12 November 2018

Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

BY EMAIL:
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Dear Director,

Re.: Reinvestigation of certain findings in Report 418 (Steel reinforcing bar exported from Greece, The Republic of Indonesia, Spain (by Nervacero SA), Taiwan (by Power Steel Co Ltd) and the Kingdom of Thailand)

AUSTRALIAN INDUSTRY SUBMISSION

We refer to the preliminary reinvestigation report of the Anti-dumping Commission (**Commission**) prepared in response to the reinvestigation request by the Anti-dumping Review Panel (**ADRP**) of specific findings that formed the basis of the reviewable decision contained in the Commission's report of 22 January 2018 concerning the above investigation (REP 418) (**the Report**).[1]

We make the following observations in response to the Commission's preliminary findings contained in the Report. The use of paragraph numbers, headings and sub-headings below follow those contained in the Report.

3. Power Steel

The Commission has correctly preliminarily affirmed its finding that there should be no adjustment to Power Steel's normal value to account for claimed differences in costs between standard grade billet and microalloy billet.

Contrary to the assertion of the Panel, the Australian industry submits that the Commission did not conflate inappropriately or otherwise, the adjustments in respect of specification differences claimed by it and Power Steel.

- The Australian industry argued minimum yield strength was the most significant factor in establishing a model match and consequently the relevant domestic model for comparison for the exported grade 500N rebar was grade SD490 rebar. This was rejected by the Commission on the basis that Power Steel did not sell grade SD490 domestically.
- Power Steel argued that normal values should be based on domestic sales of grade SD280 rebar because the production process involved the use of the standard grade billet also used in the manufacture of grade 500N for export. This proposal was also rejected by the Commission, appropriately due to the vast difference in minimum yield strength of the two grades.

[1] The Preliminary Reinvestigation Report is published at EPR Folio No. 418/070.

- The Commission determined that the most appropriate sales for normal value purposes were domestic sales of grade SD420 rebar.
- The Australian industry and Power Steel argued, from different perspectives, that a fair comparison adjustment would have to be made.
    - The Australian industry called for an upward adjustment on the basis of a price premium associated with higher yield strength rebar (SD490) over grade SD420 and produced supporting evidence of such a premium. The Commission rejected this claim on the basis that the evidence of the price premium (for SD490 over SD420 achieved by other sellers in the Taiwanese market) was insufficiently contemporaneous and there was no reliable, more recent evidence that the difference in the grade of rebar had a demonstrable effect on price.
    - Power Steel argued that a downward adjustment was necessary to account for the use of lower grade billet (as used for grade SD280) in the production of grade 500N rebar for export sales. The Commission appropriately found that a downward adjustment could not be substantiated because there was no evidence that the higher production cost of grade SD420 rebar would support a domestic price that was greater than the price of rebar of comparable yield strength produced by a cheaper method.

The Commission's consideration and determination of the two claims does not reveal any inappropriate 'linking' and the only shared feature is the Commission's focus on the impact, if any, on rebar prices of different production processes on the one hand, and different yield strength ratings on the other.

In our view, the Commission clearly adopted the correct position in insisting when considering the issue of adjustments that the emphasis, in accordance with subsection 269TAC(8),[2] Article 2.4[3] and all relevant WTO and Australian jurisprudence, must be on price comparability, not cost comparability. As the Commission has rightly observed in the Report (at p. 11):

> *"Power Steel appears to have conflated the price based inquiry required under Article 2.4 as reflected in subsection 269TAC(8) with the necessarily cost based inquiry under subsection 269TAC(9). Power Steel repeatedly refers to the need to make a "proper comparison"; those words appear in subsection 269TAC(9), not in subsection 269TAC(8)."*

And further (at p. 12)

> *"The Commission considers that subsection 269TAC(9) is limited in scope to cases where normal values are ascertained in accordance with subsection 269TAC(2)(c) or subsection 269TAC(4)(e); Power Steel's normal values were not ascertained under those provisions."*

The evidence available to the Commission and referenced in the Report further reinforce the Commission's decision to preliminarily affirm its finding that there should be no adjustment to Power Steel's normal value to account for claimed differences in cost between standard grade and microalloy billets used in producing rebar:

> *"3.4.2 Evidence shows method of production does not affect price comparability*
>
> *"During the verification Power Steel unequivocally stated that its domestic prices for rebar will vary on the grade and diameter of rebar. Grade is the measure of minimum yield strength.*
>
> *"There was no suggestion that domestic customers would pay different prices based on the level of microalloys, rather microalloys were used in domestic rebar only to achieve the required grade because using quench and tempering to achieve the required grade is prohibited in Taiwan.* [at p. 12]

[2] References to legislative provisions are references to provisions of the *Customs Act 1901*, unless otherwise expressly specified.
[3] Article 2.4 of the WTO *Anti-dumping Agreement*.

> *"3.4.3 Power Steel calculation masks the nature and effect of cost differences*
>
> *"The Commission has reviewed the analysis provided to the ADRP by Power Steel and considers that Power Steel's annual calculation masks the nature and effect of differences between the costs of 500N rebar and 420/420W rebar. Even if Power Steel's broad proposition was accepted, namely that a cost difference alone can form the basis for an adjustment, Power Steel's calculation, properly done, would result in a dumping margin not materially different to that in REP418.*" [at p. 12]
>
> *"Power Steel calculates a single cost difference for the whole investigation period* [a departure from the Commission's standard practice]."
>
> *"The Commission observes that if the cost difference calculations are made on a quarterly basis it becomes clear that the cost differences are not consistent across the investigation period. Those cost difference calculations reveal what is not clear from Power Steel's calculations, that* ***the cost of standard grade billet is materially greater than the cost of microalloy billet for half of the investigation period****."* [at p. 12, ***emphasis added***]

Evidence of a further departure by the Panel Member's observations and established norms of practice and authorities is revealed by the statement in the letter to the Commissioner of 26 June 2018 that:

> *"There would appear to be no basis for Power Steel to be required to provide evidence relating to the effect on price resulting from differences in grade between the products compared, in relation to its specification adjustment claim."*[4]

The statement is contrary to the requirements of the Anti-Dumping Agreement, domestic law and administrative practice. WTO jurisprudence culminating in *EU – Footwear (China)(DS405)* [at 7.282] have consistently maintained that it is the exporter's responsibility to make substantiated requests for due allowance adjustments. Further, the Federal Court in *Al Abdullatif Industrial Group Co Ltd v Minister for Justice & Customs* [2000] FCA 758 at [27], when distinguishing the facts before it concerning adjustments from those in *GTE (Aust) Pty Ltd v Brown* (1986) 14 FCR 309, observed that:

> *"There is not, in this situation, a legal obligation to institute further enquiries, particularly considering the strict timetable of the scheme. The imposition of a general duty to enquire which is wider than the enquiries of the applicant in a case such as this would make the scheme unworkable."*

The Panel itself, in ADRP Report No 48 at [59], commented that *"…[I] note the onus is upon the exporter to provide evidence demonstrating a difference which affects price comparative [sic] for which an allowance or adjustment must be made".* Moreover, the Commission's practice of requesting details of adjustment claims to be included in the exporter questionnaire response accords with those authorities as does the observation in the *Dumping and Subsidy Manual* at p. 61 that "*…exporters making adjustment claims also have a responsibility to provide evidence in support because this information is usually in their possession".*

The logic of the Panel's argument at page 2 of the reinvestigation request that the Commission has raised the evidentiary bar and moved the evidentiary goal posts is not readily comprehensible. While Power Steel may have provided evidence to the Commission establishing the difference in the production cost of SD280 and 500N there was no evidence before the Commission to satisfy the requirement in Article 2.4 of the *Anti-Dumping Agreement* and s269TAC(8) that selling prices reflect production cost differences. The absence of any such evidence is confirmed by the fact that on a close reading of Power Steel's application to the Panel no claim is made, let alone evidence provided, concerning any impact of the cost difference on rebar prices. It is also confirmed by the application of common sense. Rebar is a reinforcing product and its capability to deliver as a reinforcing component is governed by its rated yield strength. It is that rating that determines price because the higher the yield strength the less rebar is required and handling and welding costs are reduced. What

[4] ADRP letter to ADC – 26 June 2018. p.2

production process was used in the manufacture of the rebar is not a relevant consideration for a rational purchaser.
For the above reasons, the Australian industry considers the Commission's result of its reinvestigation on this point represents both the correct and preferable decision and should be affirmed.

4. Nervacero

4.4.1 Volume effects

The Commission has correctly preliminarily affirmed its finding that the Australian industry suffered material injury due to volume effects from dumped imports as shown in a reduced market share during the injury analysis period.

The Commission has acknowledged some errors in its volume effects analysis in REP 418 (as identified in the Panel Member's request for reinvestigation) but after correcting that information, the Commission nevertheless continues to find injury in the form of lost market share due to dumped imports to be material:

> *"The Commission has reviewed its analyses of volume effects in REP 418 and accepts that it:*
>
> - *Based its market share assessment in section 8.5.2 on imports from countries subject to investigation rather than, as it should have, from imports that were found to be dumped;*
> - *Excluded imports from Ispat and Putra Baja Deli from an analysis in Confidential Appendix 1 to REP 418 when it should have included those imports under the Other Imports category.*
>
> *"The Commission has revisited its analyses and reviewed its conclusions in light of the corrected analyses. **The Commission remains satisfied that OneSteel lost market share to imports that were found to be dumped in REP 418**."* [at p. 21 of the Report, ***emphasis added***]

And further:

> *"the Australian industry's market share materially declined between 2015 and 2016 as the market share of imports from sources found dumping increased. The Commission considers that that loss of market share caused material injury to the Australian industry (subsection 269TAE(1)(c)). The decline in market share experienced by the Australian industry is still clearly evident notwithstanding that imports by Ispat and Putra Baja Deli during the injury analysis period are included in other imports."* [at p. 22 of the Report]

To the extent that the Panel Member also claimed that the Commission failed to meet an alleged requirement in Article 3.2 that the changes in market share were 'significant'. The Commission correctly dismissed such a concern as irrelevant.

The jurisprudence on Article 3.2 with respect to dumped import volumes and market share, does not support the Panel Member's claim. In *Thailand – H-Beams*, the WTO Disputes Settlement Panel considered that Article 3.2 does not require that the term "significant" be used to characterize a subject increase in imports in the determination of an investigating authority. The Panel explained:

> *"We note that the text of Article 3.2 requires that the investigating authorities 'consider whether there has been a significant increase in dumped imports'. … We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as 'significant', and to give a reasoned explanation of that characterization, we believe that the word 'significant' does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be*

> *fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.*" [at para. 7.161]

Moreover, the Panel in *China – Cellulose Pulp*, disagreed that an investigating authority is required under Article 3.2 to analyse the correlation between an increase in the volume of dumped imports and other factors such as sales of the domestic industry and non-dumped imports:

> *"Canada's specific argument in this regard is that MOFCOM failed to provide a reasoned and adequate explanation of how MOFCOM's reference to the share of the dumped imports in total imports supported its conclusion that the volume of the dumped imports increased in absolute terms. In addition, Canada argues that MOFCOM did not take into account the expansion of the market and the increased sales of the domestic like product and non-dumped imports. Based on our views above, consideration of how any increase in the dumped imports correlates with other factors, including sales of the domestic like product and non-dumped imports, is not a required element of the consideration of whether there was a significant increase in the volume of dumped imports in absolute terms under Article 3.2. Moreover, we recall that the obligation is to consider – and not to determine – whether there was a significant increase in dumped imports in absolute terms. In the absence of a requirement to make any determination in this regard, we cannot conclude that there is an obligation to provide a reasoned and adequate explanation under Article 3.2. Whether any increase in dumped imports supports a demonstration that dumped imports cause material injury under Article 3.5 will require explanation in order to be consistent with the requirements of that Article and Article 3.1."* [at para. 7.55, emphasis added]

The last sentence of the extract from that judgement was expanded on by the Panel in *China – Cellulose Pulp* in the following terms:

> *"the consideration of whether there has been a significant increase in the volume of dumped imports under Article 3.2 does not require a duplicative analysis of causal linkages and other factors.* [at para. 7.43]

> *"Article 3.2 does not provide any guidance as to what circumstances might be relevant to consideration of the 'significance' of any increase in imports. Recalling that there is no requirement under Article 3.2 for an investigating authority to determine that an observed increase in imports, whether absolute or relative, is significant, and an investigating authority may ultimately find injury caused by dumped imports even in the absence of a significant increase in such imports, it would be inappropriate, in our view, to impose requirements for the analysis of the significance of any increase in imports that are duplicative of elements of the analysis of causation relevant to determining whether the dumped imports, whatever their volume, and whether or not it increased significantly in absolute or relative terms, are causing injury to the domestic industry."* [at para. 7.44]

4.4.2 Causal link and non-attribution analysis

The Commission has correctly preliminarily affirmed its finding that, having separated any injurious effects from other factors identified in the investigation request, the dumped imports caused material injury.

The Panel Member's allegations that the Commission failed to adequately consider the degree to which injury to the Australian industry was attributable to supply restrictions, in particular capacity limitations and restrictive trade practices, are based on a misconception. The Panel Member appears to reason that all aspects of a domestic industry's capacity are 'other factors' for the purpose of a non-attribution analysis. However capacity factors are not mentioned in either s269TAE(2A) or Article 3.5 of the *Anti-Dumping Agreement* and the references in s269TAE(3) and Article 3.4 to that factor are confined to a domestic industry's capacity utilisation as an economic factor that may indicate the existence, not the cause, of injury.

Moreover, a domestic industry's inability to supply 100% of the market is unremarkable both generally and in the context of an anti-dumping investigation. Indeed, such an investigation is only possible in circumstances where the local industry does not supply 100 per cent of the Australian market. Thus, the fact that the Australian industry supplies less than 100 per cent of the domestic rebar market does not, in itself, constitute an 'other factor' requiring consideration by the Commission. In the present case the only circumstance in which the Australian industry's capability to supply would be an 'other factor' is if that capability is reduced in the investigation period by extraneous events such as disruptions to raw material supplies, transport strikes or temporary plant closures. There is no evidence of any such events and hence no 'other factor' concerning capacity that the Commission was required to consider and evaluate. Consequently, the Panel's expression of concern that the positive obligation to separate the injurious effects of other factors has not been met, is misplaced. There is no such legal obligation in the present matter in relation to the Australian industry's capacity to supply.

4.4.2.2 OneSteel's supply arrangements are not restrictive trade practices

Restrictive trade practices are included in s269TAE(2A)(d) and Article 3.5 as a factor to be assessed in a non-attribution analysis. By appearing to accept without any evaluation the unsubstantiated assertions by the applicants for review of the existence of restrictive trade practices, the Panel Member failed to appreciate that before any evaluation of such practices can legitimately be undertaken evidence of their existence must be established. There are a number of restrictive trade practices defined in Part IV of the *Competition and Consumer Act 2010* but none of the alleged 'practices' attributed to the Australian industry member by the review applicants falls within those definitions. In particular, the terms of its Supply Agreement have never been challenged and none of the alleged practices asserted by the applicants in relation to rebar have ever been questioned by the Australian Competition and Consumer Commission. Absent any restrictive trade practices there is no prescribed 'other factor' to consider.

Besides the Australian industry's trading practices not being restrictive, the review applicants failed to demonstrate how, and to what degree, those claimed practices have contributed to the injury suffered by the local producer. Of the six 'practices' listed at page 24 in Nervacero's application for review, two are irrelevant 'capacity' claims and in relation to the remaining four no reason is advanced as to why they may be contributing to injury being suffered by the Australian industry. Indeed, there is a strong contrary inference that all four 'practices' are likely to enhance the economic performance of the local producer.

The only generalised assertion advanced by the review applicant without any supporting argument is that the 'practices' cause self-injury. Such an assertion is patently incompatible with the fact that it is conformity with laws proscribing restrictive practices that is more likely to result in some detriment. Putting aside the obligation to conform with applicable laws, in a hypothetical situation the commercial rationale for adopting restrictive trade practices would be the pursuit of a beneficial outcome by reducing competition. A commercial enterprise would not embrace such practices with the objective of injuring itself.

We acknowledge, as the Panel Member observed, that the Commission must undertake "*… a proper and comprehensive consideration of the effect of other factors*". However, in the absence of any significant and sustained reduction during the period of the investigation in the Australian industry's production capacity, there is no 'other factor' that requires that consideration. Similarly, without any evidence that the Australian industry's trade practices are restrictive or that such practices may contribute to material injury, the Commission is not under any legal obligation to undertake a comprehensive analysis.

As such the Commission has reached both the correct and preferable conclusion when it states in the Report:

> *"It is normal commercial practice in Australia for a large manufacturer or other wholesaler not to supply small purchasers; small purchasers would normally (if not invariably) take their supply from elsewhere in the supply chain such as from distributors. [fn 43] The Commission does not consider that a customer choosing dumped rebar over Australian produced rebar available on normal commercial terms can properly be characterised as non-attributable injury."* [at p. 27 of the Report, emphasis added]

4.4.3 Calculation of Nervacero's NIP excluding OneSteel's imports from Nervacero

The Panel Member has urged the Commission to reconsider its calculation of the non-injurious price (**NIP**) in respect of Nervacero. In REP 418 the Commission set an individual NIP for each exporter based on their undumped price, which presumably is their normal value. Section 269TACA, does not direct the Commission as to how to determine the NIP, just that the minimum price necessary to prevent the injury, or a recurrence of the injury, is determined. In this case, the Commission has determined that because of the Australian industry's pricing mechanism, only the normal value for each exporter is appropriate. Herein lies the problem with the Commission's preliminary decision to recalculate the NIP for Nervacero that excludes Nervacero's sales to the Australian industry.

The evidence before the Commission concerning the Australian industry's pricing mechanism is that the Australian industry does not "*set its price to individual customers according to the lowest price offer in the market*" but rather, the Australian industry sets its price to **individual** customers according to the lowest offer that an individual customer receives, which may not be the lowest offer in the market. Further, in response to a Nervacero offer received by an individual customer, the Australian industry does not consider the price Nervacero will sell rebar to it in order to determine a selling price to the individual customer, but rather, the Australian industry's sales price to that customer will be determined based on the lowest offers received by the individual customer from Nervacero or others. In this way, the Australian industry is not able to be injured by Nervacero's pricing to it, but is indeed able to be injured by dumped Nervacero prices offered to individual customers.

Therefore, by setting a NIP based on a weighted average normal value that excludes the weighting of export volumes to the Australian industry for what is likely only one-model (specifically 20 mm DBIC), then the Commission is calculating a NIP which is less than it would otherwise be, by generating a product wide normal value-based NIP, that excludes the weighting of one important product category (20 mm DBIC), which Nervacero is able to then export (even at the NIP) and cause injury to the Australian industry's sales of 20 mm rebar in straight lengths produced by it that the Commission has consistently found competes with and is substitutable for 20 mm rebar in coils (DBIC).

The only method by which the NIP proposed by the ADRP may be considered is where a NIP could be set for 20mm DBIC separate to the other models of Rebar. However, as per the Federal Court decision in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870*, the setting of separate measures on models is not allowable.

Further, the method for setting the NIP proposed by the ADRP can only be work in practise where Nervacero future exports are maintained at the same volumes and prices to the same customers as found in the investigation period.

Excluding 20mm DBIC from the NIP makes an unfounded assumption that the prices offered for those goods were not offered to other customers and would not be offered to other customers going forward. Exclusion of such goods makes an assumption that such prices will not be injurious to industry in future exports and by implication suggests that such exports at such prices should be exempt from the measures.

For this reason, the Commission's preliminary conclusion is neither the correct nor preferable decision, as it will permit Nervacero to use an understated NIP generated by the exclusion of one model of the goods, to continue to cause injury to the Australian industry's own production of another model of like goods which is considered entirely substitutable for the imported model, and as such capable of being injured. If the Commission does not affirm its original finding contained in REP 418, then it potentially reaches a conclusion at odds with s269TACA.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT