions of s 269ZDBB(5A)(d) "occur over a reasonable period" as required under s 269ZDBB(5A)(e), which necessarily implies that the assessment under s 269ZDBB(5A)(d) relates to each sale of the goods by the importer in Australia, and that where it is found that the importer has not increased the price commensurate with the total amount of duty payable, that this "occurs over a reasonable period".

26 Just as s 269ZDBB(5A)(d) requires the Commission to consider the amount of duty payable with respect to each importation (consignment) of the goods, and the price commensurate with the duty payable following each sale by the importer of those goods in Australia, so to s 269ZDBB(5A)(e), requires the Commission to assess whether instances of the conditions of s 269ZDBB(5A)(d) have occurred "over a reasonable period".

27 The Commission has failed to test the condition of s 269ZDBB(5A)(d) against each sale of the circumvention goods by the importer. Instead, the Commission has made its assessments on a weighted average basis. This is not the test required under s 269ZDBB(5A)(e), as it may result in the Commission finding that the circumvention activity has not occurred where there are sufficient instances of the importer not meeting the condition under s 269ZDBB(5A)(d). For example, where the Commission applies a weighted average assessment, then this approach may favour an importer who while does not meet the condition under s 269ZDBB(5A)(d) in relation to one large consignment imported and sold in the first quarter of the inquiry period, may nevertheless frequently and continuously meet the condition under s 269ZDBB(5A)(d) in the latter half of the inquiry period, with smaller but more frequent sales of the circumvention goods in Australia without increasing the price commensurate with the total amount of duty payable on the circumvention goods under the Dumping Duty Act. Therefore, the Commission's assessment of values on a weighted average basis is neither the correct nor preferable decision.

E. COMMISSION'S CALCULATION OF THE PROFITABILITY OF SALES OF THE CIRCUMVENTION GOODS

28 The Commission concluded that:

> The Commission analysed the profit margin earned by Stemcor on its Australian sales of the circumvention goods. The Commission is satisfied that the FIS selling price at which Stemcor sold the circumvention goods in Australia, which was sourced from Daehan, during the inquiry period, was

> sufficient to recover the full cost of importation (including dumping duty payable) and all relevant overhead costs incurred by both Stemcor's operations in Singapore and Stemcor Australia.[25]

29 However, following verification of the importer's financial information, the Commission relevantly found as follows:

> Although certain individual Australian sales transactions were found to be marginally unprofitable, the verification team observed that overall, the 16 Australian sales transactions were profitable after taking into account necessary deductions for the cost of the goods and selling, general and administration costs.[26]

30 It appears to Liberty OneSteel that the Commission has incorrectly applied the "costs of the goods and selling, general and administration costs", to reduce the unprofitable nature of a number of Australian sales. This apparent error undermines the integrity of the termination decision and provides no factual basis for the Commission to conclude that "the importer has not made sales at a loss",[27] to the extent that such a conclusion was relevant to the Commissioner's reasons for the reviewable decision.

[25] Termination Report No. 452, p. 17.
[26] EPR Folio 452/007 (*Steel Reinforcing Bar – Importer Visit Report – Stemcor (S.E.A.) Pte Ltd*), p. 6
[27] Termination Decision No. 452, p. 17.