



Australian Government
**Department of Industry,
Innovation and Science**

**Anti-Dumping
Commission**

CUSTOMS ACT 1901 - PART XVB

ANTI-DUMPING COMMISSION FINAL REPORT

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**

29 January 2019

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ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
the Act	the <i>Customs Act 1901</i>
ADRP	Anti-Dumping Review Panel
Assistant Minister	then Assistant Minister for Science, Jobs and Innovation and Parliamentary Secretary to the Minister for Jobs and Innovation
CCA	<i>Competition and Consumer Act 2010</i>
Commission	Anti-Dumping Commission
Commissioner	Commissioner of the Anti-Dumping Commission
Indonesia	the Republic of Indonesia
Ispat	PT Ispat Panca Putera
Lyndons	Lyndons Pty Ltd
the Manual	the Dumping and Subsidy Manual
Nervacero	Nervacero SA
NIP	non-injurious price
OneSteel	OneSteel Manufacturing Pty Ltd, now trading as Liberty OneSteel
Power Steel	Power Steel Co Ltd
Preliminary Report	<i>Anti-Dumping Commission Preliminary Report: Reinvestigation of Certain Findings in Report 418</i>
Putra Baja Deli	PT Putra Baja Deli
rebar	steel reinforcing bar
REP 418	Anti-Dumping Commission Report No. 418
SEF 418	Statement of Essential Facts No. 418
Thailand	the Kingdom of Thailand

1 SUMMARY

1.1 Introduction

The Anti-Dumping Review Panel (ADRP) is conducting a review of the decision of the then Parliamentary Secretary to the Minister for Jobs and Innovation to publish a dumping duty notice in relation to steel reinforcing bar (rebar) exported to Australia from Greece, the Republic of Indonesia (Indonesia), Spain - by Nervacero S.A. (Nervacero), Taiwan - by Power Steel Co. Ltd (Power Steel) and the Kingdom of Thailand (Thailand) (ADRP Review No. 2018/80).

This reinvestigation report has been prepared in response to the reinvestigation request by the ADRP of specific findings that formed the basis of the reviewable decision.¹

1.2 Findings

1.2.1 Power Steel

The Anti-Dumping Commission (the Commission) affirms 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.

1.2.2 Nervacero

The Commission:

- affirms its finding that the Australian industry suffered injury due to volume effects from dumped imports of rebar as shown in a reduced market share during the injury analysis period;
- affirms its finding that, having separated any injurious effects from other factors identified in the reinvestigation request, the dumped imports of rebar caused material injury to the Australian industry;
- has recalculated a non-injurious price (NIP) for Nervacero that excludes Nervacero's sales of rebar to OneSteel Manufacturing Pty Ltd (OneSteel).

1.3 Preliminary findings and submissions by interested parties

The Commission published its preliminary findings in the reinvestigation on 29 October 2018 in *Anti-Dumping Commission Preliminary Report: Reinvestigation of Certain Findings in Report 418* (Preliminary Report). Interested parties were invited to lodge submissions concerning the Commission's preliminary findings by 12 November 2018.

The Commission received submissions from the following parties:

¹ Further details of ADRP Review No. 2018/80 and the reinvestigation request are available on the ADRP's website at www.adreviewpanel.gov.au.

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- OneSteel;²
- Nervacero;³
- Power Steel.⁴

Public record versions of the submissions have been published on the Commission's website at the electronic public record for Investigation 418 (EPR).⁵

The Commission has addressed matters raised in the submissions in the relevant sections below. Submissions on the reinvestigation:

- as it concerns Power Steel are addressed in section 3.4.4; and
- as it concerns Nervacero are addressed in section 4.4.4.

² EPR document number 71.

³ EPR document number 72.

⁴ EPR document number 73.

⁵ The EPR can be found under the "Cases" menu at www.adcommission.gov.au.

2 BACKGROUND

2.1 Original investigation

On 27 June 2017, the Commissioner of the Anti-Dumping Commission (Commissioner) initiated an investigation into the alleged dumping of rebar exported to Australia from Greece, Indonesia, Spain - by Nervacero, Taiwan - by Power Steel and Thailand.

On 22 January 2018, the Commissioner terminated the investigation so far as it related to rebar exported from Indonesia by Indonesian exporters PT Ispat Panca Putera (Ispat) and PT Putra Baja Deli (Putra Baja Deli) (Termination Report No 418).

On 6 March 2018 the then Assistant Minister for Science, Jobs and Innovation and Parliamentary Secretary to the Minister for Jobs and Innovation (Assistant Minister) accepted the Commissioner's recommendations contained in Anti-Dumping Commission Report No. 418 (REP 418). REP 418 recommended that anti-dumping measures be imposed for Greece, Indonesia (except for Indonesian exporters Ispat and Putra Baja Deli), Spain (Nervacero), Taiwan (Power Steel) and Thailand, and that dumping duties be worked out using the combination duty method. A public notice of the Assistant Minister's decision (dumping duty notice) was published on 7 March 2018.

2.2 Review by the ADRP

The ADRP is conducting a review of the Assistant Minister's decision (ADRP Review No 2018/80). The ADRP received applications for review from the following parties:

1. Power Steel; and
2. Nervacero.

2.3 Requirement for reinvestigation

The ADRP required a reinvestigation under subsection 269ZZL(1) of the *Customs Act 1901* (the Act) of specific findings in REP 418 that formed the basis of the reviewable decision. The ADRP originally requested that the Commissioner report the result of the reinvestigation to the ADRP by 24 September 2018. The ADRP granted a number of extensions that extended the due date for providing the report to 29 January 2019.

2.4 Approach to the reinvestigation

The Commissioner must conduct a reinvestigation in accordance with the ADRP's requirements and give the ADRP a report of the reinvestigation concerning the finding or findings within the period specified by the ADRP.⁶

In its report to the ADRP the Commissioner must:⁷

- (a) if the Commissioner is of the view that the finding or any of the findings the subject of reinvestigation should be affirmed—affirm the finding or findings; and

⁶ The Act at subsection 269ZZL(2).

⁷ The Act at subsection 269ZZL(3).

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- (b) set out any new finding or findings that the Commissioner made as a result of the reinvestigation; and
- (c) set out the evidence or other material on which the new finding or findings are based; and
- (d) set out the reasons for the Commissioner's decision.

In this reinvestigation the Commission published its preliminary findings on the EPR and sought submissions from interested parties. Those submissions have been considered in preparing this report.

3 POWER STEEL

3.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Power Steel is stated in the following terms:

a. Finding that Power Steel's specification adjustment is not warranted

I set out below my reasons for making the request in respect of this finding:

i. The ADC's reason for rejecting Power Steel's claim in REP 418 is that:

"There is no evidence that a lower grade product would command a premium in the Taiwanese market irrespective of its production costs."

ii. Firstly, the ADC seems to be inappropriately linking two adjustments claimed, being:

- Downwards adjustment claimed by Power Steel for physical characteristics and costs difference in the products compared, in that low priced billet grade is used to produce the 500N grade export rebar using a quenching and tempering method and the more expensive grade billet with micro alloys is used to produce the rebar sold domestically on the Taiwanese domestic market; and
- Upwards adjustment claimed by OneSteel for grade differences between the SD 420 and SD 420W sold on the domestic market, on the one hand, and the 500N export grade of the product exported, on the other hand.

As with Power Steel's claimed downward adjustment, the ADC rejected OneSteel's claim for an upwards adjustment for the reasons set out in REP 418.⁸ OneSteel did not apply for a review of this grade difference adjustment rejection by the ADC. 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.

iii. Secondly, the ADC seems to be requiring an unrealistic standard to be met for the acceptance of a claimed adjustment, contrary to the Australian legislation, WTO law⁹ and the ADC practice as reflected in the Dumping and Subsidy Manual 2017 ("the Manual"). The ADC in its s.269ZZJ submission to the Review Panel referred to its practice that adjustments will be made if there is evidence that a particular difference affects price comparability (emphasis added). It also referred to Section 14.3 of the Manual dealing with "physical characteristics and quality". The ADC does not challenge Power Steel's submission that the cost of normal grade billet used to produce the exported rebar grade is substantially lower than the high alloy billet grade used to produce the domestic rebar grades due to the

⁸ See Section 7.7.4 of REP 418, pages 41 and 42.

⁹ WTO jurisprudence provides that while interested parties claiming adjustments are required to provide evidence in support of and to quantify their claim, there is also an affirmative information-gathering burden on the investigating authority to ensure a "fair comparison". The last sentence of Article 2.4 of the ADA requires that the authority in ensuring a fair comparison "shall not impose an unreasonable burden of proof" on the parties in question claiming the adjustment. See WTO Panel Report, Egypt - Definitive Anti-Dumping Measures on Steel Rebar from Turkey (WT/DS211/R) at paragraph 7.352; Appellate Body Report in United States - Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan (WT/DS184/AB/R) paragraph 178; Panel Report, European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (WT/DS219/R), at paragraph 7.157 and 7.158.

addition of high cost alloys However, by requiring Power Steel to provide evidence that a “lower grade product would command a premium in the Taiwanese market irrespective of its production costs” in circumstances where the difference in grade was not “the particular adjustment” claimed by Power Steel, appears to ‘raise the bar’ and move the evidentiary goalposts, contrary to stated policy.

In conducting its reinvestigation of this issue, therefore, the ADC should be mindful of its obligation to ensure a “fair comparison” in terms of s.269TAC(8), its stated policy in the Manual and WTO law.

It should be noted that this is not a reinvestigation of the ADC’s finding in respect of the adjustment claimed by OneSteel for grade differences between the SD 420 and SD 420W sold on the domestic market, and the 500N export grade of the product exported, which is also not the subject of this review. The reinvestigation is in respect of the rejection of Power Steel’s claimed adjustment relating to low priced billet grade that is used to produce the 500N grade export rebar using a quenching and tempering method, when compared with the more expensive grade billet with micro alloys used to produce the rebar sold domestically.

3.2 Affirmed or new findings

As a result of its reinvestigation the Commission:

- affirms its finding that there should be no adjustment to Power Steel’s normal value to account for claimed differences in cost between standard grade billet and microalloy billet.

3.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- the records of Power Steel showing the costs of billet purchased by Power Steel during the investigation period;
- evidence given by OneSteel and Power Steel about rebar prices and price comparability;
- a review and correction of Power Steel’s calculation of billet cost differences; and
- submissions received from interested parties.

3.4 Reasons for the Commissioner’s decision

The Commission affirms its finding that there should be no adjustment to Power Steel’s normal value to account for differences in cost between standard grade billet and microalloy billet for the following reasons:

- Power Steel has not based its claim for adjustment on price comparability. This is covered in further detail in section 3.4.1.
- Evidence available to the Commission shows that the method of production does not affect rebar prices. This is covered in further detail in section 3.4.2.
- Even if Power Steel’s approach is accepted, Power Steel’s calculations mask the nature and effect of differences in billet costs. Correcting Power Steel’s calculations shows the dumping margin would not be materially different from that determined in REP 418. This is covered in further detail in section 3.4.3.

The Commission has considered and assessed the matters raised in submissions from interested parties in section 3.4.4.

3.4.1 The basis of Power Steel's claim for adjustment is not price comparability

The Commission's primary focus in making adjustments is to ensure that due allowance is made for differences that affect price comparability.

Subsection 269TAC(8) of the Act reflects the primacy of price comparability in making adjustments in Australian domestic law. It is only to the extent that the comparison of the price paid or payable in the country of export with the export price would be affected by the differences stated in subsections 269TAC(8)(a)-(c) that normal value may be adjusted. Accordingly, the first and necessary inquiry under subsection 269TAC(8) is whether price comparability is affected by one of the matters stated in subsections 269TAC(8)(a)-(c).

The Commission observes that Article 2.4 of the Anti-Dumping Agreement is clear that the reason for making adjustments is price comparability:¹⁰

Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

The Commission considers that the enumerated differences (conditions and terms of sale, taxation, levels of trade, quantities and physical characteristics) in Article 2.4 are examples of factors which may affect the comparability of prices rather than standalone differences that will attract an adjustment absent any impact on price comparability. As the Appellate Body relevantly stated in *US – Hot-Rolled Steel* (emphasis added):¹¹

Article 2.4 of the Anti-Dumping Agreement provides that, where there are 'differences' between export price and normal value, which affect the 'comparability' of these prices, '[d]ue allowance shall be made' for those differences. *The text of that provision gives certain examples of factors which may affect the comparability of prices:* 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences'.

Accordingly the Commission considers that a difference will only attract an adjustment if, on the merits of the case, the difference is demonstrated to affect price comparability. So a difference in physical characteristics should not automatically attract an adjustment – not all differences in physical characteristics affect price comparability. As the Panel in *US – Softwood Lumber V* stated (emphasis in original):¹²

We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term 'which affect price comparability'

¹⁰ Anti-Dumping Agreement at Article 2.4, third sentence (footnote omitted).

¹¹ Appellate Body Report, *US – Hot-Rolled Steel*, at [177].

¹² Panel Report, *US – Softwood Lumber V* at [7.165].

nugatory. Further, such an interpretation would make little sense in practice, as not all differences in physical characteristics necessarily affect price comparability.

Neither subsection 269TAC(8) nor Article 2.4 of the ADA state the methods for adjusting price, only the outcome of an adjustment, namely that such differences would not affect price comparability. The Commission's practice in choosing a method for adjusting price is set out in the Dumping and Subsidy Manual (the Manual). For example, the preferred method for adjusting prices for physical characteristics is to use the actual size of the price difference where there is direct evidence of "different selling prices for products with different physical characteristics"; in practice however the Commission may need to resort to adjustments "based on production cost differences".¹³ In any event the Manual makes it clear that, consistent with the reason for making adjustments, adjustments are only "for differences which 'affect price comparability'"¹⁴ and that adjustments will not be made for physical characteristics where (emphasis added):¹⁵

[...] although there may be some differences in physical characteristics, no demonstrable effect on the selling price of the goods has been observed or is likely because, for example, the customer remained unaware of any differences and no demonstrable price effect could be observed.

3.4.1.1 Power Steel's primary focus is not price comparability

The Commission observes that the primary focus of Power Steel's complaint to the ADRP concerning an adjustment under subsection 269TAC(8) is not price comparability. Rather, Power Steel's focus is on the cost of billet used to produce Power Steel's domestically supplied 420 grade rebar.

Power Steel offers no evidence that adding microalloys affects price comparability except to say, in effect, that this might be the assumed or hypothesised outcome of a different production method.¹⁶ Power Steel contends that it takes account of its costs in setting price¹⁷ however the Commission considers that it would oversimplify price setting in the market to make the further assumption that Power Steel urges, namely that price comparability turns on the addition of microalloys rather than grade.

The Commission considers that such a claim for adjustment, based on a difference in production costs, puts the analytical cart before the horse, wrongly conflating a methodology for making an adjustment with the reason for making the adjustment.

The Commission also observes that 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";¹⁸ those words appear in subsection 269TAC(9), not in subsection 269TAC(8). In addition, the example case that Power Steel

¹³ Manual at page 67.

¹⁴ Manual at pages 64-65.

¹⁵ Manual at page 67.

¹⁶ See Power Steel's application to the ADRP at pages 18 and 20.

¹⁷ See Power Steel's application to the ADRP at pages 19 and 20.

¹⁸ See for example Power Steel's application to the ADRP at pages 14, 20 and 21.

provides in support of its argument is a case that concerned adjustments under subsection 269TAC(9).¹⁹ On that basis it is unsurprising that Power Steel has misdirected its arguments in support of an adjustment in terms of costs rather than price comparability. 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.

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.²⁰ Grade is the measure of minimum yield strength.²¹

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 quenching and tempering to achieve the required grade is prohibited in Taiwan.²²

The Commission also considered confidential pricing information provided by OneSteel during Investigation 418. That information showed that there was no material difference in pricing by OneSteel for different methods of making 500 grade rebar. The Commission's assessment of that information is contained in **Confidential Appendix 1**.

The Commission has examined the evidence available to it and finds that the method of production used to achieve a given grade of rebar does not affect price comparability.

3.4.3 Power Steel calculation masks the nature and effect of cost differences: correcting results in no material change in dumping margin

The Commission has reviewed the analysis provided to the ADRP by Power Steel and considers that Power Steel's annualised 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 REP 418.

Power Steel calculates a single cost difference for 500N rebar and 420/420W rebar for the whole investigation period. This departs from the quarterly calculations otherwise used in Appendix 2 of REP 418. Quarterly calculations are the Commission's standard practice.²³

¹⁹ Power Steel's application to the ADRP at pages 15 to 18.

²⁰ Confidential Attachment 1 to *Investigation 418: Visit Report – Exporter, Power Steel Co Ltd* at page 6.

²¹ *Investigation 418: Visit Report – Exporter, Power Steel Co Ltd* at page 5.

²² Confidential Attachment 1 to *Investigation 418: Visit Report – Exporter, Power Steel Co Ltd* at page 6.

²³ Manual at page 124. The Manual states that calculations should be either quarterly or monthly (the Manual does not contemplate annual calculations); use of a longer period for calculations will yield less accurate dumping margins where there are significant changes in costs over short periods (as appears to be the case here).

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.

Power Steel's averaged cost difference calculation also masks the *effect* of the cost difference on the dumping margin. Power Steel subtracted the *annual* average cost difference it calculated from Power Steel's *quarterly* normal values resulting in a dumping margin of less than one per cent.

The Commission corrected Power Steel's calculation by subtracting the *quarterly* average billet cost difference from Power Steel's *quarterly* normal values. The resulting dumping margin, including the additional cost of quench and tempering required to bring 280 billet to 500 grade rebar, is not materially different to the 4.4 per cent dumping margin determined for Power Steel in REP 418.

The Commission's corrections to Power Steel's calculations are contained at **Confidential Appendix 2**.

3.4.4 Submissions received from interested parties

3.4.4.1 Power Steel submission

Power Steel made a submission addressing a number of the Commission's preliminary findings in the Preliminary Report. A public record version of Power Steel's submission is available on the EPR.²⁴ The Commission summarises the primary issues raised in Power Steel's submission below.

The basis of Power Steel's claim for adjustment is not price comparability

Power Steel submission: Power Steel generally disagrees with the Commission's assessment of its claim. Power Steel rather contends that claimed higher costs of "high alloy billet" result in higher prices.²⁵

Commission comment: Power Steel's submission claims that it reiterates the position it took in its application to the ADRP, to "ensure there is no confusion".²⁶ However its application to the ADRP refers to "high grade micro-alloyed billet" or just "micro-alloyed billet";²⁷ those terms do not appear in Power Steel's submission in this reinvestigation, rather the term used in its submission in this reinvestigation is "high alloy billet".²⁸ Power Steel's original description more accurately gives precedence to the grade of the billet.

²⁴ EPR document number 73.

²⁵ EPR document number 73 at page 1.

²⁶ EPR document number 73 at page 1.

²⁷ See Power Steel's application to the ADRP at pages 10, 12, 13, 15, 16, 17, 19, 21.

²⁸ See EPR document 73 at pages 1, 3.

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Power Steel submission: In response to the Commission's preliminary finding that Power Steel offered no evidence that adding microalloys affected price comparability Power Steel offered the following as relevant facts (emphasis in original):²⁹

- all domestic 420 grade rebar is manufactured from high alloyed grade [sic] billet and air-cooled;
- all domestic 280 grade rebar is manufactured from normal grade billet and air-cooled; and
- all export 500N grade rebar is manufactured from normal grade billet and water-cooled.

Power Steel also quotes a passage from the Manual concerning adjustments when there are differences in physical characteristics.³⁰ That passage states alternative methods for making an adjustment in circumstances where there is insufficient direct evidence that would be suitable for calculating an adjustment.³¹

Commission comments:

- The Commission has not disputed the facts of manufacturing methods of different grades of rebar produced by Power Steel (except to say that Power Steel's original description of "high grade micro-alloyed billet" more accurately gives the grade of the billet precedence).³² However to say that price comparability necessarily follows from those facts is a *non sequitur*.
- Power Steel quotes from the section of the Manual's chapter on due allowance that concerns *methods for calculating* an adjustment; the policy section of that chapter states (unequivocally) the *reason for making* the adjustment, namely that "[a]djustments will be made if there is evidence that a particular difference affects price comparability".³³ Power Steel continues to wrongly conflate the methodology for making an adjustment with the reason for making the adjustment.³⁴

Power Steel submission: Power Steel argues that it is unsustainable for the Commission to adjust export prices to account for small costs but not allow an adjustment for costs that account for a larger proportion of the cost of rebar.³⁵ By way of evidence Power Steel claims that "it is generally accepted by the steel industry and confirmed by the Commission in its numerous inquiries" that rebar prices are correlated to raw billet material costs.³⁶

Commission comment: The Commission would not accept Power Steel's argument that the Commission making adjustments for comparatively smaller costs somehow restricts its ability to consider whether some larger cost affects price comparability; neither would

²⁹ EPR document 73 at page 2.

³⁰ EPR document 73 at page 2.

³¹ Manual at page 67.

³² See above comments on Power Steel's changed description of billet used in Taiwan for 420 grade rebar between its application to the ADRP and its submission in this reinvestigation.

³³ Manual at page 64.

³⁴ See the Commission's preliminary views in the Preliminary Report at page 11.

³⁵ EPR document 73 at page 3.

³⁶ EPR document 73 at page 3.

the Commission accept Power Steel's claims concerning the issue of price comparability in this specific case based on a general observation of what the Commission found in other (unspecified) dumping inquiries. The Commission would fail to properly assess the merits of the specific issue of price comparability in this case if it proceeded on the bases urged by Power Steel – that is not a course open to the Commission.

Power Steel submission: Power Steel argues that “it is widely accepted and understood” that rebar made from high grade micro-alloyed billet will be more costly to manufacture. Power Steel pointed specifically to previous statements by Liberty OneSteel that Power Steel claims support its arguments.³⁷

Commission comment: Power Steel claims wide acceptance of its views however it only cites statements of Liberty OneSteel in support. The Commission considers that the Liberty OneSteel statements quoted by Power Steel are general in nature. However Liberty OneSteel's views on price comparability in the circumstances of this case are unequivocal, in that the rated yield strength (i.e. grade) of the rebar determines price.³⁸

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...

Power Steel submission: Power Steel claims that there is “evidence gathered by the Commission” that confirms buyers expect a lower price when standard grade billet is used.³⁹

Commission comment: Power Steel does not state what the evidence is and the Commission is not aware of evidence that supports Power Steel's claim.

Evidence shows method of production does not affect price comparability

Power Steel submission: Power Steel argues that a statement in the Power Steel verification report supports its view that the method of production affects price comparability.⁴⁰ Power Steel observes that the Commission's verification team identified one of the main factors affecting the price of rebar to be “[s]pecification and grade (minimum yield strength)”.⁴¹ Therefore, Power Steel claims, specifications are vitally important to understanding any impact on prices.⁴²

Commission comment: Power Steel appears to treat the term “specification” as synonymous with, or at least incorporating, methods of production. However the Power Steel verification report does not make any direct link between specification of the finished product and method of production; indeed, the specification referred to in the

³⁷ EPR document 73 at page 3.

³⁸ EPR document 71 at page 3.

³⁹ EPR document 73 at page 4.

⁴⁰ EPR document 73 at page 4.

⁴¹ EPR document 27 at section 2.2.

⁴² EPR document 73 at page 4.

report,⁴³ AS/NZS 4672, is agnostic concerning the method of production.⁴⁴ Even putting that aside, Power Steel itself admits that “specifications are vitally important to understanding any impact on prices *as they are the primary source for determining the grade*”⁴⁵ (emphasis added). This would tend to confirm the Commission’s view that it is grade that determines price comparability notwithstanding that there may be different methods of production used to achieve a given grade.

Power Steel submission: Power Steel claims that it is erroneous for the Commission to ask whether domestic customers would pay different prices based on the level of microalloys.⁴⁶ Rather, Power Steel argues, the Commission must assess “whether domestic customers would continue to pay higher prices for rebar if the Taiwanese specification allowed for high grade rebar to be produced from cheaper standard grade billet using the quenching and tempering method”.⁴⁷

Commission comment: The Commission considers that the question squarely raised by Power Steel’s application to the ADRP is whether rebar prices for a given grade would be higher for a different method of production (i.e. the use of billet containing microalloys rather than standard grade billet using quenching and tempering).⁴⁸ The assessment Power Steel urges on the Commission would simply assume an answer to that question, namely that domestic Taiwanese customers are paying higher prices for rebar produced using microalloyed billet. It would not be open to the Commission to base its findings on such circular reasoning.

Power Steel calculation masks the nature and effect of cost differences

Power Steel submission: Power Steel makes a number of statements in support of using a 12 month weighted average billet cost rather than the quarterly costs used by the Commission in Confidential Appendix 2. Power Steel’s statements primarily concern how Power Steel claims it purchased billet for use in producing rebar in the investigation period; this, Power Steel claims, causes difficulties that are addressed by using a 12 month weighted average.⁴⁹

Commission comment: The Commission assessed the veracity of Power Steel’s statements by reviewing Power Steel’s billet purchasing records; those records were detailed monthly records of billet inventories, purchases and consumption that were previously provided by Power Steel and verified by the Commission. Those records unequivocally show that Power Steel’s statements concerning its billet purchases and inventory holdings are incorrect. Power Steel claims confidentiality over these statements

⁴³ EPR document 27 at section 2.1.

⁴⁴ AS/NZS 4671:2001 at section 6 stating that production methods “shall be at the discretion of the steel producer”.

⁴⁵ EPR document 73 at page 4.

⁴⁶ EPR document 73 at page 4.

⁴⁷ EPR document 73 at page 4.

⁴⁸ Power Steel application to the ADRP at pages 13 to 19.

⁴⁹ EPR document 73 at page 5.

concerning billet purchases and accordingly the Commission addresses those statements in greater detail in **Confidential Appendix 3**.

3.4.4.2 OneSteel submission

OneSteel made a submission addressing a number of the Commission's preliminary findings in the Preliminary Report. A public record version of OneSteel's submission is available on the EPR.⁵⁰

OneSteel's submission was generally supportive of the Commission's preliminary findings. The Commission notes the following from OneSteel's submission:

- OneSteel stated that price comparability was driven by yield strength and observed that there is a "vast difference in minimum yield strength" between the grade 500N rebar exported and the grade SD280 rebar that Power Steel, in effect, seeks to determine its normal values.⁵¹
- OneSteel observed that there was WTO jurisprudence, Australian judicial authority and ADRP comment that supported the Commission's approach to adjustments for price comparability.⁵²
- OneSteel observed that Power Steel's application to the ADRP provided no evidence, and indeed made no claim, that claimed cost differences affected price comparability for rebar.⁵³
- OneSteel also pointed out, as a matter of common sense, that rebar is a reinforcing product and its ability to provide reinforcing is governed by its rated yield strength. Accordingly it is that rated yield strength, and not the method of manufacture, that is the relevant consideration for a purchaser.⁵⁴

3.4.4.3 The Commission's assessment of matters raised in submissions

Power Steel has made a number of rhetorical revisions to its position, however the Commission considers that Power Steel's claim for adjustment in substance continues to focus on cost differences.

Power Steel provides no direct evidence of price comparability based on method of production, rather Power Steel's argument never rises above a contention that price should be expected to be affected by cost differences arising from different methods of production.

The Commission accepts that in some circumstances price will be affected by cost differences arising from different methods of production; however, as in the circumstances of this matter, there can be no such expectation where different methods of production are used to achieve the same primary measure of a product's performance.

⁵⁰ EPR document number 71.

⁵¹ EPR document number 71 at page 1.

⁵² EPR document number 71 at page 3.

⁵³ EPR document number 71 at page 3.

⁵⁴ EPR document number 71 at pages 3 to 4.

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The primary measure of performance for rebar is its minimum yield strength as shown by its grade. Accepting Power Steel's submissions would result in a normal value determined on a product that has a "vast difference" in the primary measure of performance to the product used to determine export price.

Power Steel's defence of its use of 12 monthly weighted averages in making cost based adjustments is based on incorrect statements concerning its billet purchases and inventory holdings. Accordingly the Commission does not accept that it should depart from its use of quarterly weighted average costs; on that basis there would not be any material difference in costs nor any concomitant material change to Power Steel's dumping margin (see section 3.4.3 above).

4 NERVACERO

4.1 ADRP request for reinvestigation

The ADRP's request for reinvestigation as it relates to Nervacero is stated in the following terms:

a. Finding of volume effects in respect of material injury

In reinvestigating this finding the ADC should reconsider its analysis, reasoning and conclusion in respect of its finding in respect of "volume effects", which in REP 418 focused on the increase in dumped imports relative to domestic consumption, that is, market share of the dumped imports.⁵⁵

I set out below my reasons for making the request under s.269ZZL in respect of this finding:

i) The market share analysis for the purpose of "volume effects" in Section 8.5.2 and depicted in Figure 4 of REP 418 includes in the data of the imports from those countries "subject to investigation" (forming the basis of the analysis), those imports of Ispat and Putra Baja Deli which were found to have negligible margins. WTO case law is very clear on this issue, that is, imports with negligible dumping margins may not be treated as "dumped" for purposes of the injury analysis.⁵⁶ Any volume effects finding based on such an erroneous analysis could not be considered to be in accordance with s.269TAE(2AA) of the Act, "based on facts and not merely on allegations, conjecture or remote possibilities".⁵⁷

The particular instances in REP 418 purporting to relate to the analysis of volume effects of the "dumped" imports that relied, at least in part, on analyses that included those volumes of imports that had negligible margins, are set out in Schedule 1 (Paragraphs 1 (a) – (d)).

ii) While it is stated in Section 8.5.2 of REP 418 that the Commissioner separately considered the effect of the volume of exports to Australia by Ispat and Putra Baja

⁵⁵ Volume effects are referred to in s.269TAE (1) (a) to (c) of the Act, which enacts into legislation Article 3.1 and the first sentence of article 3.2 of the WTO Anti-Dumping Agreement ("ADA") relating to the determination of injury, which states:

"With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."

From the above, it would appear that in considering volume effects, the ADC has a choice as to whether to consider a significant increase in dumped imports either in absolute terms (that is, actual tonnage) or relative to production or consumption (that is, market share). It would seem that the ADC in REP 418 did not consider in any depth the increase in volume of dumped imports in absolute terms (although Confidential Appendix 1 does contain the relevant raw data for this analysis). Instead the ADC focussed its volume effects analysis on market share, which may be more appropriate in an expanding market.

⁵⁶ See European Communities – Anti-Dumping Measure on Farmed Salmon from Norway (WT/DS337/R), paragraph 7.625 and European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R), paragraph 7.354.

⁵⁷ This provision enacts Australia's obligations under Article 3.1 of the ADA, which provides:

"A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of (a) the volume of the dumped imports"

Deli and confirmed that the decline in market share experienced by OneSteel “is still evident when the exports from these two exporters during the investigation period are excluded from the analysis”, there are problems with this ‘analysis’, which are set out in the attached Schedule 1 (Paragraphs 2 (a) – (b)), making it inadequate as a “volume effects” analysis. Section 9.4.1 of REP 418, which is referred to in Section 8.5.2, is just a repetition of what was stated in Section 8.5.2 and does not expand or remedy the defective analysis relating to the volume effects of the “dumped” products in regard to market share.

iii) I have additional concerns with Confidential Appendix 1 to REP 418, on which the volume effects analysis is based. While Confidential Appendix 1 includes an analysis of the volume of the dumped imports (excluding imports from Ispat and Putra Baja Deli), the related market share analysis (of the entire market) altogether excludes the imports from Ispat and Putra Baja Deli from the analysis, instead of including the relevant volumes under “Other Imports”,⁵⁸ thereby distorting the percentages of market share. Therefore, in the reinvestigation of the volume effects analysis comprehensive and accurate volume effects analysis should be undertaken over the injury analysis period showing any increase or changes in actual volume of the ‘dumped’ imports and of any increase or changes in market share of the ‘dumped imports’ and the Australian Industry.

iv) I also request that the ADC reinvestigate its conclusion on volume effects at Section 8.5.5 of REP 418, which Nervacero claims is a, “pre-emptive finding”.⁵⁹ For the reasons set out in Schedule 1 (Paragraphs 3 (a) – (b)), I do not consider that there is sufficient data or a proper analysis of the data in Section 8.5 of REP 418 for the ADC to reach the conclusion, in respect of volume effects relating to material injury, that OneSteel lost market share to the “dumped” imports. I therefore do not consider this to be a reasonable finding of the ADC and therefore request a reinvestigation of the conclusion of volume effects of the dumped imports in respect of the injury finding, based on a comprehensive and accurate analysis of market share.

v) For the reasons set out in Schedule 1 (Paragraph 4), I also request that the ADC reinvestigate its finding of materiality of the volume effects (or market share) in respect of injury as reported at section 8.5 of REP 418 (including capacity to supply the market, OneSteel’s own imports and other supply issues) and discussed in section 9.4 of REP 418. The reinvestigation is particularly in relation to OneSteel’s own imports, and how they are reflected in the market share analysis, supported by Confidential Appendix 1, and in so far as OneSteel’s domestic sales of the imported product are excluded from the calculation of its market share.

Given the various concerns that I have with the volume effects analysis in REP 418, as discussed above and as set out in Schedule 1, I consider that the analysis does not meet the required standard set by the Act, the ADA and the ADC’s own practice.

b. Finding of causal link in respect of non-attribution analysis

The ADC should reinvestigate its reasoning and findings in respect of its non-attribution analysis of injury caused by factors unrelated to dumping of the goods under investigation in accordance with s.269TAE(2A), and specifically in respect of supply restrictions

⁵⁸ This was clarified in a Conference held on 21 June 2018.

⁵⁹ See Footnote 19 of Nervacero’s application for review.

imposed by OneSteel.⁶⁰ I set out below my reasons for making the request in respect of this finding:

- i. Nervacero submitted that a number of parties claimed that a key reason for customers' reliance on imported goods either wholly or to some degree, was because of OneSteel's own capacity and restrictive sales practices, which placed these customers' independent business at risk. Nervacero identified various factors in this regard, both in respect of capacity restraints and in respect of OneSteel's own restrictive trade practices.⁶¹
- ii. The obligations on the ADC in respect of the "non-attribution analysis" are contained in s.269TAE(2A) and articulated in the Manual, which refers to the third and fourth sentences of Article 3.5 of the ADA. The WTO Appellate Body has made it clear that the ADC must separate the injurious effects of other factors from the injurious effects of the dumped imports so as to determine that the dumped imports are causing material injury.⁶² The method or approach the ADC chooses to use to undertake this task is a matter for it, but the need to properly examine any other factors which may be causing injury to the domestic industry is clear and reflected in s.269TAE(2A) of the Act. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports. I do not consider that the ADC has met this standard in respect of supply restrictions imposed by OneSteel, for the reasons discussed in the attached Schedule 1 (Paragraph 5).
- iii. I agree with the ADC in its submission that it considers that a relevant question is whether OneSteel had lost sales during the investigation period to dumped goods from the countries subject to investigation, in relation to the customers that it might otherwise have supplied or expected to supply. However, the ADC did not properly consider or comprehensively analyse the data and documents, to which it had access, to answer this question, or attempt to quantify or estimate OneSteel's "lost" sales from supply restrictions, or provide a satisfactory explanation of the nature and extent of the injurious effects of the supply restrictions.
- iv. I do not consider that the ADC's analysis meets the requirements of Article 3.5 and s.269TAE(2A) which imposes a positive obligation on the authority to separate the injurious effects of other factors from the injurious effects of the dumped imports so as to positively determine that the dumped imports are causing material injury.

It should be noted that the reinvestigation of the ADC non-attribution analysis relating to supply issues is only in respect of volume effects and not in respect of price injury.

c. Calculation of the Non-Injurious Price

In reinvestigating this finding the ADC should reconsider its calculation of the NIP in respect of Nervacero, for the following reasons:

- i. In the ADC's consideration of the NIP it states:

"While OneSteel cannot be injured by its own imports, OneSteel does not set its price to individual customers according to the lowest price offer in the

⁶⁰ See Ground 2(d)(4) of Nervacero's application for review.

⁶¹ See Section B(d)(4) of Nervacero's application for review, page 24.

⁶² United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (WT / DS184 / AB / R), paragraphs 223 – 224.

market. It can therefore be injured by all the dumped price offers in the market including Nervacero's price."⁶³ (emphasis added)

ii. This statement appears to be contradictory and indicates a flawed approach in the ADC's consideration of NIP by, on the one hand recognising that OneSteel cannot be injured by its own imports, while on the other hand stating that because it sets its price to individual customers according to the lowest price offer in the market, it can be injured by dumped price offers including Nervacero's price (from which it imported). This seemed to indicate that in calculating the NIP for Nervacero, the ADC incorrectly took into consideration both its own imports from Nervacero as well as those imports by Nervacero's customers in Australia.¹²

I therefore request that the calculation of the NIP be reinvestigated, with the exclusion of the data relating to OneSteel's own imports from Nervacero's, in line with the ADC's own submission that One Steel cannot be injured by its own imports.

The ADRP's request for reinvestigation as it relates to Neracero provides the following further details:

Volume Effects

1. Instances of improper market share analysis of "dumped" imports in Section 8.5.2, which includes those imports with negligible dumping margins:

- a. Figure 4 reflects, inter alia, the market share of the Australian industry domestic sales and imports from countries subject to investigation, during the injury analysis period. It is clear from Section 8.5.2 and Confidential Appendix 1 to REP 418, however, that the imports from "countries subject to investigation" includes Ispat and Putra Baja Deli imports, which were found to have negligible margins and therefore cannot be considered to be "dumped". There is therefore no actual analysis in Figure 4 of the volume effects (market share) of the dumped imports.
- b. There is further analysis of the import trends in the text of Section 8.5.2 which states that:

"The Commission's analysis indicates that the volume of imports from countries currently subject to measures fell from 22 per cent of the market in 2013 to 6 per cent of the market in 2016. During this time, the volume of imports from the subject countries rose from 5 per cent of the overall market in 2013 to 17 per cent of the market in 2016.

The Commission has conducted an analysis of import trends during the injury analysis period. The analysis is discussed further at section 9.4.2. The analysis indicates that:

- *there was a notable increase in exports from Greece, Indonesia, Thailand and Taiwan (by Power Steel) following the imposition of measures as a result of Investigation 300 in April 2016, and*
- *prior to the revocation of measures against it (in July 2016), Nervacero's*
- *volume of exports were inconsistent. Following the revocation of measures against it, Nervacero's volume of exports increased significantly." (emphasis added to show where ADC purported to address the volume of "dumped" imports)*

⁶³ See Section 11.5 of REP 418, page 96 and 97.

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This also does not appear to be a proper analysis of the volume of “dumped imports” for the following reasons:

- The emphasised sentence in the first paragraph of the quoted passage above appears to include the imports of Ispat and Putra Baja Deli which were found to have negligible margins;
- Since the ADC is considering the percentage market share increase of imports from subject countries (should be “dumped imports”) over the entire injury period, it would be appropriate to compare it to the percentage market share increase of the domestic industry over the entire period;
- The first bullet point under the second paragraph which I have emphasised above, refers to a notable increase in exports from Greece, Indonesia, Thailand and Taiwan (by Power Steel) in April 2016. Again, the imports from Indonesia referred to would appear to include imports from Ispat and Putra Baja Deli (since it is not stated that they are excluded);
- The second bullet point under the second paragraph which I have also emphasised refers only to the imports of Nervacero, which cannot suffice as the analysis of volume of dumped imports.

c. Since the quoted passage from Section 8.5.2 above refers to the import trend analysis discussed at Section 9.4.2 of REP 418, I examined that section to determine if the volume of dumped imports was properly analysed therein.

- In Section 9.4.2 there was a reference to Figure 8 which was stated to illustrates the shift in imports from “countries subject to measures” to imports “from the subject countries” over the injury analysis period. There is no reference to those imports from the subject countries with negligible margins (Ispat and Putra Baja Deli) being excluded.
- I examined the particular spreadsheet in Confidential Appendix 1 from which Figure 8 was derived, which appeared to confirm that the data reflecting imports from the subject countries did not exclude imports from Ispat and Putra Baja Deli.

d. Since the ADC referred to Confidential Appendix 1 at the end of Section 9.4.2, I examined the spreadsheet to determine if the ADC had done an analysis of the volume of the dumped imports, excluding Ispat and Putra Baja Deli. It was clear to me from Confidential Appendix 1 that the raw data was available for the ADC to provide an analysis over the injury analysis period of any increase or changes in actual volume of the ‘dumped’ imports and of any increase or changes in market share of the ‘dumped imports’ and the Australian Industry. However, REP 418 did not reflect a comprehensive analysis of the volume effects of the “dumped” imports for the purpose of the injury finding.

2. Problems with separate analysis of Ispat and Putra Baja Deli imports:

- a. Firstly, excluding the imports of Ispat and Putra Baja Deli from the “dumped” volume will not affect OneSteel’s market share at all, but rather the market share of the “dumped” imports, which will be less as a result. For a proper “volume effects” analysis the ADC should have analysed the increase in market share of the ‘dumped’ products (excluding Ispat and Putra Baja Deli) and compared this to the decline in market share of the domestic industry.
- b. Secondly, the use of the words “still evident” in referring to the decline of the market share when the exports from Ispat and Putra Baja Deli were excluded, does not appear to amount to an analysis of whether there is a “significant” increase in market share of the “dumped” imports (referred to in the last sentence of Article 3.2

of the ADA) or “significant” decline in market share of the domestic industry, when the imports with negligible margins are excluded.⁶⁴

3. Reasons for consideration that there was insufficient data and analysis to reach the conclusion set out in Section 8.5 of REP 418:

a. As mentioned above, most of the analysis of “volume effects” was in respect of imports from the subject countries (including those from Ispat and Putra Baja Deli) and therefore cannot be considered to be a proper analysis of the volume effects of the “dumped” imports.

b. The only analysis in Section 8.5 of the market share of “dumped” imports is the statement by the ADC referred to above, that the decline in market share experienced by OneSteel was “still evident when the exports from these two exporters during the investigation period are excluded from the analysis”. As discussed above, this cannot be considered to a proper analysis by the ADC of the volume effects of the dumped imports let alone be considered to lead to the ADC coming to a causal conclusion that OneSteel, “lost market share to imports from the subject countries found to be dumping in the Australian rebar market over the investigation period.”

4. Issue related to the market share analysis in respect of OneSteel’s own imports for the purpose of “materiality” of volume effects

a. In sections 8.4.3 the ADC stated that as One Steel’s own imports cannot be considered to have caused it injury, for the purposes of assessing injury factors, the ADC had, “disregarded OneSteel’s domestic sales of imported rebar.” In Section 9.4.4 it is stated that the ADC, “excluded OneSteel’s own imports of rebar from its assessment of injury factors.” While disregarding OneSteel’s own imports for certain injury factors, such as price effects, would be the correct approach, however, ignoring OneSteel’s sales of its own imports in the market share analysis, creates a distortion and understates OneSteel’s share of the market. For example, the analysis of market share during the POI as reflected in Figure 4 in Section 8.5.2 (after correction to properly reflect market share of “dumped imports”) should reflect OneSteel’s domestic sales and own imports together, to properly reflect OneSteel’s share of the market.⁶⁵

Non-attribution analysis

5. There are two aspects to this challenge of the non-attribution claim in respect of supply restrictions, being firstly, OneSteel’s capacity restraints and secondly, OneSteel’s own restrictive trade practices. These issues were addressed in Sections 9.4.4 and 9.8.9 of REP 418.

a. With regard to OneSteel’s capacity restraints:

- the ADC concludes that “on the basis of verified data it is satisfied that OneSteel had the capacity to at the very least maintain its market share

⁶⁴ See China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada (WT/DS483/R) which provides at paragraph 7.18 that while a volume effects finding for the purpose of injury (Article 3.2 of the ADA) would not require a ‘determination’ that any increase in imports, whether absolute or relative to domestic production or consumption, is “significant”, the inquiry as to the significance of any increase in dumped imports, “implies a consideration of developments, that is, changes or trends, in the volume of dumped imports over the period of the injury investigation.

⁶⁵ It was clarified in a Conference held with the ADC on 21 June 2018 that the domestic industry’s market share percentages derived from Confidential Appendix 1, excluded the domestic sales of OneSteel’s own imports.

during the investigation period”. The ADC does not however explain what the verified data related to nor expands on its analysis, in coming to this conclusion.

- The ADC stated that while there was evidence of “supply issues” due to surge in international scrap prices, “there is no evidence of wide spread supply issues such as would have caused a reduction in the market share experienced by OneSteel”. My concern is whether that this meets the requirements of Article 3.5 and s.269TAE(2A) which imposes a positive obligation on the authority to separate the injurious effects of other factors from the injurious effects of the dumped imports so as to positively determine that the dumped imports are causing material injury. There was clear evidence of some supply issues and the ADC was obliged to enquire further and properly consider and analyse the issue before coming to a reasoned conclusion as to whether the dumped imports were causing material injury. I have concerns as to whether the ADC met this standard
- b. With regard to OneSteel’s own allegedly restrictive trade practices:
- the ADC in response to submissions on supply issues by Plascorp Pty Ltd (Plascorp), SRCM Pty Ltd (SRCM); Lyndons; Sanwa and Nervacero, and OneSteel, appeared to accept OneSteel’s explanations without further enquiry or comprehensive analysis.
 - While acknowledging that the submissions suggest that OneSteel’s “adopts trade practices” that provide its downstream related party entities with a competitive advantage, the inability of the ADC to “draw any conclusion” that the injury experienced by OneSteel is due to its own practices and its unexplained assertion that these factors simply did not affect its view that dumping was the cause of material injury to the Australian industry, could fall short of the requirement under Section 269TAE(2A) and the ADA, which requires a proper and comprehensive consideration of the effect of other factors.

4.2 Affirmed or new findings

As a result of its reinvestigation the Commission:

- affirms 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 (i.e. from 1 April 2013);
- affirms its finding that, having separated any injurious effects from other factors identified in the reinvestigation request, the dumped imports caused material injury;
- has recalculated a NIP for Nervacero that excludes Nervacero’s sales to OneSteel.

4.3 Evidence or other material on which the findings are based

The Commission based its findings on:

- Capacity and capacity utilisation data obtained from OneSteel and verified by the Commission at its industry visit in July 2017;
- Market share and import data obtained and verified by the Commission during Investigation 418;
- *Halsbury’s Laws of Australia*, LexisNexis Australia; and

- Submissions received from interested parties.

4.4 Reasons for the Commissioner's decision

4.4.1 Volume effects

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, on 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.

Figure 1 below shows market shares during the injury analysis period of:

- the Australian industry;
- imports subject to measures;
- imports from sources found dumping above negligible levels (i.e. imports subject to investigation and found to be dumped during the investigation period, excluding imports from Ispat and Putra Baja Deli); and
- other imports.

Imports subject to investigation in REP 418 but found to be dumped with negligible margins (namely imports from Ispat and Putra Baja Deli) are included in other imports.

Market share for the Australian industry includes rebar imported by the Australian industry. Imports of rebar by the Australian industry ranged between 0.4 per cent and 1.2 per cent of the Australian rebar market during the injury analysis period.

Figure 1 below revisits the analysis shown in Figure 4 of REP 418 correcting for issues identified in the reinvestigation request.

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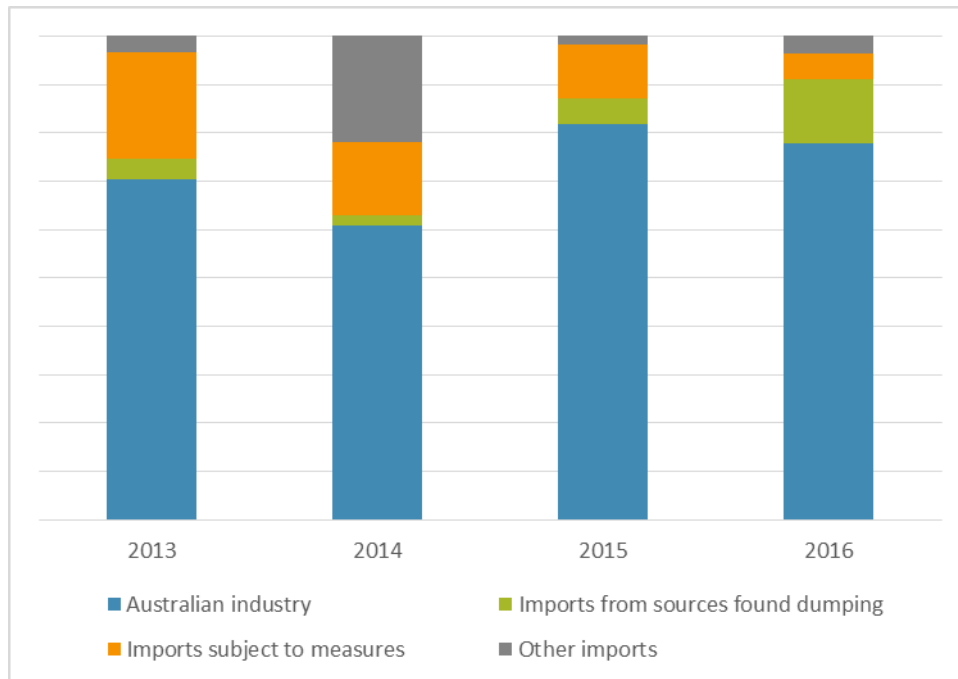


Figure 1: market share - Australian rebar market

Figure 1 shows that in 2016 Australian rebar market shares:

- declined for the Australian industry;
- increased significantly for imports from sources found dumping;
- declined for countries that were already subject to measures; and
- increased slightly for other imports.

This analysis shows that, notwithstanding an increase in the Australian industry's market share between 2014 and 2015, 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 are included in other imports.

The analysis in Figure 1 also indicates that the volume of imports from countries already subject to measures fell from 22 per cent of the market in 2013 to five per cent of the market in 2016. During this time, the volume of imports from sources found dumping rose from four per cent of the market in 2013 to 13 per cent in 2016.

The Commission has conducted further analysis of import trends during the injury analysis period below in Figure 2. This analysis is further to that discussed at section 9.4.2 of REP 418. The further analysis indicates that there was a significant increase in the imports from sources found dumping following the imposition of measures as a result of Investigation 300 in April 2016.

Figure 2 below revisits the analysis shown in Figure 8 of REP 418 correcting for issues identified in the reinvestigation request.

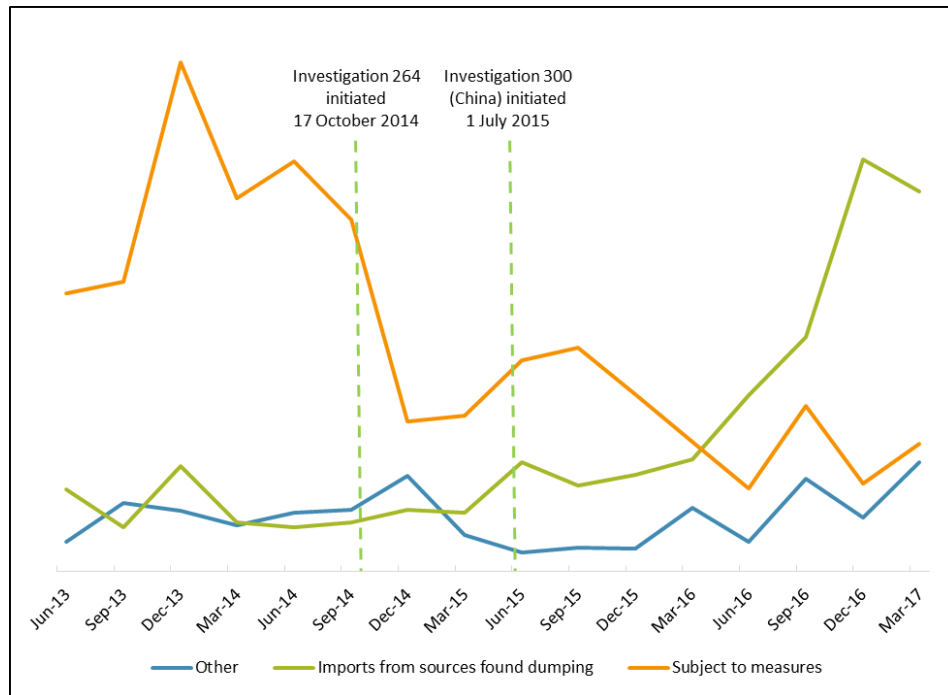


Figure 2 - Import trend analysis - rebar import volumes

Conclusion – volume effects

Based on the assessment and evidence outlined above, the Commission finds that OneSteel lost market share to imports from sources found dumping above negligible levels and that the injury from that loss of market share is material.

The analysis underlying the Commission's assessment of volume injury in this report is contained in **Confidential Appendix 4**.

4.4.2 Causal link and non-attribution analysis

The Commission has reviewed findings in REP 418 concerning causal link and non-attribution analysis in respect of the Australian industry's capacity constraints and claimed restrictive trade practices and considers that:

- OneSteel is not capacity constrained and accordingly there would be no injury attributable and there would be *de minimis* injury arising from transient supply issues caused by international shortages; and
- OneSteel's conduct in not supplying smaller customers does not fall within the meaning of restrictive trade practices in subsection 269TAE(2A)(d), rather it is normal commercial practice across the economy.

4.4.2.1 OneSteel is not capacity constrained

The Commission finds that OneSteel's capacity for production of rebar is not constrained. OneSteel experienced transient supply issues due to a number of sharp increases in international rebar prices in 2016 and 2017.

Nervacero claims that OneSteel lacks the capacity to supply the Australian market as evidenced from complaints from parties concerning supply and OneSteel's own imports of

rebar.⁶⁶ Nervacero claimed that this was a factor unrelated to dumping that caused injury to OneSteel and that the Commission in REP 418 failed to ensure non-attribution of this injury under subsection 269TAE(2A).⁶⁷

The Commission has reviewed confidential capacity and capacity utilisation data obtained from OneSteel and verified by the Commission at its industry verification visit to OneSteel in July 2017. The Commission found that OneSteel operated at significantly below its rebar production capacity during the investigation period. The Commission's analysis of OneSteel's confidential capacity and capacity utilisation data is contained at **Confidential Appendix 5**.

On that basis the Commission finds on the evidence available that OneSteel's capacity for supply of rebar is not constrained and accordingly there could have been no injury to OneSteel arising from capacity constraints.

The Commission notes that OneSteel has at times put quotas on the amount of rebar supplied to some customers⁶⁸ and imported rebar that it might otherwise have produced itself. OneSteel has pointed to shortages of rebar in the international market and that this has led to other Australian purchasers of rebar switching from imports to seeking supply from OneSteel⁶⁹ and its own customers seeking supply on an un-forecast basis.

The following graph shows international rebar prices for the period November 2015 to October 2017.⁷⁰ The Commission observes that there are several sharp increases in price during the period shown; for example Southeast Asian rebar prices increased by 50 per cent between February 2016 and April 2016. The Commission considers that OneSteel's claims regarding un-forecast demand are consistent with the increases in international rebar prices and that customers were seeking to beat the price increases by bringing purchases forward.

⁶⁶ Nervacero application to the ADRP at pages 23-24.

⁶⁷ Nervacero application to the ADRP at pages 19-20.

⁶⁸ Neumann Steel submission dated 6 December 2017, EPR 418 document 53 at page 2; Commission filenote dated 24 October 2017, EPR 418 document 32 at [2].

⁶⁹ OneSteel submission dated 9 November 2017, EPR 418 document 38 at page 2.

⁷⁰ SBB steel prices reproduced from OneSteel submission dated 9 November 2017, EPR 418 document 38 at page 5.

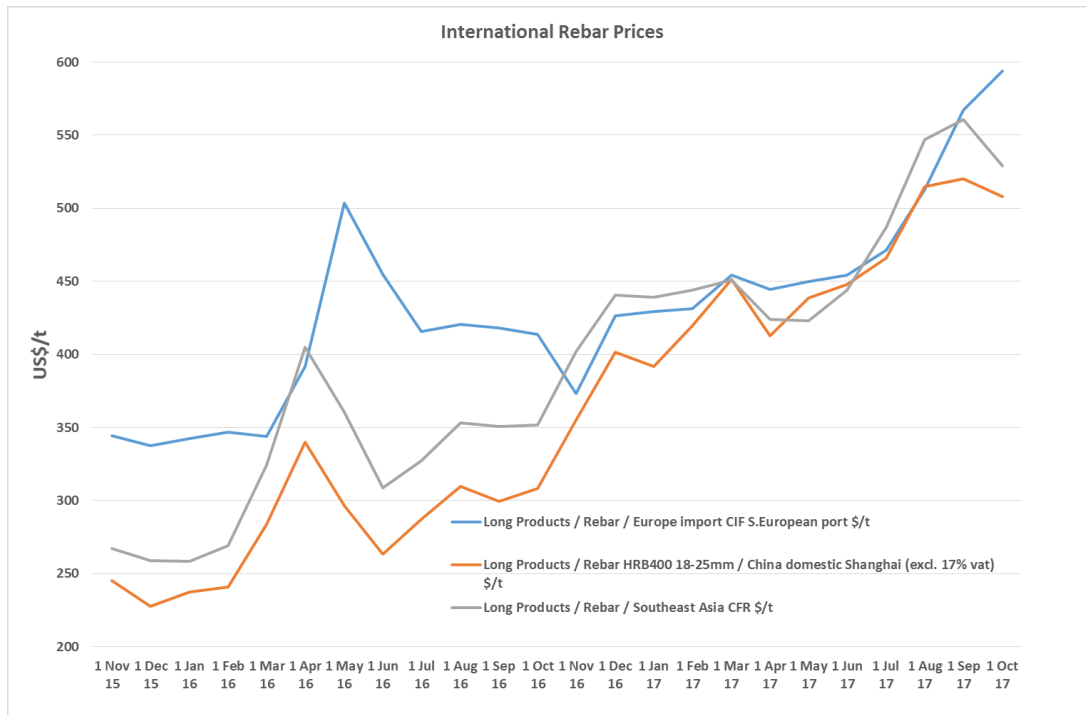


Figure 3 International rebar prices (SBB)

Given OneSteel's latent excess capacity its responses are best characterised as transient supply issues. Any injury arising from transient supply issues would be *de minimis* and should not materially affect the finding that the Australian industry suffered material injury.

The Commission further observes that:

- To the extent that OneSteel's supply issues arose from existing customers bringing orders forward to beat price increases, there would be no net impact on quantities supplied by OneSteel.
- The Commission's analysis of volume effects set out above in section 4.4.1 includes rebar imported by OneSteel in the market share for the Australian industry; notwithstanding that, the analysis shows that the Australian industry suffered volume injury.
- To the extent that Australian purchasers of rebar switched from imports to supply from OneSteel because of international shortages of rebar and concomitant price increases (i.e. not because exporters ceased dumping), injury to OneSteel from dumping may rather have been underestimated.⁷¹

⁷¹ See the Ministerial Injury Direction as considered in REP 418 at section 9.4.4 that a decline in an industry's growth rate may be as relevant as a shift from growth to decline. On that basis, absent dumping, there may have been an even greater number of Australian purchasers of rebar who switched from imports to supply from OneSteel because of international shortages of rebar and concomitant price increases.

4.4.2.2 OneSteel's supply arrangements are not restrictive trade practices

The Commission finds that OneSteel's supply arrangements are not restrictive trade practices, rather OneSteel's sales policies reflect normal commercial practice across the Australian economy.

Nervacero claims that OneSteel's terms of sale are restrictive trade practices which have forced independent customers to buy imports.⁷² Nervacero's claim invokes⁷³ subsection 269TAE(2A)(d) which sets out a factor that may cause injury, namely "restrictive trade practices of, and competition between, foreign and Australian producers of like goods"; subsection 269TAE(2A) provides that any injury caused by that factor must not be attributed to dumping.

The primary restrictive trade practice claimed by Nervacero appears to be OneSteel's refusal to directly supply some parties under its sales policy and preferred customer profile, or only to do so under certain conditions (for example a customer must buy at least 80 per cent of its total requirements from OneSteel).⁷⁴

The Commission understands that a refusal to supply may constitute a restrictive trade practice under Australian law under certain conditions. *Halsbury's Laws of Australia* states those conditions (stemming from the prohibition against misuse of market power in section 46 of the *Competition and Consumer Act 2010* (CCA)) in the following terms:⁷⁵

A corporation with a substantial degree of market power which refuses to supply goods or services to another may be held to be taking advantage of its market power if its refusal is possible only because there is no other source in the market from which supplies may be acquired. [...] If there is no nexus between the refusal to supply and the corporation's market power, that is, if the corporation could have or would have refused to supply even if there were competitive supply sources, there is no taking advantage of market power.

[...]

A corporation which continues, or offers to continue, supply of a product to a customer but on terms less favourable than previously may be held to have taken advantage of its market power if the imposition of the terms is a consequence of the degree of market power. The existence of alternative sources of supply does not preclude such a finding if the view is taken that the circumstances of the market are such that competitive pressures do not really exist in the market.

In addition, to constitute a restrictive trade practice, section 46 of the CCA states that the refusal to supply must have the purpose, effect or likely effect of substantially lessening competition in a market (as that term is defined in section 4E of the CCA).

There are a number of issues with Nervacero's claims concerning refusal to supply:

- Firstly, there are a number of elements that must be made out before a refusal to supply constitutes a restrictive trade practice under the CCA. Nervacero has not attempted for example to show that there is no other source in the market from which supplies of rebar may be acquired; indeed it is not disputed that there are

⁷² Nervacero application to the ADRP at page 25.

⁷³ Nervacero application to the ADRP at page 25.

⁷⁴ Nervacero application to the ADRP at page 24.

⁷⁵ *Halsbury's Laws of Australia*, LexisNexis Australia at [420-1050].

other sources from which supplies of rebar may be acquired, namely exporters of undumped rebar. Neither has Nervacero sought to show that OneSteel's conduct has had the purpose, effect or likely effect of substantially lessening competition. It would be open to Nervacero (or other affected party) to make a claim directly against OneSteel under the CCA if it considered that the elements of a refusal to supply could be properly made out – the Commission is not aware that any such claim has been made.

- Secondly, restrictive trade practices are investigated and prosecuted in Australia by a specialist body, the Australian Competition and Consumer Commission (ACCC); it is not within the Commission's bailiwick to assess whether or not any refusal to supply by OneSteel constitutes a restrictive trade practice under the CCA. The Commission is not aware of any action brought against OneSteel under the CCA by the ACCC. The lack of any such action serves to inform the Commission's assessment that OneSteel's conduct is not a restrictive trade practice.

In any event the Commission considers that OneSteel's sales policies reflect normal commercial practice across the Australian economy. For example, during Investigation 418 Lyndons Pty Ltd (Lyndons) claimed that OneSteel ceasing to supply it with rebar was an abuse of market power.⁷⁶ However OneSteel ceased supplying Lyndons because Lyndons failed to meet the requirements of its direct buying agreement and on average purchased only half of the agreed amount.⁷⁷

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.⁷⁸ This is the case in the Australian steel market where distributors sell OneSteel product at smaller volumes. Nervacero urges, in effect, that a customer choosing dumped rebar over Australian produced rebar available on normal commercial terms should be characterised as non-attributable injury; the Commission would not accept such a proposition.

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

As requested, the Commission reinvestigated the calculation of the NIP excluding data relating to OneSteel's own imports from Nervacero. This is consistent with the view that OneSteel cannot be injured by its own imports.

The Commission's recalculation of the NIP is contained in the Excel file at **Confidential Appendix 6**. Confidential Appendix 5 is based on the calculations in *REP 418, 418 Appendix 2 – Nervacero_Export_Price* (original calculations). The Commission has made the following changes to the original calculations:

- Existing sheet entitled 'Customers': The Commission added a calculation (highlighted) to show the percentage of Nervacero's exports to each customer.

⁷⁶ Submission by Lyndons undated, EPR 418 document 44 at page 3.

⁷⁷ Submission by OneSteel dated 18 December 2017, EPR 418 document 55 at page 3.

⁷⁸ See the discussion specifically concerning downstream supply in the Australian steel market in *Analysis of Australia's Steel Manufacturing and Fabricating Markets: Report to the Commissioner of the Anti-Dumping Commission*, November 2017 at section 2.2.

- New sheet entitled 'Export volume' (highlighted): This sheet calculates the volume of exports to Australia for each model/quarter excluding exports to OneSteel (non OneSteel exports).
- New sheet entitled 'Wt av normal value' (highlighted): This sheet uses the non OneSteel exports to recalculate (at highlighted cell F15) Nervacero's weighted average normal value and hence a NIP for Nervacero that excludes Nervacero's sales to OneSteel (non OneSteel NIP).

For comparison, the original weighted average normal value can be found in the relevant appendix to REP 418, *418 Appendix 2 – Nervacero – Dumping Margin*, at cell F28.

4.4.4 Submissions received from interested parties

4.4.4.1 Nervacero submission

Nervacero made a submission addressing a number of the Commission's preliminary findings in the Preliminary Report. A public record version of Nervacero's submission is available on the EPR.⁷⁹ The Commission summarises the primary issues raised in Nervacero's submission below.

Nervacero misconstrues the volume effects request

Nervacero submission: Nervacero argues that the Commission's volume effects analysis is limited to "the market share increase of dumped imports, and the market share decrease of the Australian industry, during the investigation period"⁸⁰ and that the Commission should rather give greater consideration to increases in the Australian industry's market share over different periods in the injury analysis period (namely 2013-2016 and 2014-2016).⁸¹ Nervacero also considered that the overall increase in the Australian industry's sales volumes during the injury analysis period was relevant,⁸² stating that the "factor, in subsection 269TAE(1)(b), provides that absolute volume is also a factor to which the Minister may have regard".⁸³ On those bases Nervacero claims that the Preliminary Report did not comply with the volume effects request.

Commission comments:

- The Commission would reject any submission that it should shift its focus from the investigation period in assessing the impact of dumping on the Australian industry. Assessing the impact of dumping on the Australian industry in the investigation period is the *sine qua non* of injury causation because, as an evidentiary matter, dumping is only established in the investigation period⁸⁴ and, as a legal matter, it is not open to the Commission to do otherwise (section 269T(2AE)). Thus,

⁷⁹ EPR document number 72.

⁸⁰ EPR 418 document 72 at page 1.

⁸¹ EPR 418 document 72 at page 2.

⁸² EPR 418 document 72 at pages 1-2.

⁸³ EPR 418 document 72 at page 2.

⁸⁴ See *Termination Report 179* at chapter 10; see also submission by Moulis Legal, Nervacero's lawyers, stating this proposition in Investigation 179 dated 16 October 2013 at page 4.

Nervacero misstates or misunderstands the Commission's finding as "the Australian industry suffered material injury due to volume effects during the four year injury analysis period".⁸⁵

- Nervacero highlights the percentage increases of the Australian industry's market share between 2013 and 2016 and between 2014 and 2016. However this is a selective description of what took place during those periods: Nervacero omits the highly material fact that goods from sources found to be dumping increased by more than 300 per cent between 2013 and 2016 and by more than 500 per cent between 2014 and 2016.⁸⁶ Contrary to Nervacero's misstatement of subsection 269TAE(1)(b),⁸⁷ those increases in rebar quantities exported to Australia fall squarely within the matters to which the Commission may have regard in assessing material injury.⁸⁸
- The Commission observes that Nervacero fails to point out that the Australian industry's increases in market share between 2013 and 2016 and between 2014 and 2016 are due in large part to reductions in imports of goods that were subject to measures following investigations 264 and 300 (see Figure 2). But for a substantial increase in dumped volumes in the investigation period, it seems clear that the Australian industry's market share would have continued to increase between 2015 and 2016 (see below at page 35).
- In any event the Commission considers that a mere slowing of the Australian industry's growth rate due to dumping may support a finding of material injury.⁸⁹ The Commission considers it clear that substantial imports of dumped goods during the investigation period displaced Australian industry market share (see Figure 1); accordingly the Commission finds that the Australian industry's market share growth observed by Nervacero between 2013 and 2016 and between 2014 and 2016 would have been materially greater but for the dumping (see below at page 35). Accordingly, the Commission finds that there was material injury caused by dumping notwithstanding that growth.

Nervacero submission: Nervacero quotes substantial sections of the Preliminary Report verbatim and claims that the Preliminary Report fails to address specific aspects of the reinvestigation request including whether the injury to the Australian industry from dumping was material.⁹⁰

Commission comments:

- Nervacero's complaint in respect of these specific aspects is for the most part unclear; if Nervacero has undertaken a substantive assessment of the substantial passages it quotes verbatim from the reinvestigation request then it has not given

⁸⁵ EPR 418 document 72 at page 2.

⁸⁶ See Confidential Appendix 2 at sheet "Additional analysis for ADRP".

⁸⁷ EPR 418 document 72 at page 2.

⁸⁸ Paragraph 269TAE(1)(b) rather provides that in determining whether material injury has been caused the Minister may have regard to "any increase or likely increase, during a particular period, in the quantity of goods of that kind exported to Australia from the country of export".

⁸⁹ Ministerial Direction on Material Injury, 1 June 2012.

⁹⁰ EPR 418 document 72 at pages 2-3.

the Commission the benefit of that exercise. In short, for the most part, Nervacero fails to specify the particular aspects that it claims the Preliminary Report fails to address.

- The Commission considers that the four per cent reduction in Australian industry market share between 2015 and 2016 is material injury; that much is evident from Figure 1 which shows the significant extent to which dumped rebar displaced Australian industry market share during the investigation period. However Nervacero's submission has highlighted two other matters that would confirm the Commission's finding that the injury is material:
 - The first matter confirming the materiality of injury is the extent to which imports from sources found to be dumping have increased during the injury analysis period. As described above, goods from sources found to be dumping increased by more than 300 per cent between 2013 and 2016 and by more than 500 per cent between 2014 and 2016.⁹¹ The Commission has had regard to these increases in assessing material injury in this report (subsection 269TAE(1)(b)).

The second matter confirming the materiality of injury is the extent to which growth of the Australian industry's market share has been disrupted by dumping. As Nervacero observes,⁹² prior to the importation of dumped rebar in 2016 there is evidence of an incipient upward trend in the Australian industry's market share. The Commission considers that this upward trend is due in large part to imports subject to measures falling following investigations 264 and 300. The disruption of this upward trend by dumped rebar in 2016 indicates that the injury inflicted on the Australian industry is greater than the four per cent reduction in market share between 2015 and 2016; rather it seems more likely that, but for the dumping, the Australian industry's market share would have continued increasing. On that basis the Commission finds, consistent with the Ministerial Direction on Material Injury, that the loss of market share (including a reduction in likely growth absent dumping) would have been materially greater than four per cent. For example, if, absent dumping, the 2016 market share for goods found to be dumped had remained at their 2015 market share and that market share was instead captured by the Australian industry then the loss in market share would be eight per cent.

Nervacero misconstrues the causal link and non-attribution analysis request

Nervacero submission: Nervacero complains that the Commission has not responded to a number of examples of non-dumping factors listed in its application to the ADRP.⁹³

Commission comment: The Commission considers that ADRP clearly specified the non-attribution matters for the Commission to reinvestigate, namely claimed capacity constraints and claimed restrictive trade practices.⁹⁴ The Commission must conduct a reinvestigation in accordance with the requirements of the ADRP (subsection 269ZZL(2))

⁹¹ See Confidential Appendix 2 at sheet "Additional analysis for ADRP".

⁹² EPR 418 document 72 at page 2.

⁹³ EPR 418 document 72 at page 4.

⁹⁴ ADRP reinvestigation request at section 2.b.i.

and accordingly it is not at liberty to reinvestigate the other matters that Nervacero refers to.

Nervacero submission: Nervacero quotes verbatim the Commission's findings on OneSteel's capacity and finds the Commission's explanation of OneSteel's capacity and capacity utilisation variously perplexing,⁹⁵ does not understand it,⁹⁶ finds it not clear⁹⁷ and that it doesn't make sense.⁹⁸

Commission comment: The Commission's primary finding concerning OneSteel's capacity can be stated very simply: OneSteel's rebar production is not capacity constrained. Evidence of OneSteel's rebar capacity and rebar capacity utilisation has been verified by the Commission and is unequivocal; it would not be open to the Commission to make another finding in the face of that evidence. The Commission sets out and assesses that evidence in **Confidential Appendix 5**.

Nervacero submission: Nervacero calls the Commission's comments concerning restrictive trade practices a "frolic".⁹⁹ Nervacero considers that any claims made against OneSteel under the CCA are irrelevant to a consideration under subsection 269TAE(2A)(d);¹⁰⁰ rather, Nervacero argues:

- refusal to supply by OneSteel of "whatever magnitude and whatever intent" would restrict supply and reduce sales that would otherwise be made;¹⁰¹
- considerations of whether or not Australian produced rebar is available on normal commercial terms are misplaced when the issue is whether Australian produced rebar was "one way or the other" unavailable to a customer;¹⁰² and
- OneSteel "manipulated its market dominant position for its own ends" and, in circumstances where it operates at production and fabrication levels of the supply chain, "the implications of this are clear".¹⁰³

Commission comments:

- The Commission would reject Nervacero's expansive interpretation of restrictive trade practices in subsection 269TAE(2A)(d). To accept Nervacero's interpretation would, in effect, require Australian industry to supply directly to any person who demanded it regardless of whether or not it was commercial to do so; failing which the Australian industry would not be considered injured. The Commission does not

⁹⁵ EPR 418 document 72 at page 4.

⁹⁶ EPR 418 document 72 at page 5.

⁹⁷ EPR 418 document 72 at page 5.

⁹⁸ EPR 418 document 72 at page 6.

⁹⁹ EPR 418 document 72 at page 6.

¹⁰⁰ EPR 418 document 72 at page 6.

¹⁰¹ EPR 418 document 72 at page 6.

¹⁰² EPR 418 document 72 at page 7.

¹⁰³ EPR 418 document 72 at page 7.

consider that the legislature could have intended such a requirement; indeed such a requirement might itself inflict injury on the Australian industry.

- Nervacero has not provided any basis for its claim that OneSteel manipulated its market dominant position for its own ends, neither are the implications of it doing so clear in the circumstances that Nervacero alludes to. The Commission would prefer to proceed on the basis of the known facts rather than to embark on unfounded conjecture concerning OneSteel's intentions. Those known facts are set out in section 4.4.2.1, in particular that: there were instances of rebar shortage and price spikes during the relevant periods that caused transient supply issues for OneSteel; and OneSteel had substantial latent excess capacity in rebar production.

Nervacero submission: Nervacero quotes verbatim the section of the reinvestigation request concerning causal link and non-attribution and argues that the Preliminary Report fails to comply “adequately or at all” with any of the reinvestigation request.¹⁰⁴ Rather, Nervacero considers that the Preliminary Report “rebelliously defends the Commission against the valid concerns of the ADRP, and trenchantly sides with OneSteel”.¹⁰⁵

Commission comment: Nervacero does not address or identify the specific matters in the reinvestigation that it claims the Commission did not comply with, nor does it give a reason why the Commission's assessment in the Preliminary Report fails to comply. Nervacero's resort to intemperate language without appeal to reason or evidence gives the Commission no cause to revisit its assessment.

NIP calculation

Nervacero submission: Nervacero claims that the NIP calculation requires “more than a simple mathematical exclusion” of export volumes sold by Nervacero to OneSteel.¹⁰⁶ Rather, Nervacero argues, the purpose of the “exclusion” is to account for the non-injurious exports of Nervacero in the calculation of the NIP.¹⁰⁷ Nervacero proposes implementing its preferred “exclusion” by calculating a combined weighted average by volume of: normal values for Nervacero's export sales excluding sales to OneSteel; and export prices of Nervacero's sales to OneSteel.¹⁰⁸ Nervacero also reiterates submissions made in its application to the ADRP.¹⁰⁹

Commission comments:

- The Commission considers that what Nervacero describes as “more than a simple mathematical exclusion” is no exclusion at all. Rather it very much *includes* export volumes sold by Nervacero to OneSteel. The ADRP's reinvestigation request expressly requires the Commission to exclude OneSteel's own imports from

¹⁰⁴ EPR 418 document 72 at pages 7-8.

¹⁰⁵ EPR 418 document 72 at page 8.

¹⁰⁶ EPR 418 document 72 at page 9.

¹⁰⁷ EPR 418 document 72 at page 9.

¹⁰⁸ EPR 418 document 72 at page 9.

¹⁰⁹ EPR 418 document 72 at pages 9-10.

Nervacero.¹¹⁰ The Commission must conduct a reinvestigation in accordance with the requirements of the ADRP (subsection 269ZZL(2)) and accordingly it is not at liberty to adopt Nervacero's preferred NIP calculation that includes OneSteel's own imports from Nervacero.

- In any event the Commission considers that Nervacero's preferred NIP calculation is wrong in principle. The Commission would not include export prices in a calculation of normal value (as Nervacero urges). The Commission considers, if anything, that Nervacero's export prices to OneSteel should rather be excluded from Nervacero's export price for the purposes of calculating its dumping margin. The Commission observes that this would reduce Nervacero's export price by 1.1 per cent,¹¹¹ which in turn would increase Nervacero's dumping margin.
- The Commission considers that the further consideration urged by Nervacero of additional submissions it made in its application to the ADRP would be outside the scope of the reinvestigation. On that basis the Commission is not at liberty to address those matters (subsection 269ZZL(2)).

4.4.4.2 OneSteel submission

OneSteel made a submission addressing a number of the Commission's preliminary findings in the Preliminary Report. A public record version of OneSteel's submission is available on the EPR.¹¹²

Non-attribution assessment

OneSteel submission: OneSteel observes that capacity factors do not appear in the non-attribution factors in subsection 269TAE(2A) but rather appear in the relevant economic factors in subsection 269TAE(3). The Commission may have regard to the relevant economic factors in determining whether injury has been caused to the Australian industry (subsection 269TAE(1)(g)). On that basis, OneSteel argues, capacity utilisation may be used to indicate the existence, not the cause of injury¹¹³ and so the fact that OneSteel supplies less than 100 per cent of the market does not constitute another non attribution factor.¹¹⁴

Commission comment: The Commission observes that the non-attribution factors in subsection 269TAE(2A) are not exhaustive. Although not the case in the current circumstances, there may be circumstances where a capacity constraint is causing injury that cannot be attributed to dumping. Accordingly the Commission would not accept OneSteel's argument in this respect.

OneSteel submission: OneSteel observes that there are a number of restrictive trade practices defined in the CCA and that none of the practices attributed to OneSteel by

¹¹⁰ Reinvestigation request at page 6.

¹¹¹ Confidential Appendix 3 at worksheet "Export price".

¹¹² EPR document number 71.

¹¹³ EPR 418 document 71 at page 5.

¹¹⁴ EPR 418 document 71 at page 6.

Nervacero falls within those definitions.¹¹⁵ OneSteel argues in any event that a commercial enterprise would not embrace restrictive trade practices and reduce competition with the objective of injuring itself.¹¹⁶

Commission comment: The Commission agrees that a commercial enterprise would not embrace restrictive trade practices and reduce competition with the objective of injuring itself. However the Commission understands that the underlying economics of many restrictive trade practices is that an enterprise or enterprises engaging in a restrictive trade practice will restrict output in order to increase prices and profits.¹¹⁷ The enterprises benefit from higher profits but the effect of subsection 269TAE(2A) would be that the reduction in output attending the restrictive trade practice must not be attributed to injury from dumping. Accordingly the Commission would not accept OneSteel's submission in that regard.

Volume effects

OneSteel submission: OneSteel queries whether the Commission's analysis of volume effects in REP 418 failed to meet the requirements of Article 3.2 of the Anti-Dumping Agreement.¹¹⁸ OneSteel cites WTO jurisprudence to the effect that an investigating authority must *consider* whether there has been a significant increase in dumped imports however there is no requirement for an express *finding* or *determination* that the increase was significant.¹¹⁹ Concerning duplicating elements of such considerations in the causation analysis OneSteel cites the Panel in *China – Cellulose Pulp*.¹²⁰

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.

Commission comment: The Commission notes the views of the WTO Panel in *China – Cellulose Pulp* however it accepts that its analyses of volume effects in REP 418 was, at the very least, not clear. In this report the Commission has revisited its analyses and reviewed its conclusions in light of the corrected analyses and found both that the increase in dumped imports was significant and that those dumped imports caused material injury to the Australian industry.

NIP calculation

OneSteel submission: OneSteel observes that the change to Nervacero's NIP is primarily determined by excluding the weighting of an important category of the goods, namely

¹¹⁵ EPR 418 document 71 at page 6.

¹¹⁶ EPR 418 document 71 at page 6.

¹¹⁷ See for example *Visy Paper Pty Ltd v ACCC* [2003] HCA 59, per Kirby J at [59].

¹¹⁸ EPR 418 document 71 at page 4.

¹¹⁹ EPR 418 document 71 at pages 4-5.

¹²⁰ *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada: Report of the Panel*, WT/DS483/R at [7.44] cited in EPR 418 document 71 at page 5.

20 mm rebar in coils.¹²¹ Contrary to the Commission's statement that OneSteel sets price according to the lowest price in the market, OneSteel sets price to an individual customer according to the lowest price offered to that customer.¹²² OneSteel considers that the only method to set the NIP proposed by the ADRP would be to set the NIP for 20 mm rebar coils, separate to other models of rebar; however OneSteel notes that the Federal Court has precluded that possibility.¹²³ OneSteel notes that Nervacero could in any event export 20 mm rebar coils to Australian customers other than OneSteel but the change to the NIP implicitly assumes that this would not occur.¹²⁴ On that basis OneSteel considers that the change to the NIP potentially has a result at odds with section 269TACA.¹²⁵

Commission comment: OneSteel raises a number of issues with calculating NIP in this case (and more generally); however the Commission considers it is not clear how these issues might be addressed in practice. In any event the Commission is subject to the requirements set out by the ADRP in its reinvestigation request and would not be at liberty to calculate a NIP to address issues raised by OneSteel. The Commission would observe that the change in calculation required of the Commission in the current matter has not made a significant change to Nervacero's NIP.

4.4.4.3 The Commission's assessment of matters raised in submissions

Nervacero and OneSteel did not provide any reason for the Commission to change its preliminary findings in the Preliminary Report for the reasons set out in its comments on submissions above in sections 4.4.4.1 and 4.4.4.2.

However the Commission found that Nervacero's submissions highlighted matters that would confirm some of the Commission's preliminary findings, in particular that goods from sources found dumping increased substantially in the investigation period compared to earlier years in the injury analysis period (subsection 269TAE(1)(b)) and that the Australian industry's growth in market share during the injury analysis period was substantially disrupted by dumping (see analysis above at section 4.4.4.1).

¹²¹ EPR 418 document 71 at page 7.

¹²² EPR 418 document 71 at page 7.

¹²³ EPR 418 document 71 at page 7.

¹²⁴ EPR 418 document 71 at page 7.

¹²⁵ EPR 418 document 71 at page 7.

APPENDICES

Confidential Appendix 1	Commission's assessment of confidential pricing information provided by OneSteel
Confidential Appendix 2	Power Steel cost analysis
Confidential Appendix 3	Assessment of Power Steel's claims concerning use of 12 month weighted average billet costs
Confidential Appendix 4	Analysis underlying the Commission's assessment of volume injury
Confidential Appendix 5	Commission's analysis of OneSteel's confidential capacity and capacity utilisation data
Confidential Appendix 6	The Commission's recalculation of the NIP for Nervacero