



Australian Government

Anti-Dumping Review Panel

ADRP DECISION No. 82

Review of Termination Decision:
Steel Rod in Coils exported from the
Republic of Indonesia, the Republic of
Korea and the Socialist Republic of
Vietnam

July 2018

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
Assistant Minister	Assistant Minister to the Minister for Industry, Innovation and Science
Appellate Body	Appellate Body of the World Trade Organization
CTMS	Cost to make and sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Dumping Duty Act	<i>Customs Tariff (Anti-Dumping) Act 1975</i>
FOB	Free on board
FIS	Free into store
GAAP	Generally accepted accounting principles
Goods	the goods described in Termination Report No.416
GOV	Government of Vietnam
Hoa Phat	Hoa Phat One Member Company
IDD	Interim dumping duty
Indonesia	Republic of Indonesia
Investigation period	1 April 2016 - 31 March 2017
Ispat	PT Ispat Indo
Korea	Republic of Korea

ADRP DECISION No. 82 Steel Rod in Coils exported from the Republic of Indonesia, the Republic of Korea and the Socialist Republic of Vietnam.

Manual	Dumping and Subsidy Manual April 2017
Minister	Minister for Industry, Innovation and Science
NIP	Non-injurious price
OneSteel	OneSteel Manufacturing Pty Limited (now trading as Liberty OneSteel)
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science
CIO Regulation	<i>Customs (International Obligations) Regulation 2015</i>
REP 240	Report No 240 Alleged Dumping of Rod in Coils exported from the Republic of Indonesia, Taiwan and the Republic of Turkey
Reviewable Decision	The decision of the Commissioner made on 26 March 2018 and published in Anti-Dumping Notice No 2018/53
Review Panel	Anti-Dumping Review Panel
RIC	Steel Rod in Coils as described in Termination Report 416
SEF 416	Statement of Essential Facts Report No 416 Alleged Dumping of Steel Rod in Coils exported to Australia from the Republic of Indonesia, the Republic of Korea and the Socialist Republic of Vietnam published on 27 October 2017
TER 416	Termination Report No 416 Alleged Dumping of Steel Rod in Coils exported to Australia from the Republic of Indonesia, the Republic of Korea and the Socialist Republic of Vietnam.
Undumped goods	Goods that are not dumped, or are de minimus (ie dumped at a rate of less than two per cent)
Vietnam	Socialist Republic of Vietnam
WTO	The World Trade Organization

Summary

1. This report has been prepared in response to an application by OneSteel Manufacturing Pty Ltd (OneSteel) for review of the decision by the Commissioner of the Anti-Dumping Commission (Commissioner) to terminate an investigation (reviewable decision) relating to exports of Steel Rod in Coils (RIC) from the Republic of Indonesia (Indonesia), Republic of Korea (Korea) and the Socialist Republic of Vietnam (Vietnam). The review application was made on 24 April 2018, within the legislative timeframe. Four grounds have been considered in this review.
2. On 7 June 2017, an investigation into the alleged dumping of RIC exported from Indonesia, Korea and Vietnam was initiated by the Anti-Dumping Commission (ADC). On the 26 March 2018, the Commissioner terminated the investigation on the basis that injury, if any, to the Australian industry that has been or may be, caused by dumped exports, is negligible.
3. The Anti-Dumping Review Panel (Review Panel) has assessed the grounds and considers that the applicant has not established that the reviewable decision was not correct or preferable. On this basis, I have decided, under s.269ZZT(1), to affirm the reviewable decision.

Introduction

4. This is an application for review by OneSteel, lodged with the Review Panel on 24 April 2018, for a review of the Commissioner's decision to terminate an investigation. The reviewable decision was a termination decision as defined by s.269ZZN of the *Customs Act 1901* (the Act).
5. The termination decision was made by the Commissioner on the 26 March 2018 and notified by Anti-Dumping Notice No 2018/53. The notice advises that Termination Report No 416 (TER 416) outlines the reasons for the termination decision.

6. The application for review was not rejected under s.269ZZQA of the Act and the Review Panel accepted the reviewable grounds in the application. As required under s.269ZZRC, a notice that the Review Panel intended to conduct a review, was published on the Review Panel's website on 15 May 2018.
7. Pursuant to s.269ZZT of the Act, the Review Panel must make a decision within 60 days of the s.269ZZRC notice, in this case, no later than 16 July 2018. The decision must either:
 - affirm the reviewable decision; or
 - revoke the reviewable decision.
8. The Senior Member of the Review Panel has directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

Background

9. On 7 June 2017, the Anti-Dumping Commission (ADC) initiated an investigation into the alleged dumping of RIC exported from Indonesia, Korea and Vietnam during the investigation period, 1 April 2016 to 31 March 2017. The ADC also considered the period commencing 1 January 2013 (injury assessment period) to assess trends in the market. The initiation of the investigation followed an application by OneSteel, now trading as Liberty OneSteel, alleging that the Australian industry had suffered material injury caused by the export of RIC from the above-mentioned countries at dumped prices.
10. The statement of essential facts (SEF 416) was placed on the public record on 27 October 2017, and the final report (TER 416) was placed on the public record on 26 March 2018. Both SEF 416 and TER 416 were granted extensions of time.

11. TER 416 sets out the findings and the reasons the Commissioner terminated the anti-dumping investigation as follows:

- ‘the goods exported by PT Ispat Indo (Ispat) from Indonesia were dumped but by a margin of less than 2%. Section 269TDA(1) requires the Commissioner to terminate an investigation, so far as it relates to that exporter, if an exporter’s margin is less than 2%;
- the goods exported from Vietnam were not dumped and in accordance with s.269TDA(1), the Commissioner must terminate an investigation if no dumping is found; and
- While there was dumping by exporters (other than Ispat) from Indonesia and all exporters from Korea, the Commissioner found injury, if any, to the Australian industry that has been or may be, caused by that dumping is negligible. In accordance with s.269TDA(13) (sic)¹, the Commissioner must terminate an investigation if negligible injury has been caused by the dumped exports.’

12. There have been a number of previous cases relating to RIC. These include:

Investigation 240: On 17 June 2015, anti-dumping measures were imposed on RIC exported from Indonesia for all exporters (except Ispat) and all exporters from Taiwan.²

Reinvestigation 318: On the 16 October 2015, the Review Panel required a reinvestigation of certain findings from REP 240.³ I note that I was the Review Panel member who dealt with this matter. The reinvestigation found

¹ Confirmed with the ADC that s.269TDA(13A) of the Customs Act is the applicable reference.

² REP 240 Alleged Dumping of Rod in Coils exported from the Republic of Indonesia, Taiwan and the Republic of Turkey.

³ Reinvestigation Report No 318 Alleged Dumping of Rod in Coils exported from the Republic of Indonesia, Taiwan and the Republic of Turkey.

that injury caused by goods, dumped by Gunung, were unable to be identified as causing injury to the Australian industry. On 22 August 2016, the relevant Minister revoked the original decision to impose dumping duties on the goods exported from Indonesia (other than by Ispat).

Investigation 301: On 22 April 2016, anti-dumping measures were imposed on RIC exported from the People's Republic of China.⁴

Reinvestigation 361: On the 22 August 2016, the Review Panel required a reinvestigation of certain findings in REP 301. On 31 January 2017, the relevant Minister revoked the original decision and replaced it with a decision imposing anti-dumping measures with corrected variable factors.⁵

Conduct of the Review

13. In accordance with s.269ZZT(1) of the Act, the Review Panel must make a decision either affirming or revoking the reviewable decision (in this case the decision to terminate the investigation).

14. In the Power Transformers review,⁶ the Hon Michael Moore (former Senior Member of the Review Panel) discussed the scope of the Review Panel:

‘... Rather the Panel's role includes, by way of illustration, assessing whether there has been **inappropriate reliance on particular data to the exclusion of other data, assessing whether relevant data has been ignored, assessing whether there has been miscalculations or the misconstruction or misapplication of the Act or relevant regulations.**

The Panel's powers to revoke or recommend the revocation of a number of types of reviewable decisions only arises if the reviewable decision was

⁴ REP 301 Alleged Dumping of Rod in Coils exported from the People's Republic of China.

⁵ Reinvestigation Report No 361 Alleged Dumping of Rod in Coils exported from the People's Republic of China.

⁶ Extract from ADRP Report No. 24 – Power Transformers.

either not the correct decision (when there has been a decision which does not involve the exercise of a discretion) or, alternatively, not the preferable decision (when there has been a decision involving the exercise of a discretion). It is tolerably clear this is the statutory test having regard to the obligation (at various points in Division 9 of Part XVB) on an applicant for review to identify in the application reasons for believing that the decision was not the correct or preferable decision and the power of the Panel to reject an application if this is not done.

Of course in many instances it will be necessary to look at criticisms or comments of an applicant about the way the Commissioner went about making the calculations or reaching subsidiary conclusions in order the (sic) form a view about whether, in a case such as the present, the report under s.269TEA on which the operative decision (to decide to publish a dumping duty notice) was wholly or substantially based, infected the ultimate decision such as to justify a recommendation that it be revoked, however the Reviewable Decision is the operative decision and it is the correctness of that decision only which is to be assessed by the Panel.’ (my emphasis)

15. In making a decision under s269ZZT, the Review Panel must have regard only to information, other than to information specified in s.269ZZRA(2) and s.269ZZRB(2), that was before the Commissioner when the Commissioner made the termination decision.⁷

16. If a conference is held under s.269ZZRA of the Act, then the Review Panel may have regard to further information obtained at that conference. This is subject to the extent that this information was before the Commissioner when he made his decision.

⁷ Pursuant to s.269ZZT(4) of the Act.

17. Conferences were held with OneSteel and the ADC on 1 May, 9 May and 2 July 2018, for the purpose of clarifying certain grounds in the OneSteel application and information in TER 416. A conference was held with the ADC on 22 June 2018 to clarify certain confidential information in TER 416. A non-confidential summary of these conferences was placed on the Review Panel's website. I have had regard to the matters discussed at the conferences.
18. Section 269ZZRB of the Act allows the Review Panel to seek further information from the ADC in relation to information that was before the Commissioner when the reviewable decision was made, and to have regard to that further information. I requested copies of the confidential documents that were before the Commissioner when the reviewable decision was made and these were supplied by the ADC. The ADC also supplied requested information as a result of the conferences referred to in paragraph 17 above.
19. Unless otherwise indicated, in this report, I have had regard to the application (including documents submitted with the application or referenced in the application), as well as the information obtained at the above-mentioned conferences, information on the ADC electronic public record 416, confidential submissions, information and reports held by the ADC, SEF 416 and TER 416 and the confidential attachments to these reports.
20. On 14 June 2018, OneSteel lodged a submission supporting the grounds in its application to the Review Panel. Under the Act, there are no specific provisions that allow submissions to the Review Panel for a review of a termination decision.⁸ This is unlike reviews of Minister's decisions, where there is a specific provision which allows for submissions to be made to the Review Panel, subject to certain time limits, following the initiation of a review.⁹ As referred to in

⁸ Section 269ZZT of the Customs Act.

⁹ Section 269ZZJ of the Customs Act.

paragraphs 16 and 18 above, the Review Panel may only have regard to information that was before the Commissioner when the Commissioner made the reviewable decision (subject to subsections 269ZZRA(2) and 269ZZRB(2)). On this basis I did not consider the OneSteel submission lodged on 14 June 2018.

Grounds for Review

21. The Review Panel accepted the following grounds as 'reviewable grounds' under s.269ZZQA(5):

- The Commissioner should not have determined the normal value under s.269TAC(1) for Vietnamese exporters as it was not authorised by the terms of s.269TAC(2)(a)(ii) as the situation in the Vietnamese market is such that sales in that market are unsuitable for determining a price under s.269TAC(1);
- The dumping margin for Vietnam was incorrectly determined under s.269TACB(2)(aa) and should have been determined under s.269TACB(2)(a);
- The Commissioner failed to properly assess the impact of dumped goods on the prices of the Australian industry and this failure prevented a proper calculation of the degree of injury that would have demonstrated that injury to the Australian industry caused by dumped goods was not negligible; and
- Alternatively, to the extent (if any) that the Commissioner's claim that a significant portion of injury experienced by Liberty OneSteel resulted from factors other than dumping formed part of his decision to terminate the investigation, it was not authorised by the terms of s.269TAE(2B).

Consideration of Grounds

Normal value determination for Vietnam

22. OneSteel claims that the normal value for Vietnam should not have been determined under s.269TAC(1) of the Act (based on domestic selling prices) as a market situation exists in Vietnam. It claims that this market situation means that sales in the Vietnamese market are unsuitable for use in determining prices in that market. It suggests that the prices are lower than they would otherwise be due to the influences of the Government of Vietnam (GOV) on:
- prices of key inputs to RIC production including iron ore, coking coal, coke and scrap steel;
 - preferential taxation treatment; and
 - electricity prices.
23. OneSteel further claims that the ADC conclusion that the ‘Vietnamese domestic RIC prices are suitable for the purpose of calculating a normal value under 269TAC(1)’ relies on its view that ‘prices are being inflated’. It suggests that the ADC view is unsound, not based on evidence and not in accordance with the Act. In particular, that the ADC economic analysis focuses on factors that it contends counteracts the price effects of the GOV’s policies and interventions rather than the impact of these on the RIC domestic market. OneSteel proposes that the prices in the market would be higher than they currently are but for the GOV interventions. On this basis, it claims that the normal value should not be based on domestic selling prices in the Vietnamese RIC market.
24. OneSteel suggests the following specific flaws are apparent in the ADC approach:
- its economic analysis of supply and demand conditions for RIC is unsound;
 - it should have focused on the prices (and supply conditions) of the raw materials and electricity costs used in the production of RIC;

- it should have considered the impact of the export tax differentiation policy on the raw materials, leading to prices of RIC being lower than they would have otherwise been;
- its conclusion about the supply conditions being tight and ‘perfect inelastic conditions’ is incorrect in terms of impact on RIC prices;
- its analysis and conclusions of the impact of the safeguard measures applied to RIC are unsound, in particular:
 1. the impact of the wrong tariff code,
 2. the conclusions as to whether the domestic industry can supply the entire market; and
 3. the reliance on whether Hoa Phat is at near full capacity;
- its benchmarking of Vietnamese domestic prices with export prices of a number of other countries export prices is irrelevant, and in any event, has not been conducted at an appropriate level to enable meaningful comparisons.

25. Chapter 5 of TER 416 outlines the ADC consideration of the market situation in Vietnam. It summarises the OneSteel claims¹⁰ and the two GOV submissions. The GOV submissions are summarised as follows:

- the ADC should adopt the same findings in relation to the Vietnam market situation, as reported in ADC Report No 370 concerning zinc coated (galvanized) steel, noting there had been no changes in the GOV’s policies;
- emphasised that the market was suitable for use in determining normal value;
- the influence over electricity prices is not sufficient or significant enough to have created a market situation in Vietnam; and

¹⁰ The OneSteel claims (in TER 416) have not been repeated given their similarity to the review application.

- noted that the volume of imports of raw materials (for RIC production) were significant and at prices similar to that occurring in other countries.

26. The ADC findings included:

- the situation in Vietnam is that there is no particular industry support or specific measures in place which are relevant to RIC. OneSteel had proposed that the findings in ADC Report No 198 relating to China were relevant to the situation in Vietnam, the ADC indicated that the circumstances were dissimilar;
- the assessment of the volume of raw materials in the context of the differential between import and export taxes, did not support the conclusion that there had been a restriction on the volumes of exports of the raw materials used in RIC. (Restrictions on volumes of exports may decrease the prices of such raw materials). The ADC stated that it undertook ‘analysis of the government’s influence on upstream raw materials to establish the causal relationship between the government’s intervention to the market at the upstream level and the corresponding end product prices’¹¹;
- the electricity prices are suppressed in Vietnam, however the ADC did not agree with OneSteel’s conclusions regarding the impact on RIC prices;
- the substantial volumes of imported RIC in Vietnam and the increasing gap between domestic production and consumption indicates strong demand for RIC in the Vietnam market. Demand in the domestic Vietnamese RIC market had increased during the period 2013 to 2016. Domestic production increased by 30 per cent (with 80 percent going into the domestic market) and imports increased by over 100 per cent.
- the significant increase in imports of RIC into Vietnam to meet increasing demand. The ADC noted that Hoa Phat was operating at 96 per cent capacity during the investigation period. (In response to OneSteel’s

¹¹ TER 416, page 32.

comments on the extrapolation of this information to reflect the capacity of the entire industry, the ADC commented that it was merely one indicator of the surge in domestic demand for RIC.);

- the pricing in the Vietnam market is typical of that found in other regions. The ADC undertook a comparison of Hoa Phat One Member Company (Hoa Phat) verified domestic selling prices (converted to FOB) with international export prices from Turkey, China, Latin America and Black Sea region all at the FOB level.
- no evidence of other distortionary features present in the RIC market or in the upstream raw materials;
- no evidence of preferential taxation treatment applied to RIC manufacturers;
- the impact of the safeguard measures (March 2016) has increased prices for steel billet and RIC (and decreased volumes of imports of RIC). The ADC considered the issue raised by OneSteel about the particular tariff code excluded from the safeguard measures but concluded that it would have minimal impact on the price of domestic RIC, given the volumes relating to this tariff code;
- the absence of other forms of government intervention in the Vietnamese market;
- the RIC market is characterised by predominantly private sector and foreign invested participants; and
- the prices of RIC are being inflated.

The ADC concluded on this basis that the market was suitable for the assessment of normal values using domestic selling prices as it did not consider the GOV had distorted the prices to such an extent that the market was unsuitable for the determination of a normal value.

27. Section 269TAC(1) of the Act states:

Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumptions in the country

of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

Sections 269TAC(2)(a) of the Act states:

Subject to this section, where the Minister:

(a) is satisfied that:

- (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purposes of determining a price under subsection (1); or*
- (ii) **because the situation in the market of the country of export is such that sales in that market are not suitable** for use in determining a price under subsection (1);
the normal value of goods exported to Australia cannot be ascertained under subsection (1); or ... (my emphasis)*

28. The Manual provides the following guidance in relation to the assessment of market situation for normal value purposes:

‘Sales that would otherwise be suitable for use in determining a normal value may be unsuitable because the price does not reflect a fair price in normal market conditions...

the Commission may have regard to factors such as whether:

- the prices are artificially low; or
- there are other conditions in the market which render sales in that market not suitable for use in determining prices under subsection 269TAC(1)....

Prices may also be artificially low or lower than they would otherwise be in a competitive market due to government influence and distortion of the costs of inputs. The mere existence of any government influence on the costs of inputs would not be enough to make the sales unsuitable. The Commission looks at the **effect of this influence on market conditions** and the extent

to which **domestic prices can no longer be said to prevail** in a normal competitive market.’¹² (my emphasis)

29. Outlined below is relevant case law relating to consideration of the market situation provision. Black CJ and Lockhart J stated in *La Doria* that:

‘Before s.269TAC(2)(a)(ii) can be invoked, the decision-maker must be satisfied that there is a situation in the relevant market whereby sales in that market that would otherwise be relevant to determine a price under sub-sec. (1) are not suitable for use in determining such a price. ...

The exercise in which the decision-maker must engage under s.269TAC(2)(a)(ii) is essentially a practical one. It was for the Authority and later the Minister to determine, as a matter of fact, the true nature and consequence of payments of production aid in the EEC. The Authority went about its task to determine this question. ...

The determination of them requires a broad judgment on questions of fact:...¹³ (my emphasis)

30. Justice Nicholas also considered ‘market situation’ in the *Dalian Steelforce* judgment:

‘In particular, I am satisfied that Customs did not equate government influence on a market with unsuitability within the meaning of s.269TAC(2)(a)(ii). Rather, Customs’ finding on this issue was in my view **the result of a considered assessment of a factual question requiring a “broad judgment”** namely, whether the impact of the various GOC influences on the Chinese iron and steel industry rendered domestic sales of HSS “not suitable” for use in determining normal value under s.269TAC(1) of the Act.’¹⁴ (my emphasis)

¹² Dumping and Subsidy Manual April 2017, pages 35 to 36.

¹³ *Minister for Small Business, Construction and Customs v La Doria Di Diodata Ferraiolli SPA* [1994] 33 ALD 35 at [45].

¹⁴ *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 at [26].

31. In general, a competitive market is said to exist when there are many buyers and many sellers so that each has a negligible impact on the market price and the interplay of supply and demand determines the prices.¹⁵ However, in practice, there are few markets that are perfectly competitive markets, and furthermore, most markets are influenced to some degree by the policies and practices of governments. The question to be considered, as both the ADC and OneSteel highlight, is whether the market has been influenced to such a degree by the Government, that the market is unsuitable for the assessment of normal value based on prices in that market.
32. The general practice, as referred to in the Manual, is to only use prices that reflect a fair price in normal market conditions.¹⁶ The legislation does not prescribe what would make a market unsuitable and the practice has been to assess whether the government has ‘materially distorted’ competitive conditions. That is, ‘the degree to which the government has influenced market conditions and the extent to which domestic prices can no longer be said to prevail in a normal competitive market’. The above-mentioned judgments make clear, that it is ‘a considered assessment of a factual question requiring a “broad judgment”’. I have considered the approach of the ADC in TER 416 in this context.
33. In TER 416, the ADC considered the RIC market size in terms of quantity and also prices based on confidential information supplied by the GOV. This included information and trend analysis of imports and exports of RIC during the period 2012 - 2016. I have reviewed the analysis undertaken by the ADC, and in particular, the confidential evidence of production, importation and exportation, and consumption of RIC. I consider the ADC findings in TER 416 on market size and trends are consistent with the material examined. These findings appear

¹⁵ Principles of Economics, JS Gans, SP King, RE Stonecash, NG Mankiw, Harcourt (2000), page 62.

¹⁶ Dumping and Subsidy Manual, April 2017, pages 35 - 36.

reasonable and appropriate reliance has been placed on these issues in the consideration of the impact on the RIC market.

34. I also reviewed the confidential evidence supplied by the GOV on the importation and exportation of the upstream raw materials used in RIC manufacture, and in particular, the findings of the ADC regarding the impact of the differential between the import and export taxes. At the conference held with the ADC on 22 June 2018, I clarified with the ADC whether there had been any analysis undertaken of prices of the upstream raw materials.¹⁷ The ADC indicated that it had used the GOV confidential information on volumes and values of upstream raw materials to make findings in relation to impact on the prices in the RIC market rather than on the specific prices of raw materials. I note, however, that the ADC did observe ‘the volume of exports of these raw materials have not shown any correlation with the level of export tariffs, reflecting instead the international supply, demand and price movements for these commodities’.¹⁸ I have assumed that this is based on the movement of these values associated with the import and export volumes of raw materials.
35. The evidence supports the observations outlined by the ADC in TER 416 regarding the lack of correlation between the tariffs and volumes exported. The ADC finding that the export volumes are reflective of the international supply, demand and price movements (of these commodities) also appears a reasonable conclusion. This tends to support, in my view, the finding of the ADC that the GOV influence on export tariffs of the upstream raw materials (given the import and export volumes of these materials) is unlikely to be a significant factor in the prices of the RIC market. On the evidence available the conclusions reached by the ADC about whether the differential in tariffs for raw materials impacted the prices in the RIC market appears reasonable.

¹⁷ Non-confidential summary of conference with the ADC on 22 June 2018.

¹⁸ TER 416, page 40.

36. The ADC also analysed the claims regarding preferential taxation for RIC manufacturers and found no evidence that these applied to RIC manufacturers. The ADC considered other aspects and features of the Vietnam RIC market (number of producers and whether they were privately owned) and also conducted a comparative assessment of Hoa Phat's domestic selling prices (adjusted for comparison purposes) with other international FOB prices of RIC, to assess whether the prices were much lower. In my view, all of this information appears to be appropriate and relevant factors to be considered in assessing whether there is a 'market situation' for RIC in Vietnam.
37. I reviewed the information on electricity prices and impact on the costs of RIC manufacture. While the ADC found that the electricity prices had been suppressed by the GOV, it did not consider that this had been a substantial distortionary impact on the prices in the RIC market, as claimed by OneSteel.
38. As clarified at the conference with the ADC, the finding relates to the extent to which it considered electricity prices distorted the price in the RIC Vietnam market.¹⁹ The ADC considered that RIC prices were primarily driven by the market and, in particular, by the prices of imported RIC, given their volumes in this market. This is not, in my view, an unreasonable conclusion based on the evidence before the ADC.
39. I also note that the ADC used an uplifted electricity cost in the assessment of whether the Hoa Phat domestic selling prices covered the cost to make and sell to determine whether the sales were in the ordinary course of trade. Sales were still profitable even with the uplifted electricity costs. The ADC indicated that this supported its finding that prices in the market were being impacted by the prices of imported RIC rather than the electricity costs. Again this conclusion is not unreasonable in light of the evidence before the ADC.

¹⁹ Non-confidential summary of conference with the ADC on 22 June 2018.

40. The issue remains as to whether the prices are largely set by supply and demand in the market, or as claimed by OneSteel, been distorted by Government interventions to such an extent that prices in that market are unsuitable for use as 'fair' market prices. As referred to in the La Doria and the Dalian judgments (referred to above), the decision-maker needs to make a broad judgment. In practice, there are various influences impacting prices in most competitive markets. Sometimes it is by governments, other times due to the nature of the industries concerned (for example, a monopoly) the forces of supply and demand do not completely establish the prices in even in so-called 'normal' competitive markets. It is a question of degree and there is no particular threshold that can be applied, it requires a judgment based on the available facts.
41. I have found no evidence that suggests that the ADC ignored or placed insufficient emphasis on particular facts. I also do not agree with OneSteel's claim that the ADC did not focus on whether the GOV impacted the RIC prices in the Vietnam market but rather considered the counteracting factors only. Many of the elements described in TER 416 relate to the circumstances of the RIC market rather than only the degree to which such elements counteract the GOV's interventions in prices in the market. Further, it does not appear that the ADC placed undue emphasis on particular information or ignored any of the claims made by OneSteel. OneSteel suggests that a threshold has been applied. I do not agree with this statement. In any event, and as referred to above, the decision-maker is required to make a judgment based on the available evidence and there is no particular threshold that can guide that decision.
42. In my opinion, the ADC drew its conclusions based on various facts regarding whether the domestic market for RIC was distorted or not by GOV interventions. It examined each of the OneSteel claims and made a judgment of the impact of each on the RIC domestic market in Vietnam as well as the totality of these factors on the market. It did not rely solely on the fact that it considered RIC prices were inflated. It considered a range of claims by OneSteel regarding the

impact of the GOV in the RIC market but concluded that these were not at a level that suggested the domestic RIC prices could no longer be said to prevail in a normal competitive market. Having examined the ADC's approach and the evidence considered, I do not agree with the OneSteel claims in this regard. The Commissioner has made a judgment based on a number of facts. There does not appear, in my view, to be an unreasonable or inappropriate reliance on particular facts in forming its finding that the market for RIC was suitable for determination of normal value under s.269TAC(1) of the Act.

43. For these reasons, I do not consider that OneSteel has established that the Commissioner erred in determining that a 'market situation' did not exist in Vietnam. Accordingly, it was not inappropriate for the Commissioner to use prices in the domestic market to determine a normal value.

Dumping margin determination

44. OneSteel claimed that the ADC should not have determined the dumping margin under s.269TACB(2)(aa) of the Act but rather under s.269TACB(2)(a).
45. The ADC advised at a conference held on 9 May 2018, that it checked its reports, (namely SEF 416 and TER 416), as well as the confidential spreadsheets detailing the dumping margin calculations for Hoa Phat regarding the determination of dumping margins. The relevant spreadsheets revealed that the dumping margins had been calculated in accordance with s.269TACB(2)(a), not s.269TACB(2)(aa) of the Act. The ADC advised that the above-mentioned reports contained typographical errors.
46. I further note that there was an additional typographical error in TER 416 paragraph 6.7.3 which suggested that the dumping margin had been a comparison of the normal value with the corresponding weighted average normal value. Clearly, this is a typographical error and meant to state a comparison of the export prices with the corresponding normal values. The confidential dumping

margin spreadsheet confirms the correct comparison point. I also confirmed this with the ADC at the conference held on 22 June 2018.²⁰

47. Given the above-mentioned aspects could not be confirmed prior to the initiation of the review, this ground was initiated. I have examined the relevant spreadsheets at Confidential Attachment 6 of TER 416 and confirmed that the dumping margin has been determined in accordance with s.269TACB(2)(a), that is, a comparison of the weighted average of export prices with the corresponding weighted average of normal values over the entire investigation period. Accordingly, since this was a typographical error and the dumping margin was determined in accordance with s.269TACB(2)(a), it is not necessary to rule on this ground.

Material injury (price effects) and causal link

48. OneSteel claims that the ADC failed to properly assess the impact of the dumped goods from Korea and Indonesia (excluding Ispat) on the prices of the Australian industry. This failure prevented the correct assessment of the degree of injury caused by these exports and OneSteel asserts this injury was not negligible.
49. OneSteel submits that the ADC:
- incorrectly concluded there was a lack of correlation between the movements in OneSteel prices and the prices of dumped goods;
 - should not have used 'constructed prices' for imports for comparison with OneSteel prices and as part of this calculation made an unsound judgment that the goods were delivered to Australian customers one month after the day of importation which impacted its causation analysis (a number of reasons were provided);

²⁰ Non-confidential conference summary with the ADC on 22 June 2018.

- should have used verified importer's FIS information or failing this relied on OneSteel's verified market intelligence;
- relied on an incomplete set of price offers;
- failed to properly assess competition between the dumped and undumped exports as well as with the Australian industry goods. (OneSteel highlights the finding in REP 240 (the earlier investigation involving RIC) regarding the price sensitivity of the market)²¹; and
- incorrectly analysed the impact of the dumped goods prices in the market.

50. The findings in TER 416 concluded that RIC is a 'highly commoditised product which competes mainly on price ... high degree of price sensitivity in the market, price competition is a major condition of competition...' ²² As a result of its review of the price undercutting analysis, the ADC considered there 'was little correlation between movements in OneSteel's prices and the prices of dumped goods'. It also stated that 'the weight of evidence indicated that OneSteel's prices have been set by reference to mostly undumped goods from Ispat and Hoa Phat.'

51. Section 269TG of the Act states:

(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia that:

(a) the amount of the export price of the goods is less than the amount of the normal value of the goods; and

*(b) **because of that:***

*(i) material injury to an Australian industry producing like goods **has been or is being caused or is threatened,***

²¹ REP 240 Alleged Dumping of Rod in Coils exported from the Republic of Indonesia, Taiwan and the Republic of Turkey.

²² TER 416, page 69.

or the establishment of an Australian industry producing like goods has been or may be materially hindered; or...

the Minister may, by public notice, declare that Section 8 of that Act applies:

*(c) to the goods in respect of which the Minister is so satisfied:
and*

(d) to like goods that were exported to Australian after the Commissioner made a preliminary affirmative determination under section 269TD in respect of the goods referred to in the paragraph (c) but before the publication of that notice.

(2) Where the Minister is satisfied, as to goods of any kind, that:

(a) the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and

*(b) **because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened,** or the establishment of an Australian industry producing like goods has been or may be materially hindered:*

the Minister may, by public notice (whether or not he or she has made, or proposes to make, a declaration under subsection (1) in respect of like goods that have been exported to Australia), declare that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of the notice or such later date as is specified in the notice. (my emphasis)

52. I have also had regard to the Ministerial Direction on Material Injury (2012) in terms of 'the injury caused by dumping or subsidisation must be material in

degree'. I also considered the following relevant paragraphs from the ICI judgment:²³

‘the ultimate issue for the Minister is whether he or she is satisfied that there has been **material injury causally connected** in the manner required by the legislation to the dumping of goods’;(p.15)
‘that s.269TG requires that the “material injury” referred to must be caused solely by the dumping the subject of the inquiry ... material injury suffered **“by reason of” or “because of”**; (p 18);
‘On a fair reading of the Report as a whole ...’(p.23)
‘in the practical application of that notion material injury will in most though not necessarily in all cases be injury which is greater than that likely to occur in the normal ebb and flow of business uninfluenced by dumping or other anti-competitive practices proscribed by the Customs Act’ (p.28). (my emphasis)

53. I held a conference with the ADC on 22 June 2018 to clarify its approach to the price undercutting analysis in TER 416 as well as to obtain volume information on the verified importers’ coverage and the source data for both dumped and undumped offers, in light of the issues raised by OneSteel.²⁴

54. The ADC provided the following information:

- it wished to obtain a complete picture of prices in the market at the same level as the Australian industry selling prices. Given it did not have actual selling prices from all importers of the subject countries, it considered constructing selling prices (based on available verified information) would enable such a view.

²³ *ICI Australia Operations P/L v D. Fraser, the Anti-Dumping Authority, the Minister of State for Small Business and Customs* [1992] FCAFC 564.

²⁴ Non-confidential summary of conference with the ADC on 22 June 2018.

- as a result of clarifying its construction of these amounts (as a result of the conference) it found some minor calculation errors which understated the constructed prices used in TER 416 Figures 127 and 138. It addressed these and provided the corrected analysis to the Review Panel. This revealed lower price undercutting margins than that shown in the original Figures in TER 416.
- it adjusted Figure 138 (as requested by the Review Panel) to remove the one month timing difference and include the undumped Vietnam prices and weighted average undumped Vietnam and Ispat prices for the entire period.
- it prepared additional analysis of the price undercutting based on the actual FIS prices of the verified importers (rather than the 'constructed prices'). I note that this analysis is based on information that was before the Commissioner and is able to be considered by the Review Panel.²⁵
- in confidential attachment 9 while based on OneSteel's price offer information, additional confidential information obtained by the ADC on imported RIC prices was included in the graphs. The ADC considered that it had a material number of offers to consider in the context of the overall volume of imports.

55. I held a conference with OneSteel and the ADC on 2 July 2018 to clarify its claims as to the flaws in the ADC analysis on price undercutting and particularly, in relation to the method used by OneSteel to set its prices.²⁶ OneSteel claims that it is well known that OneSteel sets its prices relative to imported product, that is, [REDACTED] (Confidential market information [REDACTED]). OneSteel provided additional explanation of its price setting model based on import price offers. It explained based on its Review Panel application, that it considered that given the ADC's main focus had

²⁵ Section 269ZZT(4) of the Act.

²⁶ Non-confidential summary of conference with OneSteel and the ADC on 2 July 2018.

been on price undercutting, it had not fully considered the price injury through the suppression and depression effects.

56. At the above-mentioned conference, the ADC also clarified the number of price offers it has used in the causation analysis in confidential attachment 9, given the OneSteel comments about the exclusion of certain offers.

57. I have reviewed the revised Figure 138 (and related confidential spreadsheet) and the Figure detailing actual prices (Actual Prices Figure) developed from the comparison of OneSteel selling prices with importer's actual selling prices (noting this does not include all imports). My observations of this information is as follows:

- amended Figures 127 and 138 revealed less price undercutting than that shown in TER 416;
- amended and adjusted Figure 138 (removal of timing difference and inclusion of the undumped Vietnam prices and weighted average undumped Vietnam and Ispat prices) revealed similar trends to that shown in the original Figure 138 (in TER 416):
 - OneSteel's prices to unrelated parties, except at the beginning of the period were higher than all dumped and undumped prices;
 - prices of undumped sources, except at the beginning of the period, were below OneSteel's prices to unrelated parties;
 - prices of dumped sources were inconsistent, sometimes below and sometimes above the undumped sources but generally above and following similar patterns to the undumped sources; and
 - in general, prices were quite similar (which is not surprising in a highly competitive market and given OneSteel's pricing model).
- the Actual Prices Figure developed to analyse actual prices revealed that:
 - except for one period (late in the investigation period) dumped sources were at higher prices than the undumped sources;
 - there were instances of undumped prices being both higher and lower than OneSteel's selling prices to unrelated parties but for the

majority of the investigation period were lower than OneSteel's prices;

- except for one period, OneSteel's prices were closely aligned to the undumped prices.

In general, the findings from the Actual Prices Figure were consistent with the ADC findings in TER 416.

58. Although the above-mentioned trends are not inconsistent with the ADC findings in TER 416, there are some aspects that I consider should have greater significance and emphasis. Overall, pricing was more closely aligned than perhaps conveyed in TER 416. While it remains correct to say that there was 'little correlation between movements in the OneSteel's price and the prices of dumped goods in the above figures' it appears in my view that the overall trends in the market (that is, including undumped and dumped sources) reveals that prices are moving in similar patterns. The constructed pricing does provide an overall picture of the pricing from all sources, and has some value noting the price construction assumptions have been applied uniformly. However, given the assumptions and variables identified and criticised by OneSteel, I have limited my reliance on this price undercutting analysis (Figures 127 and 138) and focused more on the Actual Prices Figure. I note however that as identified in paragraph 57, the findings between TER 416 and the Actual Prices Figure were largely consistent.
59. The analysis undertaken by the ADC (for causation purposes) in confidential attachment 9 using the OneSteel price offers and adjusted to include information obtained by the ADC on whether such offers were dumped or undumped is also valid information, notwithstanding it too has some limitations. I do not agree with OneSteel's comments that the analysis excluded too many offers and that it did not fully consider whether the prices of the dumped and undumped sources were in competition. I have reviewed this material and consider it provides an additional view of prices in the Australian RIC market and provides another piece

of evidence of price behaviour at particular points of time during the investigation period.

60. As highlighted in the Ministerial Direction and the above-mentioned judgment, the issue to be addressed is whether the dumped exports are causing material injury to the Australian industry.
61. The actual price analysis reveals that undumped sources are below OneSteel's prices for the majority of the investigation period. In these circumstances, it is appropriate to then consider these prices of undumped sources in the context of the volumes exported to Australia. When the volumes of the undumped sources are compared to the volumes of the higher priced dumped sources, it is difficult to conclude that the dumped sources are causing material injury.
62. OneSteel contends that the ADC finding in REP 240 that the 'presence of dumped imports in the market would be impacting the pricing behaviour of all market participants'²⁷ be applied to the current case. It claims that the ADC did not provide sufficient weight to the impact of the dumped sources on pricing. However, in my view, the key issue to be addressed under the legislation is whether the dumped exports caused material injury, not only whether the dumped imports impacted pricing behaviour. There are clear differences between the pricing and volume levels in this inquiry and the circumstances identified by the ADC in REP 240. These relate to the:
- difference in volumes of the undumped sources;
 - intermittent presence of dumped sources during the investigation period;
 - presence of undumped sources (and in increasing volumes) throughout the investigation period; and

²⁷ REP 240 Alleged Dumping of Rod in Coils exported from the Republic of Indonesia, Taiwan and the Republic of Turkey.

- prices of undumped sources prices are lower than the dumped prices for the majority of the investigation period.

On this basis, during this investigation period the ADC concluded that while there is evidence of price suppression and depression and material injury, its judgement is that this is more likely caused by the undumped sources.

63. While there may be arguments about whether the dumped or undumped sources are setting the prices, in my opinion, having reviewed the evidence before the Commissioner, I agree ‘that OneSteel’s prices have been set by reference to mostly undumped goods from Ispat and Hoa Phat, which collectively accounted for most of the imports’.²⁸
64. In these circumstances, I do not consider the findings of the ADC are unreasonable. For the reasons outlined above, I do not agree that OneSteel has established that the Commissioner erred in failing to consider whether the price effects of dumped exports caused material injury to the Australian industry.

Material injury assessment under s.269TAE(2B)

65. OneSteel’s ground is: ‘Alternatively, to the extent (if any) that the Commissioner’s claim that a significant portion of injury experienced by Liberty OneSteel resulted from factors other than dumping formed part of his decision to terminate the investigation, it was not authorised by the terms of s.269TAE(2B).’ OneSteel clarified the intent of this ground at the conference on 1 May 2018.²⁹ OneSteel claims that the ADC failed to consider threat of material injury as required under s.269TAE(2B) of the Act. It claims that in assessing whether s.269TG notices should apply to particular goods, threat of material injury should have been considered.

²⁸ TER 416, Section 8.7, page 75.

²⁹ Non-confidential conference summary with OneSteel and ADC on 1 May 2018.

66. In particular, OneSteel contends that the Commissioner failed to consider the potential for large volumes from Indonesia (excluding from Ispat) and from Korea to be exported to Australia given the recent decision of the President of the United States of America on trade barriers.³⁰ OneSteel's view, is that RIC exports will be displaced from the USA to Australia. It claims that if the volumes from these sources increase and in light of the level of dumping margins identified in TER 416, this would have a material injury impact on the Australian industry.

67. Section 269TAE(2B) of the Act states:

In determining:

(a) for the purposes of subsection (1), whether or not material injury is threatened to an Australian industry; or

(b) for the purposes of subsection (2), whether or not material injury is threatened to an industry in a third country;

because of the exportation of goods into the Australian market, the Minister must take account only of such changes in circumstances, including changes of a kind determined by the Minister, as would make that injury foreseeable and imminent unless dumping or countervailing measures were imposed.

68. OneSteel claims that there were significant volumes from Indonesia and Korea and that if the periods in which the dumped exports undercut the Australian industry and the undumped exports were at the beginning of the investigation period, this would demonstrate the causative link between the presence of these goods and price changes. On this basis, it suggests that the Commissioner should have taken account of the threat of injury posed by the US President's decision, and accordingly, that s.269TAE(2B) has not been properly considered.

³⁰ Non-confidential summary of conference between ADC, OneSteel and the Review Panel held on 1 May 2018.

69. The Commissioner determined that for the purposes of s.269TG that ‘injury, if any, that has been or may be caused to the Australian industry by dumped exports, was negligible’.
70. I examined the OneSteel application, as well as Consideration Report 416, OneSteel’s response to SEF 416 and its submissions during the investigation (including its submission dated 22 December 2017 regarding the exports from Korea (by POSCO) and the decision by the United States administration regarding dumping of RIC). OneSteel indicated in its submission to SEF 416 that the ADC had ‘incorrectly concluded that the dumped imports will continue in the future and that they will not cause injury to industry’.³¹ OneSteel does not appear to have made any other specific claims in relation to an imminent or foreseeable threat of injury during the investigation period, rather, its focus appears to be on whether material injury was caused by dumping during the investigation period.
71. I requested the ADC (at a conference) to clarify whether there was any other evidence before the Commissioner at the time of the termination decision other than that referred to in TER 416.³² The ADC confirmed that TER 416 outlined the evidence on threat of injury before the Commissioner.
72. The Commissioner determined that material injury had not been caused by the dumped exports during the investigation period as price injury had been caused by the prices of undumped exports. In the context that these were the majority of imports, the Commissioner did not consider there was sufficient evidence to suggest that there was threat of material injury from the dumped exports. While a substantial volume increase from dumped sources would have been noteworthy, the evidence before the Commissioner at the time of the termination decision did not suggest that such a volume change was apparent.

³¹ OneSteel submission to the ADC in response to SEF 416 dated 24 November 2017, page 2.

³² Non-confidential summary of conference with the ADC on 22 June 2018.

73. I also considered whether the volumes of imports from Korea and Indonesia occurred early in the investigation period, given OneSteel's claim that this would illustrate the causative price impact on the Australian market. The bulk of these shipments occurred later in the investigation period rather than at the beginning. However, of more significance in my view, is an examination of the price undercutting analysis overlaid with the volumes from the various export sources, and in particular, from the undumped sources the subject of the inquiry.
74. The ADC did consider the particular circumstances of Korean exports and determined that any injury caused by such exports was negligible in the context of the overall market. In the absence of any other evidence that suggested a more immediate threat, I do not consider it was unreasonable for the Commissioner to have made this finding.
75. On this basis, I do not think OneSteel has demonstrated that there was evidence before the Commissioner that there was imminent or foreseeable threat of material injury as required under s269TAE(2B) of the Act. Therefore, I do not agree that the Commissioner failed to properly consider threat of injury in relation to s.269TG of the Act. This ground fails for this reason.

Recommendations/Conclusion

76. For the reasons outlined above, the reviewable grounds submitted by OneSteel did not establish that the reviewable decision was not correct or preferable. Accordingly, I affirm the reviewable decision pursuant to s.269ZZT(1) of the Act.
77. Interested parties may be eligible to seek a review of this decision by lodging an application with the Federal Court of Australia, in accordance with the requirements in the *Administrative Decision (Judicial Review) Act 1977*, within 28 days of receiving notice.



Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
16 July 2018