23rd May 2016

Anti-Dumping Review Panel
Industry and Trade Legal Section
Department of Industry, Innovation and Science
Cnr Bunda & Akuna Street
Canberra City 2600
GPO Box 9839
Canberra ACT 2601

By email: ADPR@industry.gov.au

Dear Sir/Madam

Application for review of the Assistant Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 301

Please find attached for your consideration Vicmesh Pty Ltd's application for the review of the Assistant Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 301 - ***(Application).***

The attached Application details the grounds on which the Assistant Minister's decision is not the correct or preferable decision.

If you have any questions in respect of this Application or would like to discuss any aspect of the Application, please do not hesitate to contact me on +61387956666.

Yours faithfully

Richard Hosking
Director

VICMESH PTY LTD
ABN 74 827983713

Office/Factory 80-84 Ventura Place Dandenong Sth 3175 Phone 8795 6666 Fax 8795 6688
Narre Depot 6/33-35 Narre Cranbourne Rd Narre Warren 3820 Phone 9704 2755 Fax 9704 2766
Shepparton Depot 2 Fordyce Street Shepparton 3630 Phone 58217940 Fax 58218740
Bendigo Depot 6 Fitt Court Bendigo 3550 Phone 03 5442 7634 Fax 03 5442 4534

23rd May 2016

Authority to Act and Obtain Information

I, Richard Hosking, Director of Vicmesh Pty Ltd of 80-84 Ventura Place, Dandenong South, Victoria 3175, authorise Jeffrey Waincymer, Trade Consultant, and any external counsel engaged to act on behalf of Vicmesh Pty Ltd to submit its application to the Anti-Dumping Review Panel to review Anti-Dumping Commission Case 301 ***(Application).***

I also authorise Jeffrey Waincymer and staff to request and receive information and documentation in relation to Vicmesh Pty Ltd's Application.

This authority to act and obtain information is provided for the duration of the Application, review by the Anti-Dumping Review Panel ***(Review)*** and any further actions in respect of the Application and Review.

……
Richard Hosking
Director

VICMESH PTY LTD
ABN 74 827983713

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Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

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

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

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

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

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

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

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

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

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: Vicmesh Pty Ltd

Address: 80-84 Ventura Place, Dandenong South, 3175, Australia

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

2. **Contact person for applicant**

Full name: Richard Hosking

Position: Director

Email address: rhosking@vicmesh.com.au

Telephone number: +61 3 8795 6666

3. **Set out the basis on which the applicant considers it is an interested party**

The applicant is the importer subject to the duty.

4. **Is the applicant represented?**

Yes ~~**No**~~

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

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

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

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

☑ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

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

The goods the subject of the application are:

> "Hot rolled rods and coils of steel, whether or not containing alloys, that have maximum cross sections that are less than 14 mm.
>
> The goods covered by this application include all steel rods meeting the above description regardless of the particular grade or alloy content.
>
> Goods excluded from this application include hot-rolled deformed steel reinforcing bar in coil form, commonly identified as rebar or debar, and stainless steel in coil."

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

The goods are classified in the following paragraph sub-headings in Schedule 3 of the Customs Tariff Act 1995:

> 7213.91.00 (statistical code 44), and
>
> 7227.90.90 (statistical code 42) (as from 1 July 2015 statistical code 02).

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

Anti-Dumping Notice No 2016/47 attached.

9. **Provide the date the notice of the reviewable decision was published**

22 April 2016.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

See attached.

PART C: GROUNDS FOR THE APPLICATION

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

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

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

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

See attached.

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

The correct or preferable decision was to not publish a dumping duty notice. In the alternative, the Minister should have called for a reinvestigation.

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

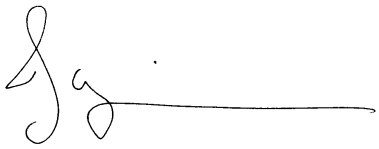
    Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The proposed decision would lead to a revocation of the dumping duty notice and would no longer render Vicmesh Pty Ltd liable for excessive rates of dumping duty. The alternative proposed decision, calling for a reinvestigation, should if properly conducted, lead to the same outcome.

PART D: DECLARATION

The applicant's authorised representative declares that:

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

Signature: 

Name: Jeffrey Waincymer

Position: Trade Consultant

Organisation: Self Employed

Date: 23/05/2016

PART E: AUTHORISED REPRESENTATIVE

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

Provide details of the applicant's authorised representative

Full name of representative:	Jeffrey Waincymer
Organisation:	Self Employed
Address:	45 Victoria Road North, Malvern
	Melbourne 3144
Email address:	jeffreywaincymer@gmail.com
Telephone number:	+61 418 147 629

Representative's authority to act

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

See attached.

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

Signature:……..

(Applicant's authorised officer)

Name:

Position:

Organisation

Date: / /

Customs Act 1901 – Part XVB

Steel rod in coils

Exported from the People's Republic of China

Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG (1) and 269TG (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of steel reinforcing bar ("the goods"), exported to Australia from the People's Republic of China (China).

The goods the subject of the investigation (the goods) are:

> *Hot rolled rods in coils of steel, whether or not containing alloys, that have maximum cross sections that are less than 14mm.*
>
> *The goods covered by this application include all steel rods meeting the above description regardless of the particular grade or alloy content.*
>
> *Goods excluded from this application include hot-rolled deformed steel reinforcing bar in coil form, commonly identified as rebar or debar, and stainless steel in coils.*

The goods are classified to the following tariff classifications in Schedule 3 of the *Customs Tariff Act 1995*:

- Tariff subheading 7213.91.00 with statistical code 44;
- Tariff subheading 7227.90.90 with statistical code 42 (as of 1 July 2015, statistical code 02)

The Commissioner reported his findings and recommendations to me in *Anti-Dumping Commission Report No. 301* (REP 301), in which he outlines the investigation carried out and recommends the publication of a dumping duty notice in respect of the goods. I have considered REP 301 and accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact and law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings.

The method used to compare export prices and normal values to determine whether dumping has occurred and to establish the dumping margin was to compare the weighted average of export prices with the weighted average of corresponding normal values over

the investigation period pursuant to subsection 269TACB(2)(a) of the *Customs Act 1901* (the Act). The normal values were established under subsections 269TAC(2)(c) and 269TAC(6) of the Act. The export prices were established under subsections 269TAB(1)(a), 269TAB(1)(c) and 269TAB(3) of the Act.

Particulars of the dumping margins that have been established in respect of the goods exported from China by the following exporters are set out in the table below.

EXPORTER / MANUFACTURER	DUMPING MARGIN
Hunan Valin Xiangtan Iron & Steel Co. Ltd.	44.1%
Jiangsu Shagang Group	37.4%
Uncooperative and All Other Exporters	53.1%

I, KAREN LESLEY ANDREWS, Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science,[1] have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 301.

I am satisfied, as to the goods that have been exported to Australia from China, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) of the Act, I DECLARE that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (the Dumping Duty Act) applies to:

(i) the goods; and

(ii) in accordance with subsections 45(2), 45(3A)(b) and 269TN(2) of the Act, like goods that were exported to Australia for home consumption on or after 2 December 2015, which is when the Commonwealth took securities following the Commissioner's Preliminary Affirmative Determination published on 27 November 2015 under section 269TD of the Act, but before the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused and is being caused. Therefore under subsection 269TG(2) of the Act, I DECLARE that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from China.

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped

[1] On 20 September 2015, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Science

imports on prices in the Australian market in the form of price undercutting and the consequent impact on the Australian industry including price suppression, price depression, less than achievable profits and profitability, reduced employment, and reduced value of assets employed in the production of rod in coils.

In making my determination, I have considered whether any injury to the Australian industry is being caused by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

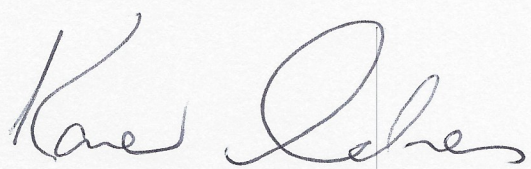
Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures are applied to 'goods on the water' is available in ACDN 2012/34, available at www.adcommission.gov.au.

REP 301 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au

Enquiries about this notice may be directed to the case manager on telephone number +61 3 8539 2409, fax number +61 3 8539 2499 or email at operations4@adcommission.gov.au.

Dated this 22nd day of April 2016.



KAREN LESLEY ANDREWS
Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science

NON-CONFIDENTIAL

ADRP Submission Re Final Report No. 301

Rod in Coil from the People's Republic of China

1. Anti-dumping Notice 2016/47 , dated 22 April 2016, announced a decision by the Assistant Minister for Science and the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Assistant Minister) to accept the recommendation from the Anti-Dumping Commission (the Commission) in Final Report 301 and declare that s 8 of the *Customs Tariff (Anti-Dumping) Act 1975,* applies to certain rod in coil exported to Australia from the People's Republic of China. This application seeks a review of that decision by ADRP on the following grounds:

Ground 1: The Commission and Assistant Minister erred in concluding that there was a particular market situation that justified ignoring Valin's actual cost to produce billet.

2. Final Report 301 (paragraph 1.4) concludes that "a particular market situation exists in the Chinese iron and steel markets due to significant Government of China (GoC) influence. The Commissioner considers this has led to prices in individual product markets within the Chinese economy, such as RIC, to be significantly distorted." It goes on to state that "because of the operation of s 269TAC(2)(a)(ii), the Commissioner has not had regard to the domestic price of the RIC in China for the calculation of normal value."

3. This conclusion implies a valid finding of fact that a particular market situation exists in the iron and steel markets; then implies a valid finding of fact that this then flows through to distort prices in the domestic RIC market to a sufficient degree to also constitute a particular market situation in the RIC market; then implies a valid finding that any such distortion cannot be accounted for by an appropriate adjustment, but should instead lead to the total rejection of domestic RIC prices; and overall, implies that the approach to law and evidence was valid under Australian law and Australia's international obligations. For reasons outlined below, the Commission's conclusion fails on each of these elements.

4. A number of documents were relied upon to identify the alleged market situation and the reasons why this rendered domestic prices unsuitable. OneSteel's application identified policies and plans that outline the Chinese government's aims and objectives for the Chinese steel industry and implementation measures under such policies and plans.[1]

5. OneSteel relied upon:

   - National Steel Policy (2005).
   - Blueprint for the Steel Industry Adjustment and Revitalisation (2009).

[1] OneSteel Application pages 61-2.

- National and Regional Five Year Plans and Guidelines.
- The Twelfth Five Year Plan: Iron and Steel (2011-2015 Development Plan for Steel Industry).
- Value Added Tax (VAT) arrangements.

6. In addition, subsidy programs were alleged but were not particularised.[2] That was then contradicted by the fact that the application noted further in section C-1 that it was not a countervailing request and that as a result, details of subsidies did not need to be provided.[3] That concession alone should mean that subsidy programs should not have been considered as an alleged basis for a finding of a particular market situation. Nevertheless, vague references to subsidies do permeate the Commission's findings and hence need to be addressed in this submission. For reasons outlined further below, it is also appropriate to note the countervailable subsidy programs identified by OneSteel in a related application for countervailing measures against Chinese rod and coil, which may have been inappropriately considered in this case.[4]

7. Before considering the evidence and reasoning relied upon by the Commission in making its recommendations to the Assistant Minister, it is first appropriate to consider the legal provisions that govern the entitlement to ignore actual cost in the exporting country by reason of an alleged market situation in the relevant product market.

Legal provisions

8. It is clear that Australia's legislation, regulations and Anti-Dumping Manual are all intended to be fully compliant with Australia's WTO obligations, in particular under the WTO Anti-Dumping Agreement.

9. China's protocol of accession to the WTO, which allows for certain protectionist measures in anti-dumping investigations, does not apply in Australia's case. Australia acknowledged China as an equal WTO trading partner and recognised its full market economy status in paragraph 2 of the *Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People's Republic of China.*

10. Where the Anti-Dumping Agreement (ADA) is concerned, Article 1 indicates that anti-dumping measures shall be applied only under the circumstances provided for in Article VI of GATT 1994 and in accordance with the provisions of ADA. In addition, Article 18.1 provides that no specific action against dumping of exports from another member can be taken except in

[2] OneSteel Application page 62.
[3] OneSteel Application page 75.
[4] Case 331 Application at pages 61-63.

accordance with the provisions of GATT 1994, as interpreted by that Agreement.

11. Where Article 2.2 ADA is concerned, the gateway requirement before a decision-maker can ignore the requirement to base normal value on domestic sales in the export country, is to identify a "particular market situation" that leads to the conclusion that "such sales do not permit a proper comparison."

12. Article 2.2 ADA then indicates that in such circumstances, either a comparable price of a like product when exported to an appropriate third country should be used, or alternatively, normal value is to be based on "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (emphasis added).

13. The Commission has rejected the first method which references third country export prices, but has not properly followed the second, ignoring the actual cost of production of the billet by the exporter Hunan Valin (Valin) and instead, has applied a surrogate billet price from Latin America, without be entitled to do so under ADA.

14. In particular, Article 2.2.1.1 indicates that for the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter provided that they are in accordance with generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

15. There has been no suggestion that Valin operates other than generally accepted accounting records. Furthermore, the records reasonably reflect the actual costs.

16. Alternative methods are available for calculating administrative, selling and general costs, but not for actual costs of input such as billet.

17. Australian legislation gives effect to the WTO provisions through s 269TAC(2)(a)(ii). This stipulates that where the Minister is satisfied that because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining the normal value in the ordinary manner, the Minister may determine the normal value under s 269TAC(2)(c) or (d). Sub-section (c) provides for the cost of production method, while (d) provides for use of third country export prices.

18. Neither the WTO Agreement nor Australia's legislation, further define what is meant by a relevant market "situation". On plain meaning considered in context, such a situation under Australian law must be one that renders sales in that market as being "not suitable for use in determining the normal value in the ordinary manner …". In the context of WTO obligations, lack of suitability only arises where a proper comparison cannot be made by reason of the market situation.

19. This also needs to be considered in the context of adjustment obligations under Article 2.4 ADA and sections 269TAC(8) and (9) of the Australian legislation.

Prices that can be adequately compared after an adjustment, cannot lead to a contrary conclusion that a proper comparison cannot be made in relation to them.

20. Section 269TAC(2)(a)(ii) was considered by the Federal Court of Australian in *Enichem Anic Sil v Anti-Dumping Authority* (1992) 39 FCR 458 ("Enichem"), *Hyster Australia Pty Ltd v Anti-Dumping Authority (No 2)* ("Hyster") (1993) 40 FCR 364 and *La Doria Di Diodata Ferraioli Spa v Beddal, Minister for Small Business Construction and Customs* unreported, 11 June 1993, NG541 of 1992 ("La Doria"). The Federal Court clearly considered it to be a question of degree in indicating that for a particular market situation to arise, there should be some factor such as one which "so distort(s) the market that arm's length transactions made in the ordinary course of trade are rendered unsuitable to give true normal value in the country of export." In *Hyster,* Hill J considered that suitability "must mean something different to lack of arms length sales.."

21. In *La Doria,* Lee J stated that "(d)epressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of subs 269TAC(1)." The matter went on appeal to the Full Court. Black CJ and Lockhart J held the finding of Lee J was overturned, the Full Court noted that "(t)he nub of this case is whether it is correct to say, as the primary judge did, that there was no relevant nexus between the payment of the production aid by the Italian government and the price paid for canned tomatoes sold in the ordinary course of trade for home consumption in Italy …".[5] The court did not purport to alter the above comments as to the legal test, but instead stated:

> "The exercise in which the decision-maker must engage under section 269TAC(2)(a)(ii) is essentially a practical one. It was for the Authority and later the Minister to determine, as a matter of fact, the true nature and consequence of payments of production aid in the EEC. The Authority went about its task to determine this question. It determined that the payment of the production aid distorted domestic selling prices to the extent that canned tomatoes were being consistently sole at prices below the production and selling costs of the canners. The Authority therefore considered that sales in Italy were not suitable for use in assessing normal value under section 269TAC(1) of the Customs Act as provided for in section 269TAC(2)(a)(ii).
>
> 39. In our opinion this approach and the findings of the Authority have not been shown to be erroneous in law."

22. It should also be noted that the finding was that the domestic sales were below cost, a matter separately articulated in the legislation and the Anti-Dumping Agreement as a reason to ignore domestic prices for normal value purposes.

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[5] *Minister of Small Business, Construction and Customs, Anti-Dumping Authority, Comptroller-General of Customs v La Doria Di Diodata Ferraioli SPA* [1994] FCA 904, para 35.

There was simply no suggestion that similar facts pertained in the current investigation.

23. It should also be observed that the *Enichem* decision was itself a Full Federal Court decision where the lead judgment of Hill J was supported by Gummow and O'Connor JJ. Once again, nothing was suggested by the Full Federal Court in *La Doria* to the effect that such court wished to alter the approach and interpretation of the provisions in issue.

24. In *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*[6] Nicholas J acknowledged the use for mesh in the statutory interpretation exercise before him, to refer to the key provisions in the relevant international agreements.[7]

25. The Commission's Dumping and Subsidy Manual (November 2015) refers to one possible factor as being whether the prices are artificially low. It then references government influence on prices or costs as one possible cause of such artificially low prices. It suggests a test of whether a government's involvement in the domestic market has "materially distorted competitive conditions." Such observations cannot supplant legislative provisions or Australia's international obligations, although as is demonstrated below, this suggested standard is not satisfied in any event.

26. The comment in the Manual is also inconsistent with the views of the predecessor to ADRP, the Trade Measures Review Officer (TMRO), in various Reports. In a report on Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice on Hollow Structural Sections from China, Korea, Malaysia, Taiwan and Thailand, 14 December 2012, (TMRO HSS Review) the TMRO cited the above comments from *Enichem.*[8]

27. At paragraph 21 of that Report the TMRO observed:

> "In my view, the mere existence of government involvement in the market does not automatically engage paragraph 269TAC(2)(a)(ii), because such involvement or control does not necessarily distort the market to the extent that the domestic prices are made unsuitable for use under section 269TAC(1)."

28. The TMRO engaged in a detailed analysis of the market situation provisions. He observed that in the absence of a statutory definition, the proper meaning is a question of statutory interpretation.[9]

29. He also reiterated the views of Lee J from *La Doria* and then considered "it will be a matter for a case by case analysis of distorting factors.."[10]

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[6] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870.
[7] Ibid, para 10.
[8] Decision of the Trade Measures Review Officer – Review of a Termination Decision 177 Concerning Certain Hollow Structural Sections Exported to Australia from Thailand (31 August 2012), para 17.
[9] TMRO HSS Review para 41.
[10] TMRO HSS Review para 63.

30. The ADRP in its review of decision regarding dumping duties and countervailing duties for zinc coated (galvanised) steel and aluminium zinc coated steel exported from the People's Republic of China 15 November 2013, considered that there was a difficulty in adopting the test of Lee J from *La Doria*, given that Justice Lee's decision was overturned on appeal. As noted above, nothing in the appeal court commentary purported to change the legal test. Instead, it considered that a clear finding of a production subsidy that led to goods being sold below cost, was a particular market circumstance satisfying s 269TAC(2)(a)(ii) and that such a finding was not able to be attacked on judicial review.

31. The same ADRP Report looked at the question of the use of benchmark prices from foreign jurisdictions, not mentioned in the Anti-Dumping Agreement or the domestic legislation. The ADRP considered that the approach taken by Customs was supported by the decision of Justice Nicholas in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*.[11]

32. In the current investigation, the Commission saw the question to be answered as "whether the relevant policies operate in a manner which:

> "(a) leads to a distortion of competitive market conditions in relation to the subject goods such that domestic sales are unsuitable for the purposes of determining normal value; and
>
> (b) affects the conditions of commerce related to the production or manufacture of like goods such that the records of exporters cannot be relied upon to reasonably reflect competitive market costs associated with production in accordance with the provision of subsection 43(2) of the Regulations." (emphasis added)

33. A number of important gateway elements can be expressly or impliedly identified from the above-mentioned sources:

> (a) If the particular market circumstance of concern is government interference in some aspect of the market mechanism, there must at the very least be a clear identification of the nature of that interference and why it distorts the particular market.
>
> (b) Secondly, it is not any interference that suffices, but instead, it must be one that is material in distortive effect. This means that even if there is some influence, it is then necessary to consider the effect of that influence and the extent of the distortion.
>
> (c) Even if the influence can be considered material under such an analysis, that itself is still not sufficient, as that interference must render the domestic commercial data "unsuitable" for

[11] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 cited by ADRP at para 62, page 15.

normal value purposes in the context of interference with a proper comparison.

(d) What is clear from the last observation is that if there is some interference that can be adjusted for, that is the proper approach. Records are thus not unreliable, simply because they include a true payment for one input element that the Commission asserts is artificially low because of government involvement.

34. For reasons outlined below, the Assistant Minister's decision fails on each of the above-mentioned required criteria.

Ground 1.1: The Commission failed to properly apply required evidentiary standards

ADA evidentiary obligations

35. For reasons outlined below, it is argued that the Commission's decision to find a particular market situation for RIC in China is wrong in law and fact. Within its particular market situation analysis, a number of evidentiary issues arose which are alleged to be subsidiary violations of the Commission's mandate. It is argued below that the Commission used inappropriate evidence and evidentiary standards in its finding of a particular market situation, relying wrongly on irrelevant secondary sources and effectively shifting the burden of proof.

36. When the Commission then sought to calculate normal value by other means, it again breached evidentiary standards by ignoring Valin's input costs, plus its costs to make billet and instead, used Latin American prices for billet as a surrogate. The use of Latin American prices for billet had not been mentioned in the PAD or SEF. To compound the problem, the Commission used data on Latin American pricing that included freight, which would not be applicable to an integrated manufacturer like Valin, but failed to make appropriate adjustments, again by reason of the application of inappropriate evidentiary standards.

37. For reasons outlined below, it is argued that the Commission's decision to use Latin American prices is improper in law, is unreasonable on the facts and should have at most come with a range of necessary adjustments even if permissible. At this stage, an additional concern is the failure to allow interested parties the opportunity to respond to that post SEF change in methodology, hence denying them fundamental evidentiary rights and rendering the decision unreliable.

38. This section simply outlines the key provisions as to evidence, with arguments then outlined in the sections below dealing with the Commission's analysis of market situation and normal value.

39. Article 6.2 of the Anti-Dumping Agreement provides that throughout the investigation, "all interested parties shall have a full opportunity for the

defence of their interests." Of necessity such a full opportunity could only have been afforded if exporters and importers were made aware that post-SEF, the Commission intended to utilise Latin American prices for billet, rather than the exporter's own prices or costs to make.

40. Similarly, Article 6.4 ADA provides that the authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases …".

41. Article 6.6 ADA provides that except in the circumstances outlined in paragraph 6.8, the authorities shall satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based. Article 6.8 indicates that decisions may be made on the basis of the facts available when any interested party does not provide necessary information within a reasonable period.

42. This is subject to the provisions of Annex II of ADA. Article 18.7 ADA provides that the annexures to the Agreement constitute an integral part thereof. Annex II deals with best information available.

43. Paragraph 7 of that Annex indicates that if authorities have to base their findings on information from a secondary source, "they should do so with special circumspection." The paragraph indicates that "(i)n such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation."

44. In *Mexico – Anti-Dumping Measures on Rice*, the WTO Appellate Body stated:

> "The agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available' … Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'."[12]

The evidentiary burden

45. In addition to considering the appropriate test by which to employ s 269TAC(2)(a)(ii), it is also necessary to consider the proper evidentiary standards to apply. This has a number of elements, first, the evidentiary obligations on the applicant, second the relevance, if any, of the government in issue's failure to respond by way of a questionnaire, thirdly the investigatory

[12] *Mexico – Anti-Dumping Measures on Rice*, WT/DS295/AB/R (29 November 2005).

obligations on the Commission and finally, the proper attribution of the burden of proof and the proper identification of the requisite standard of proof.

46. As to the burden and standard, while there is legislation allowing for a market situation to be identified, there should be a strong onus on any applicant seeking to show that a market situation is of such significance that its domestic figures cannot be relied upon, even in cases where adjustments could be made to counter that interference, as mandated pursuant to the legislation and the Anti-Dumping Agreement.

47. The TMRO HSS Review pointed to the importance of being able to identify the impact of a particular measure, on domestic prices.[13] Unless some attempt is made to calculate the impact and to identify its materiality, the Commission would not be in a situation where it could legitimately conclude that domestic prices are "unsuitable". The TMRO stated that what is required is "concrete evidence of the implementation of governmental policies and their effect in the market, such as the generation of an evidently artificial domestic price. Only then, in my view, would it be possible to form a defensible view that it was more likely than not that a market situation of the requisite type had arisen."[14]

48. In speaking of the evidentiary threshold in the current enquiry, the Commission uses unclear language that at least implies correctly that the burden is on the party seeking to assert a market situation. The Commission considered it to be a "positive test", and that the decision maker must be "satisfied" that the situation identified renders the sales not suitable for normal value purposes. While it was proper to then note that the evidence does not have to be "conclusive", it was unhelpful for the Commission to say that instead, "it must be relevant and reasonably reliable".[15] At the very least, it should on balance be the dominant evidence. Relevant and reasonably reliable evidence may be outweighed by other relevant and reliable evidence, in which case it cannot justify the conclusions reached.

49. In addition to these comments about the evidentiary burden, when it comes to looking at what the Commission actually did, it does not appear that the Commission has in fact applied the appropriate standard of proof as it itself contemplated. In any event, when ADRP considers all of the relevant information, a contrary conclusion should be preferred.

The lack of a questionnaire from GoC

50. One particular concern in the Commission's approach is what appears to be an effective reversal of the burden of proof by reason of the Commission's attitude to the decision by the Government of China not to respond by way of a questionnaire.

[13] TMRO HSS Review para 97.
[14] TMRO HSS Review para 94.
[15] Final Report 301, page 54.

51. It is a wholly inappropriate methodology for the Commission to effectively see the lack of response by the Chinese government, as entitling the Commission to rely on information from previously completed investigations which looked at the use of export taxes and export quotas on key inputs.[16] The following sections outline the problems with the information utilised and the conclusions sought to be drawn from it. The point to be made at this stage is that both the applicant and the Commission failed to investigate readily available material, which cannot be justified on any basis and certainly not by the decision by the Government of China not to respond by way of a questionnaire.

52. Most importantly, it would be a failure to undertake its legislatively mandated investigatory task, for the Commission to simply refer back to findings it made in previous reports. At most it could consider what material was to hand in those other investigations, then consider the currency of that material and evaluate its utility in the context of the distinct evidence presented on this occasion in relation to a different product and a different time period. Whether or not the Government of China (GoC) provides a questionnaire response can have no bearing on this required methodology.

53. The same is the case with the application itself. The applicant has purported to research the Chinese regulatory framework to assert that there is a particular market situation. It either does or does not have access to material indicating the detail of governmental actions, such as current export taxes. Such material is readily available.

54. The Commission itself could either look for such information or instead, demand that the applicant do so in order to meet its burden of proof. To instead imply that a foreign government against whom an allegation is made, must respond by way of a questionnaire, otherwise unrelated case findings will be applied against it, improperly shifts the effective burden of proof and makes any allegation presumed true until negated by the government targeted. That goes completely against the evidentiary requirements under the WTO Anti-Dumping Agreement.

55. The unrelated case findings also involve irrelevant time periods. The Commission has referred to reports published in 2013, dealing with investigation periods much earlier than this case, and wrongly presumes that similar rules apply currently. This is expanded on further below.

56. For the Commission to raise concerns about the failure of GoC to respond to a questionnaire is particularly problematic in this case, given the readiness with which the Commission considered its findings in other investigations, some of which clearly identified the Government of China's responses to allegations in relation to various national plans and subsidy arrangements. If it was appropriate for the Commission to consider such other secondary material, it should have included consideration of the responses of the Government of China's through those investigations and addressed them specifically in this enquiry.

[16] Final Report 301, page 64.

57. Numerous detailed submissions have been provided by the Government of China in a range of steel cases, all of which are relevant to the arguments thought valid by the applicant and the Commission.[17] For example, the Commission well knew that it had a very detailed submission from the Government of China in the rebar case, Submission No 26, which addressed in detail, the attempted application of alleged subsidies in the anti-dumping inquiry No 300. In one case a detailed report by eminent economists sought to analyse the conditions in the Chinese steel market. The evidence of Professor Drysdale and two colleagues from the Australian National University was submitted under a position paper of the Government of China on 9 January 2013 in relation to the investigation of countervailing duties and anti-dumping duties on Plate Steel from China.

58. Previous responses on behalf of the Government of China have also pointed out how onerous continued questionnaires have been, in particular calling for information about numerous alleged subsidy programs and plans over very long time periods, commonly far beyond those mandated in anti-dumping investigations.[18]

59. It is important to understand that no adverse inferences are allowed for under the WTO ADA. Instead, if information considered necessary is not provided, then determinations may be made on the basis of "facts available". That is a reference to evidence and not conclusions from previous reports and certainly not from reports in other jurisdictions, on other products and over other time periods.

60. In addition, whether an interested party responds or not, cannot affect issues of the burden and standard of proof. The applicant is still required to have presented a case, which after proper investigation by the Commission, including consideration of all favourable and unfavourable facts, on balance supports an anti-dumping measure.

61. The Commission's own investigatory obligations also do not change simply because one interested party chooses not to repeat detailed answers, that were not accepted as persuasive on other occasions. Article 6.6 of ADA stipulates that subject to paragraph 6.8, "the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Paragraph 3 of Annex II indicates that information should be taken into account, inter alia, if "verifiable …". The Commission would have access to a vast amount of material that can identify the nature of China's alleged subsidy regimes and plans. At the very least, the Commission could have looked to the notifications made by the Government of China to the WTO.

62. The Commission has based its findings in part on Report 198 published on 19 December 2013, which repeated the findings in Report 193 made by the

[17] See for example http://www.adcommission.gov.au/cases/documents/1236-Submission-ForeignGovernment-GovernmentofChina.pdf; http://www.adcommission.gov.au/cases/documents/004-Submission-ForeignGovernment-MOFCOM-PRC.pdf

[18] See for example the submission of Moulis Legal, 17 November 2011 in relation to the Hollow Structural Sections investigation.

Commission's predecessor agency, the Australian Customs and Border Protection Service ("Customs"). As the GoC Submission 26 pointed out, Customs' findings were overturned by ADRP and the Minister removed subsidy duties in relation to certain programs as from 20 February 2014. It is clearly inappropriate to fail to address the ADRP findings and the then Minister's response to those findings under some supposed entitlement to consider the best available evidence.

63. As a further example, GoC's submission 26 sets out in great detail, local laws directed towards ensuring that goods are not sold at less than their fair market value. If the Commission wished to reject such assertions, it needed to address them specifically and identify competing evidence that is to be preferred.

Evidence utilised

64. In addition to in effect erroneously drawing adverse inferences from the failure of the Government of China to respond to a questionnaire in this investigation, the Commission has also relied on a range of irrelevant and prejudicial material. In various sections below, it is clear that the Commission has also drawn inconsistent conclusions from the evidence before it. While ADRP does not concern itself with procedural errors per se, where such errors undermine the evidence relied upon and in turn the conclusions dependent upon such evidence, they can properly lead to the conclusion that the evidence was insufficient to justify the conclusions drawn under a merits style review. Such considerations are equally valid with respect to the ADRP's powers to recommend a re-investigation or call for further work from the Commission.

65. The following subsections deal further with the evidence relied upon by the Commission and expand upon the above criticisms.

The application

66. While the Commission was entitled to rely on the application, that document simply did not contain any meaningful detail as to the various actions of the Government of China that were alleged to have distorted the domestic market to a degree that rendered domestic prices unsuitable for normal value purposes. As noted above, a contextual reading of the application should show that subsidy issues were not alleged.

67. Once again, ADA provides direction. Article 6.6 of ADA stipulates that subject to paragraph 6.8, "the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Paragraph 3 of Annex II indicates that information should be taken into account, inter alia, if "verifiable …" The obligation is then to verify it.

The use of findings from earlier Commission reports

68. The Commission was then in error when it sought to rely on its own conclusions in previous investigations as to different products during different time periods.

69. The Commission refers to a number of previous reports in support of its allegation that certain types of subsidies have been provided and that even if they do not correspond with the investigation period, they contribute to the state of the Chinese steel industry at the relevant time. The Commission refers to Report No 198 (2013): Dumping of Hot Rolled Plate Steel Exported from the People's Republic of China, Republic of Indonesia, Japan, the Republic of Korea and Taiwan, and Subsidisation of Hot Rolled Plate Steel exported from the People's Republic of China; Australian Customs Service 2013, Report No 190 on Alleged Dumping of Zinc Coated Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China, Korea and Taiwan; Australian Customs Service 2013; Report No 193 on Alleged Subsidisation of Zinc Coated Steel and Aluminium Zinc Coated Steel Exported from the People's Republic of China; Australian Customs and Border Protection Service, 2012, Report Number 177, Certain Hollow Structural Sections exported from China, Korea, Malaysia, Taiwan and Thailand; and Anti-Dumping Commission, 2015, Dumping Investigation 300: Alleged Dumping of Steel Reinforcing Bar Exported from the People's Republic of China. Paragraph 2.3 of the Final Report also notes Investigation 240 into RIC exported to Australia from Indonesia, Taiwan and the Republic of Turkey and paragraph 2.4 notes Investigation 331 being a parallel case to this one, dealing with an application by OneSteel for countervailing action against rod in coil from China.

70. Stated simply, conclusions about different products, about different time periods and about some government subsidies and taxes that may have no relevance to this industry, cannot be best evidence available to support a conclusion that there was a particular market situation preventing the use of domestic prices of RIC in relation to the period under investigation in this enquiry.

71. Such an approach is contrary to law and involves improper conclusions of fact. Where past reports are concerned, paragraph 7 of Annex II of the Anti-Dumping Agreement is of great significance. It stipulates as follows:

> "If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as public price lists, official import statistics from customs returns, and from the information obtained from other interested parties during the investigation."

72. The first point to note is that it would be a rare circumstance where authorities "have" to base findings on secondary sources. The Commission has access to all relevant Chinese plans and laws alleged to pertain to RIC during PUI. The relevant primary sources must then be analysed directly.

73. Secondly, the findings referred to in Annex II that might be gleaned from secondary sources, must be findings of fact. A conclusion from a fact is not a

fact. The Commission should not be concerned with what it thought elsewhere, but only with what it saw.

74. The minute one realises that other investigations ought only be a means to elicit relevant evidence, it becomes clear how little can actually be useful from those earlier enquiries. For example, if an interested party in this case purported to provide evidence of the RIC market outside of the period under investigation, the Commission would rightly reject it. It cannot be any more reasonable for the Commission to itself be persuaded by the findings it made or other government investigatory bodies made on different products in relation to time periods outside the period under investigation on this occasion.

75. The next key observation is that there is a grave risk in using reports on different products. The relevant legislation must call for a determination as to whether there is a "particular market situation" in the Chinese market for the product under investigation, in this case, wire rod in coil. That does not prevent it considering how upstream market distortions might impact that industry, but reports on different products cannot demonstrate this, as they would never have considered that question. They would not consider how one would demonstrate that the effect passed through to the required degree to the required industry.

76. As is contemplated by the ADRP in the Zinc Coated Steel Review, it is perfectly reasonable to have identified certain potentially relevant information through other investigations, for example, a Government of China national steel plan. Once identified, however, there is then a clear requirement to determine whether such information remained current during the relevant investigation period for this case, consider whether it actually applies to the goods under investigation in this case, whether it distorted the market for those goods to a degree rendering local prices unsuitable during the period under investigation, and consider whether the government interference cannot be simply adjusted for under provisions requiring such adjustments.[19]

77. Stated differently, if a report on a different product is being considered, there then needs to be a discrete analysis of the relevance of facts in that case, to a distinct product category that would then be part of the articulated reasoning in the Final Report. Even if government interference found in one case could conceivably apply in the other, this may not always be so. For example, a government subsidy on iron ore for one billet producer, may have no relevance to a different billet producer who sources iron ore from Australia. Similarly, a discounted electricity tariff for a large corporation in a particular geographical area, may not apply to a different corporation in a different location at a different time. Once again, prior reports can inspire lines of inquiry, but cannot be used as findings of fact for this investigation.

78. The next concern is the age of these reports, in some cases, years before the relevant period under investigation that applies on this occasion. It is true that the legislation allows consideration of periods prior to the investigation period to determine whether material injury has been caused, but this is only so as to

[19] Such requirements are expressed or inferred by para 27 of that Review Report.

provide a timeline for comparative analysis. It does not allow events outside the investigation period to *ipso facto* be deemed to apply during that period without proper analysis. Recent amendments under the *Customs Amendment (Anti-Dumping Measures) Act (No 1) 2015* made clear that, although periods prior to the investigation period can be examined to determine whether material injury has been caused, a finding of dumping cannot be made in relation to goods exported prior to the investigation period.

79. More detailed critique of the use to which these past Reports were put, is left to the section dealing with the Commission's reasoning.

Use of foreign investigatory reports

80. A further evidentiary error was to rely on the findings in an old investigation conducted by Canadian authorities. The Commission has a delegated investigatory power. It is not for it to further delegate that decision-making power to foreign administrators. That is effectively the result if a conclusion from a foreign adjudicator is accepted.

81. It is particularly problematic to rely on Canadian findings that incorporate different legal tests under Canada's *Special Import Measures Act* and where Canada relies for the validity of its measures, in part on Article 15 of China's Accession Protocol allowing for discriminatory policy for a significant period of time.

82. In addition, as noted above, paragraph 7 of Annex II of the Anti-Dumping Agreement refers to scenarios where "the authorities <u>have</u> to base their findings, including those with respect to normal value, on information from a secondary source.." (emphasis added). The Commission cannot "have" to rely on such reports from foreign investigators and adjudicators.

83. Once again, there is nothing improper in considering such investigations as a means to <u>source</u> relevant arguments and information. The findings themselves, however, cannot be adopted. The arguments and information have to be tested for relevance and currency.

84. Even then, the Commission's behaviour has been problematic as it has accepted certain findings supportive of its conclusions, but has ignored other key findings that contradict its own conclusions.

85. The same problem arises in the use of European Commission reports.

86. Even if such material was permissible other than as a means to glean sources, it cannot be relevant. A conclusion by foreign bureaucrats under different legislation, about a market situation some years ago, cannot say anything meaningful about the nature of China's governmental behaviour in 2014 and 2015. Those reports can also say nothing about the suitability or otherwise, of the accounting records of Valin, the exporter on this occasion. It is thus self-evident that such material cannot have any material relevance.

Ground 1.2: The Commission has used an improper methodology in dealing with subsidy allegations as the basis of undue market influence

87. Sections below deal in detail with the reasoning of the Commission in relation to each allegation of market interference. One significant aspect of such alleged interference was in relation to various subsidy regimes. It was noted above that the application did not even allege subsidies, but such factors can at least be implied into the Commission's reasoning. This section raises the distinct legal question of when and why subsidy allegations can be used as the basis of a particular market situation claim in an anti-dumping investigation, where, as in this case, there is a concurrent and on-going countervailing investigation over the same goods from the same source country that is not as yet resolved.[20]

88. The first issue is whether it is ever appropriate to consider alleged subsidies under the anti-dumping regime or whether instead, they must be challenged under the countervailing regime. The argument in favour would be that the reference to a particular market situation in the anti-dumping regime is broad enough to encompass all market distortions, including those which arise by way of subsidies. The contrary argument, considering the WTO regime and the legislation in context, would conclude that the specific reference to subsidies in the Agreement on Subsidies and Countervailing Measures and the discrete provisions in Australia's legislation that mirror that Agreement, only allow responses to subsidies that follow an investigation of them, and would not allow a back door response under lesser tests and evidentiary standards via the anti-dumping regime.

89. Stated differently, if the real concern is the impact of some alleged domestic subsidies, then a countervailing action should be brought and it should not be appropriate to simply claim the subsidy as a particular market circumstance in an anti-dumping case. WTO members certainly could not have intended that a subsidy allegation that does not satisfy the requirements of the countervailing regime, would necessarily suffice to ground an anti-dumping case.

90. There are a number of particular aspects of the countervailing regime that have certainly not been satisfied by the broad allegations in this application or by the very general reasoning of the Commission.

91. As per s 269T of the Customs Act 1901, a subsidy requires a financial contribution, provided in a specified manner, by a specified body, that confers a benefit. The benefit must be "in relation to the goods exported to Australia" and not simply be to the general iron and steel industry. Hence, there must be an analysis in relation to the particular goods and in relation to the particular period under investigation. Section 269T(2AA) expands on the definition and expressly indicates that the support may be made "in relation to goods or services used in relation to the production, manufacture or export of the goods exported to Australia." (emphasis added) In addition, s 269TAAC(1) requires a countervailable subsidy to be specific. No attempt was made by the

[20] The Commission Investigation 331.

Commission to determine whether the subsidies alluded to, met each of these tests.

92. Even if that interpretation does not prevail, at the very least, it would not be possible to determine whether a subsidy was a material distortion in relation to a particular industry, without seeking to assess the relevant facts. If the facts did not support a finding of a material distortion, then that should be the end of the matter. Even if the facts demonstrated a particular serious distortion, that itself would not render domestic prices unsuitable, but instead, the measured impact of the subsidy could simply be the basis for an adjustment. For example, if a foreign government provided a $20 subsidy on the cost of iron ore, that could simply be added to the actual cost to make to identify a figure equating to an undistorted market price.

93. Less clear is what is meant by the Commission seeking to emphasise that the consideration of government administered programs for the purposes of considering a market situation, is different to the determination of countervailable benefits in a countervailing investigation. That is correct in the sense that a market situation might arise where the specificity test is not satisfied, and may arise in means other than by way of a subsidy, but this should not mean that similar evidentiary burdens do not pertain.

Even if it is valid to consider subsidies in anti-dumping cases, it is premature to consider the impact of subsidies in this anti-dumping investigation, given the on-going Investigation 331

94. A further significant problem with the approach taken is that the Commission is currently considering a separate countervailing inquiry in relation to wire rod and coil, *Case 331*. No decision has been taken in that case. It cannot be valid to make conclusions in this case, in relation to matters still being considered in an on-going investigation.

95. It is also inappropriate to address subsidies in a very general sense in this investigation, without providing details of the government's schemes to which the questionnaire in *Case 331* is addressed.

96. In Investigation 331, a submission was also made on behalf of one of the interested parties that the final decision in this case, should await the outcome of Investigation 331. The Commission's stated reason for not accepting this request is unsatisfactory. The Commission simply indicated that it "has not agreed to this submission as the potential delay in finalising this investigation may lead to the continuation of the identified injury."[21] That makes little sense for two reasons. First, the Assistant Minister's decision on Investigation 331 is due in a matter of days. Secondly, securities may always be called for where the concern is continuation of alleged injury. Such a concern cannot ever be a reason to come to conclusions based on conjecture and not on comprehensive analysis of all available evidence, together with considerations of submissions thereon by interested parties.

[21] Final Report, para 2.4.

Ground 1.3: The Commission's reasoning on the evidence before it was flawed and did not justify the conclusions drawn

97. The Commission considered that government influences could arise through direct price regulation (floor or ceiling pricing mechanisms); or, indirect influence through policies that impact on the supply of the subject goods or the supply or price of major inputs used in the production of the subject goods.[22] It must then look to the effect of such influence, the extent of distortion and the reason why that renders prices unsuitable for proper comparison.

98. The Commission concludes that the Chinese government materially influenced conditions within the Chinese RIC market during the investigation period through mechanisms which "include":

- government directives and oversight,
- subsidy programs,
- taxation arrangements, and
- the significant number of state-owned steel companies.[23]

99. It concludes that the domestic price for Chinese RIC was substantially different to what it would have been in the absence of these interventions and that during the investigation period, the domestic price for Chinese RIC was influenced to a degree which makes domestic sales unsuitable for use in determining normal value.[24]

100. The Commission's Final Report states that:

> "(t)he Commission considers that the significant influence of the GoC has distorted prices in the steel industry and RIC market in China. The Commission also considers that various plans, policies and taxation regimes have also distorted the prices of production inputs including, but not limited to, raw materials used to make steel in China, rendering them unsuitable for cost to make and sell (CTMS) calculations.
>
> The Commission has formed the view that the GoC influence in the iron and steel industry is most pronounced in the parts of that industry that might be described as upstream from RIC production. In particular, GoC driven market distortions have resulted in artificially low prices for the key raw materials, and this includes other inputs associated with the production of steel billet from which RIC is made.
>
> The Commission considers that direct and indirect influences of the GoC affect Chinese manufacturers' costs to produce steel billet and, because of that, Chinese manufacturers' records do not reasonably

[22] Final Report 301, page 53.
[23] Final Report 301 page 65.
[24] Ibid.

> reflect competitive market costs. The Commission has found that steel billet costs comprise 80 to 85% of RIC CTMS."[25]

101. Each of the particular alleged distortions is addressed in turn.

Interference with the market for input materials

102. The Commission considers that most input materials are in relation to CTMS of billet. It lists iron ore; coking coal and/or coke; coal; various alloys; pig iron; alloy; natural gas; electricity; water; oxygen; nitrogen; steam; lime; valimite; and auxiliary materials. The report goes on to say that neither exporters CTMS or raw material purchase information was provided in sufficient detail for the Commission to be able to conduct a comprehensive analysis of all of these inputs. As an example, it noted coal expense as a one line item but thought that this might relate to gas coal, gas-fat coal, soft coal or a range of other possibilities.[26] The Commission simply concludes that it is not possible to ascertain whether each of these different sub-types or grades of coal were sourced at competitive market prices.[27] It also noted that the price of iron ore was dependent on iron (Fe) content.

103. It was unreasonable to reject Valin's figures by reason that they did not segment into different types of coal, while at the same time when the Commission analysed OneSteel's financial reporting, it noted that its WRIC was captured within the steel division which would cover other products as well.[28]

104. The logic also wrongly shifts the burden of proof. It is clear that Valin paid what it did to independent parties for input materials. It is for the Commission to determine what impact, if any, GoC has on the costs incurred by those input suppliers, not Valin. Only then could it be said that these are unfair input prices that are not comparable even when adjusted.

105. In considering evidence as to input materials, the Commission notes the similarity of inputs for rebar and RIC.[29] It further notes GoC supporting a significant increase in steel making capacity "through support of increase in blast furnace capacity."[30] The Commission provides no evidence of that support or indication of its nature and extent. It is simply unclear whether input assistance is to iron ore and coke suppliers, or to the means of converting these to iron or both.

106. Nor does it follow its own directive in explaining how this is significant enough to render all billet pricing as unreliable. The same can be said for unspecified allegations as to input materials, save for references to various export taxes and quotas.

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[25] Final Report 301, para 5.4.1 page 11.
[26] Final Report 301, para 5.4.2.1.
[27] Final Report 301 page 14.
[28] Final Report, page 27.
[29] Final Report page 56.
[30] Ibid.

107. It was also commercially unrealistic to consider that export taxes and quotas on coking coal, coke, iron ore and scrap would depress domestic prices, given the high import volumes of such products into China and the fact that China is not the lowest cost producer of such commodities.

108. Most disconcertingly, the Commission's logic showed that it simply adopted conclusions from previous Report's, after improperly drawing adverse inferences or improperly shifting the burden against GoC for failing to respond to a questionnaire. It stated that "(p)revious investigations by the Commission identified the use of export taxes and export quotas on a number of key inputs in the steel making process including coking coal, coke, iron ore and scrap steel. Due to the lack of response by the Chinese Government, the Commission has relied on the best available information, including previously completed investigations."[31] Whether GoC fills in a questionnaire or not has no impact on the Commission's obligation to analyse the input market during the PUI if the argument is that a distorted input market distorts the RIC market. As the ADRP noted in the Zinc Coated Steel Review, regardless of where information is sourced, it needs to be updated and tested in any current investigation.

109. As noted above, it is also misleading to simply say that GoC did not respond. GoC's submission 26 in the Rebar case notes that export tariffs on coking coal were reduced from 10% to 3% on 1 January 2015. It asserts that the import tariff has been eliminated on and from 1 January 2016 under the China-Australia Free Trade Agreement. Simply no mention is made of this.

110. Given that no such evidence was provided in relation to the Government of China's impact on input prices, the Commission erred in concluding on the evidence before it, that the Government of China caused excess capacity, rather than concluding that such excess capacity was caused by other factors.

111. In the absence of direct evidence, there is also no analytical reasoning that would support the Commissions conclusion. Excess capacity cannot be blamed on government without some evidence of government action supporting that outcome. It is typical in markets for supply and demand to not always be in equilibrium. Excess demand at any point in time, will tend to bring on new sources of supply, until a point is reached where this depresses prices, in turn providing an incentive for reduction in supply. China's boom years clearly led to this phenomenon.

112. The Commission concludes that during the investigation period, the average monthly price for RIC in China fell from around US$496.50 per tonne to US$350.50 per tonne due to weakening demand and high levels of supply. Even if the suggested reasons are valid, this is an example of normal market forces operating. Furthermore, the Commission rightly concluded that this decline "was consistent with the broader downward trend in China's and

[31] Final Report 301 page 64.

world steel prices in recent years,"[32] which undermines its conclusions about governmental influence.

113. It would also clearly be the case that the bulk of the iron ore and coking coal used in this industry was sourced from Australia or Brazil at prices unaffected by any Chinese governmental action. Valin sources its iron ore from Australia as the Commission would know, or ought to have known from the verification visit. It is clear that companies such as BHP, Rio Tinto and Vale are the price-setters of the bulk of such commodities. Any assertion to the contrary should be based on evidence properly outlined in the Commission's SEF and subsequent Final Report. None was forthcoming.

114. While the Commission concluded that both supply and demand factors operated, nevertheless it concluded without reasons that "the primary factor was the high on-going level of RIC production due to a historically high level of government support leading to an artificially high investment in blast furnace production assets resulting in excess supply."[33] No direct evidence was given as to that support or why it was historically high. It is not even clear whether the allegation is support for the ingredients used in blast furnaces, or the construction of blast furnaces.

115. The only supposed support for that vague proposition was via a citation to the Department of Industry and Science, March 2015, Resources and Energy Quarterly, p 24. That report in no way supports the contention. It notes that after a decade of growth, driven primarily by fixed asset investment, the Chinese government is planning to rebalance the economy through market reform to increase domestic consumption.[34] The report states that "(t)he successful implementation of these reforms will … force cuts in sectors that are over-producing, such as steel."[35]

116. The report makes no mention of governmental inducement of excess capacity. Importantly, the Commission needed to find sufficient evidence that Chinese over-capacity was caused by governmental interference of a material nature. Yet the Australian document cited merely states as follows:

> "Over the past decade China's steel production capacity increased 193% as large scale integrated steel mills were built across China."

117. The report relied upon by the Commissioner does the exact opposite of what the Commission contends, and highlights actions being taken by the Government of China to reduce excess capacity. That report notes that the Government of China had announced that 80,000,000 tonnes of steel capacity would be removed from the market by 2017 and that no new capacity would be approved until that time. The report notes that the Environmental Protection Law that came into effect in January 2015, increased the penalty for non-compliance to encourage older high-polluting mills to exit the market. TMRO Reports cited above, made clear that environmental protection is a proper

[32] Final Report 301, page 56.
[33] Final Report 301., page 57.
[34] Resources and Energy Quarterly March 2015, page 21.
[35] Ibid.

governmental approach and not the basis for finding a particular market situation.[36] The TMRO also considered that even differential environmental controls would not normally involve dumping.[37]

118. It is thus simply remarkable that the Commission finds that there is a high level of government support for blast furnaces in China, and cites an Australian Department of Industry and Science report in support of such conclusions, where that report simply makes no reference whatever to subsidies for blast furnaces. Hence the Commission's conclusion fails its own stipulated tests as to both the degree of interference, the extent of the impact and the burden and standard of proof.

119. The Commission goes on to conclude that both state-owned and privately owned steel producers "have received significant assistance from the Chinese government, particularly at the provincial and local government level."[38] Here again there were simply no citations to any material that allowed this conclusion to meet the test of the nature, extent and evidentiary basis for such a conclusion.

120. Here again it should be noted that the application by OneSteel did not allege subsidisation and refused to identify subsidies for analysis.

121. Far from articulating assistance, the Commission notes instead, numerous steps taken by the Chinese government to reduce excess capacity.[39] Nevertheless, the Commission concludes that these measures were "limited" in effectiveness in part based on "the divergence in objective between the different levels of the Chinese government and the availability of financing to support the restructuring and reorganisation."[40] As to the second factor, whatever is meant by a reference to availability of financing, this cannot be blamed on government interference without some evidence to that end. Either the availability is more than would be expected or less. If it is less, the lack of finance for private companies seeking to restructure, is not a market situation or an aspect of government interference. It is simply the fact that outmoded mills were not able to borrow money to improve the quality of their output. If it is more than might be expected, it is understandable that in an operating market, banks may prop up over-extended entities, rather than seek to liquidate debtors and crystallise losses unsupported by sufficient security.

122. Turning to the first factor mentioned, being divergence in objective between different levels of the Chinese government, this allegation would need to be supported by an indication of which policies or measures at which level not only undermined the policy aim to reduce over-capacity, but then constituted sufficient interference to justify a conclusion of a particular market situation. To simply conclude as the Commission does that "there are significant incentives for provisional and local governments to resist directives from the

[36] TMRO HSS Review para 100.
[37] Ibid, para 61.
[38] Final Report 301, page 57.
[39] Final Report 301, page 58.
[40] Final Report 301, page 58.

central government to remove excess capacity,"[41] may be a relevant factor in analysing the policies aimed at reducing that over-capacity, but says nothing about the positive evidence needed to show improper government interference leading to a valid conclusion of a particular market situation. Stated differently, the fact that a policy is sub-optimal as a regulatory measure, does not mean that it violates the market situation provisions in the legislation.

123. In similar manner, there is neither logic nor evidence to support the conclusion that the central role of GoC in the current restructuring is consistent with its role throughout the development of the industry and the implication that this distorts the market to the required degree.[42] At the very least, as the Commission acknowledges that the current role is to try and reduce over-capacity, if that role was indeed consistent as it concludes, then at all times GoC was seeking to minimise distortion. Instead, the Commission works on the premise that in the past, the Chinese government was aiming to stimulate capacity through market distorting measures. Once again, none are articulated in relation to that conclusion.

124. As noted above, the Commission improperly relied upon the CBSA investigation on rebar and its report released in December 2014. Even then, nothing in that report suggests a particular market situation. The Commission simply notes the CBSA finding that the Chinese government classifies the iron and steel industry as a "fundamental or pillar" industry. That would be so with most governments, as is the case with Australia.

125. The CBSA report also notes GoC maintaining a degree of control over the industry. Control in and of itself would not demonstrate distortion. The only aspect of control identified by CBSA is a minimum of 50% equity in the principal enterprises. An equity role may or may not be distortive, whether an industry is 100% owned, as was historically the case with energy in Australia, or partially owned, as was the case with Telstra. If the equity is a non-commercial subsidy, that may be problematic. In any event, no comment is made as to government ownership in Valin. If there is no 50% ownership, CBSA comments on an irrelevant scenario are as a result, irrelevant.

126. The only other matter relied upon in the CBSA report was the National Development Reform Commission's responsibility for approving all large steel projects. A requirement of approval can hardly be evidence of stimulation of over-capacity via blast furnaces. The Commission also makes no comment as to whether this observation has any relevance to Valin.

127. For the foregoing reasons, the Commission's logic is unsupportable. In any event, even if the contrary pertained, world excess supply is impacting upon prices everywhere. If it is considered in an importing country but not in the export country, this would be protectionist. Hence adjustments would be required in any event.

[41] Final Report 301, page 58.
[42] Final Report 301, page 59.

GoC plans in the iron and steel industries

128. The Commission goes on to attempt to justify a conclusion that GoC materially contributed to the excess supply of RIC through "directives, subsidy programs and involvement in strategic enterprises; taxation arrangements, including value added taxes and export rebates." The Commission goes on to cite the central role of GoC through numerous planning documents and directives.

129. The Commission refers to government plans but does not explain why they are problematic compared to any other government's industry plans.

130. When one considers the plans alluded to, it is apparent that these lead to the opposite conclusion to that contended for. The key themes and objectives in these documents are rationalisation and adjustment, not distortive creation of over-supply. The *National Steel Industry Development Policy,* which it cites, speaks of "structural adjustment", "industry consolidation", and "regulation of technological upgrading to new standards".

131. Reference to such forms of government supervision and management does not provide evidence of some means of promoting over-production through excessive support for blast furnaces or other means.

132. The *Blueprint for the Adjustment and Revitalisation of the Steel Industr*y (2009) is to similar effect, referencing "maintaining stability", "controlling … output and eliminating of backward capacity", "reorganisation and … concentration", "technical transformation and progress". Once again, there is simply no reference to undue government support for blast furnace capacity or other stimuli to over-capacity.

133. The 2011-2015 *Development Plan for the Steel Industry* (2011) similarly references increased mergers, government restrictions of capacity expansion, upgrading technology, greater emphasis on high end steel products, relocation of companies, regulations to reduce the number of small producers and increased controls on the expansion of capacity. Moving to higher end steel products, identifies a shift away from the goods under consideration in this anti-dumping inquiry. Once again, there is simply nothing that references government stimulus of blast furnace capacity or other stimuli to over-capacity.

134. The same can be said for *Guiding Opinions on Pushing Forward Enterprise M&A and Reorganisation in Key Industries* (2013). This document again only references consolidations at the top end and the desirability of investments in foreign mills. Neither are relevant to Valin.

135. Where the *Steel Industry Adjustment Policy* (2015 Revision) is concerned, again we see reference to rationalising capacity, environmental measures, mergers, consolidation and the aim of lifting capacity utilisation rates and upgrading the product mix. Once again, there is no reference whatever to government stimulus for excessive blast furnace capacity, the core factor upon which the Commission has asserted that there is a particular market situation

in China, through that support being a stimuli to over-capacity and/or improper pricing at the billet stage.

136. The Commission also ignores comments in Submission 26 by the Government of China in relation to the *Guiding Opinions on Pushing Forward Enterprise M&A and Reorganisation in Key Industries* (2013) and the *Steel Industry Adjustment Policy* (2015 revision).

137. Taking all of these plans together, the Commission's following conclusion correctly notes that the emphasis is the orderly restructuring and reorganisation of the Chinese steel industry,[43] but the Commission then concludes further that these documents and directives demonstrate the extent of the Chinese government's interventions within the industry. As the Commission itself noted, intervention per se is not problematic. If governmental action is simply undertaken to deal with chronic over-supply that distorts the market, then the intervention is aimed at better promoting a market mechanism. Such intervention by any government cannot be the kind of government intervention that the WTO Anti-Dumping Agreement was concerned with, or that the Australian legislature was concerned with in giving effect to its WTO obligations.

138. The TMRO also did not consider that the mere exercise of regulatory controls or inducements to rationalise or become more efficient, are properly seen as distortive events justifying a finding of a particular market situation.[44]

139. The Commission then notes one province's policies being similar to the national government and "holds that the consistency between planning documents and directives at the central and provincial government level further reinforced the high level of government intervention in the Chinese steel industry."[45] Yet the Commission had previously concluded that national government directives had <u>not</u> been supported at the regional level because regional governments have incentives to act differently. In any event, whether a regional government supports <u>rationalisation</u> directives or not, cannot make such directives improper interferences with smooth market operations, where the rationalisation directives are aimed at addressing excess capacity. It is the central government's policy that matters, not whether regional governments follow it or not.

140. For the foregoing reasons, there was simply nothing in the plans alluded to that could in any way justify the Assistant Minister in concluding that Chinese billet prices are unreasonable and unsuitable by reason of some governmental undue influence in the domestic market mechanism.

The Commission has failed to properly analyse subsidy programs it alludes to

141. The Commission then turned it's attention to a consideration of Chinese government subsidy programs. That itself is problematic from a procedural

[43] Final Report 301, page 61.
[44] TMRO HSS Review, paras 83-5.
[45] Final Report 301, page 62.

perspective. As noted above, the application from OneSteel stated that it is not alleging subsidisation, so it is not clear on what legal or factual basis the Commission purported to analyse PRC subsidies. The decision should be overturned for this reason alone.

142. Even if for some reason it was entitled to analyse subsidies *sua sponte*, all the Commission does is to give examples of the types of subsidies provided to the Chinese steel industry as found in other investigations undertaken by it. No attempt has been made to identify what, if any, subsidies actually apply directly or indirectly to the production of the goods under consideration, or to identify the materiality of any such distortions and finally, the reasons why they would render prices unsuitable, rather than simply calling for some appropriate adjustment.

143. The SEF states that China's government subsidy programs in the steel sector are "documented through previous investigations undertaken by the Commission. While these investigations don't correspond with the investigation period, these measures directly contributed to the state of the Chinese steel industry and rod and coil market during the investigation period. Examples of the types of subsidies provided to the Chinese steel industry are set out below.

- Steel inputs provided by the government of less than adequate remuneration.
- Coking coal and coke provided at less than adequate remuneration.
- Preferential Tax Policies for Enterprises with Foreign Investment.
- Preferential Tax Policies for Specific Reasons.
- Preferential Tax Policies for Foreign Invested Enterprises.
- Land Use Tax Deductions.
- Preferential Tax Policies for High and New Technology Enterprises.
- Tariff and Value-Added Tax (VAT) Exemptions on Importing Materials and Equipment.
- Research and Development (R&D) Assistance Grant.
- Special Support Funds for Non State-Owned Enterprises."

144. More fundamentally, as argued above, it is not the intention of the anti-dumping regime of the WTO to allow inadequate subsidies allegations to undermine the real normal values contended for by foreign exporters.

145. While the Commission noted that an evaluation of a particular market situation is different to a countervailing inquiry, if contrary to the above

argument that subsidy programs cannot be relied upon to establish a particular market situation, there would at least need to be a careful identification of the subsidy alleged to be relevant to the particular goods under consideration, whether directly or indirectly, and an assessment of the materiality of that subsidy to ultimate pricing and the satisfaction of an evidentiary burden in that regard.

146. Stated differently, if there is insufficient evidence of the nature and coverage of the subsidy regime, actual normal value should not be rejected. Conversely, if there is a clear identification of the amount of any subsidy received, an adjustment can be made under ss 269TAC(8) and (9).

147. Only if that was done with full reasons being given to interested parties, in order to allow them to respond meaningfully, could it be said that there has been sufficiently appropriate analysis of the alleged market situation.

148. In addition, given the concurrent subsidy investigation, it is important to ensure that countervailing and dumping duties over the same facts, do not lead to excessive protection. This is a clear requirement under the international obligations.

149. Once again, if reference is made to steel inputs such as coking coal and coke provided at less than adequate remuneration, for that to be relevant to this inquiry, there would need to be evidence that Valin received such inputs at inappropriate prices and that this was a material distortion. The fact that subsidised inputs might have been provided to other producers at earlier periods of time, can have no relevance to this inquiry. It is important to bear in mind that it was Valin's own billet cost to make and sell that was ignored.

150. Similarly, preferential tax policies for enterprises with foreign investment, would only be relevant if Valin was one such enterprise. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

151. For the same reasons, preferential tax policies for specific regions would only be relevant if the goods were produced in one such region and if Valin was currently receiving the benefit of such preferential tax policies. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

152. It is also not clear what is the difference between the reference to preferential tax policies for enterprises with foreign investment and preferential tax policies for foreign invested enterprises.

153. No indication was given as to the relevance of the land use tax deductions. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

154. Preferential tax policies for high end new technology enterprises would also not be relevant if Valin is not one such enterprise. It would then have to be

shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

155. Tariff and VAT exemptions on imported materials and equipment would only be relevant if they applied to Valin. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

156. R&D assistance grants would also only be relevant if they applied to Valin. The TMRO rejected the reliance on export tariffs on coke as there was no data available about its impact on the domestic steel product prices.[46] It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

157. Special support funds for non state-owned enterprises would only be relevant if they applied to Valin. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

158. The Commission then goes on to speak of the Chinese government involvement in strategic enterprises, noting "significant interests" in a number of major steel producers including, some producing RIC. The report notes Chinese steel producers that have government ownership. Notably, Valin is not included in the list. All the Commission then says is that several companies have the ability to produce and sell RIC. No effort is made to determine what level of RIC is produced and whether it is produced at such low prices to skew the market by reason of government ownership.

159. Once again, no effort has been made to indicate how government investment in other companies, renders unreliable, the actual costs of a different entity. It would then have to be shown that such a benefit was provided to a degree per tonnage of product to constitute a material distortion.

160. The Commission then points at differential taxation arrangements, noting that China operates a value added tax (VAT) system.

161. The Commission has failed to articulate what tax is applied or rebated at what level and with what impact.

162. Even then, from a mere analytical perspective, the Commission has wrongly seen VAT rebates as a problem, but consumption taxes would commonly be rebated on exports. The key point to a consumption tax operated by a particular country, is to tax consumption <u>in that country</u>. Many countries also operate duty drawback schemes for input VAT that is not appropriate when the final product is not consumed in that country.

163. In that context, the Commission makes a remarkable statement in terms of tax policy when it says:

[46] TMRO HSS Review para 97.

> "Because it is difficult for exporters to pass these taxes on, some steel exports have traditionally been compensated for VAT paid during the production process through VAT rebates."

164. The Commission then remarkably turns to one example of the Chinese government altering VAT rebates as evidence that this is used to influence the volume of steel directed to either the domestic or foreign markets. The Commission references the reduction of the VAT rebate on steel products containing boron. As the Commission would well know from anti-circumvention enquiries it has completed, that was in response to the inclusion of boron as a means to make steel treated for tariff purposes as alloyed steel. By doing so, in many countries that led to duty free entry or to alleged circumvention of anti-dumping duty that only applied to non-alloyed products. Hence the Chinese government action was a regulatory device to remove the incentive to adding boron for such purposes. It was not aimed at forcing boron added product onto the domestic market to depress prices.

165. The Commission then considers that export taxes on billet and on non-alloy RIC provides an incentive for Chinese exporters to redirect their products from the export to domestic Chinese market, distorting domestic prices. No attempt has been made to indicate the degree of distortion that is likely to apply. An export tax will not be a disincentive to export if it can be passed on to the customer. Even if the entire 15% was a disincentive, it could be accounted for by an appropriate adjustment to the actual domestic cost. In any event, neither is relevant to Valin that does not buy billet, but instead makes it from foreign sourced input materials.

The Commission's conclusions as to unsuitability

166. The above analysis of individual claimed governmental interference was shown to be problematic in a range of ways. Where the claim was as to interference with input costs, there was simply no evidence of subsidies on such products. Even if there was, there was no evidence to support a contention that world prices of iron ore and coking coal would not prevail in China.

167. On this occasion, the Commission also failed to turn its attention to whether any demonstrable GoC influence on input products and services, flows through to the selling price of the goods under consideration. In past cases, the Commission has taken note of ultimate selling prices and profit levels to test this issue.[47]

168. The evidence as to governmental plans all showed a consistent aim to redress market imbalances and rationalise the industry and reduce over-capacity.

169. The references to foreign bureaucratic decisions at a different point in time were inappropriate and in any event did not support the conclusions sought to be drawn.

[47] See for example PAD 238.

170. The evidence as to subsidies was flawed both in terms of entitlement and calculation and went beyond the allegations in the application.

171. The conclusions drawn are also inconsistent with the findings of Australian Customs in Report 116 that:

> "The NDRC Steel Policy represents China's government objectives for the broader steel industry, and Customs is unaware of the success or degree of policy implementation and cannot possibly affect the actual influence, if any, on HSS prices."[48]

172. The Commission also provides no reasoning for its conclusion that GoC influence is not only on input raw materials, but also is on "other costs associated with the conversion of raw materials to steel billet."[49] No particulars were forthcoming.

173. There is also no basis provided for the conclusion that "the influence of the GoC is wide-ranging …".[50]

174. It is also illogical to conclude as the Commission does[51] that "(a)s RIC is part of the broader steel industry findings demonstrating government influence in the Chinese steel industry are relevant to the RIC market." Once again, one would have to show that interference in the broader steel market applies to RIC as well and then, that such interference renders RIC costs unreliable.

175. It was also inappropriate to rely on broad statements by the Government of China that the steel industry is significant. The Australian Government, like most other governments, "recognises that the viability of the steel industry chain is vital to our economic prosperity.

176. It is thus particularly problematic to simply identify some government support mechanisms in PRC and conclude that this undermines normal value calculations, given that the Australian government has itself through the Australia Steel Transformation Plan 2015, given massive amounts of financial support to OneSteel and BlueScope. To support the industry the Australian government has established various initiatives, provides various forms of assistance and has identified a number of resources relevant to the Australian steel industry."[52] Australian government assistance under the Steel Transformation Plan, of some $300,000,000, was notified to the WTO as a subsidy.[53] Steel making companies in Australia have also been exempted from the renewable energy target scheme. The Australian Financial Review has also reported that Arrium receives royalties' concessions to its iron ore mine and

[48] Certain Hollow Structural Sections Exported from the People's Republic of China, the Republic of Korea, Malaysia, Taiwan and Thailand Report 116, December 2006, p 70.
[49] Final Report 301, para 5.4.2.1, page 12.
[50] Final Report 301, para 5.4.2.1, page 12.
[51] Page 56.
[52] http://www.industry.gov.au/industry/steel/Pages/default.aspx
[53] G/FCM/N/253/AUS, 11 September 2013, p 35.

pays no royalties on the feed stock directed into the Whyalla Steel Works.[54] The South Australian government has also announced support for Arrium.[55] Both state and federal governments have also demanded the use of Australian steel in certain projects.[56] The federal government has announced rail upgrades with requirements for Australian steel and more recently, announced proposals with regard to ship building, again using Australian steel. As recently as 18 May 2016, it was reported that the South Australian Treasurer was discussing co-investment proposals with private parties considering acquiring some or all Arrium assets. Newspaper reports indicated that the Federal Government was also considering such initiatives.

177. It is also important to consider the motivation of a particular regulation. For example, any tax aiming to incentivise environmental improvements, cannot be anything other than normal regulatory behaviour.

178. For the foregoing reasons, ADRP should conclude that there is no justification for finding a particular market situation and instead, should direct the Commission to analyse the actual domestic market normal value and/or the actual figures of the exporters concerned and identify whether there was or was not dumping causing material injury from their actual figures. The approach taken by the Commission, which seems to effectively be to rely indiscriminately on a range of reports and taxes in a host of anti-dumping cases against China, without discrete analysis on a product by product and time period basis, is a clear violation of Australia's WTO obligations that could easily be challenged by the Government of China under the WTO dispute settlement regime.

Ground 2: The Commission made improper normal value calculations

179. The Commission calculated normal value for Valin in the following manner; it began with the Latin American billet FOB price as obtained from Platts bulletin, with a profit adjustment. It only did so after the SEF and without warning interested parties that it was no longer utilising Platts South East Asian billet prices, but was instead using Latin American prices. The Commission then added Valin's actual conversion cost to WRIC; added Valin's SGA; added Valin's rate of domestic sales profit; added Valin's rate of profit. This calculation leads to a landed cost for Vicmesh of (confidential figure) as compared to $795.18 to OneSteel.

180. The calculation was in error for the following reason. The use of a surrogate for billet prices is improper in law. It was also wrong to ignore billet costs, but not conversion costs. Using a surrogate also led to a grossly unfair calculation in the current circumstances. This is so for the following reasons, addressed separately in subsections below, namely; the calculation was improper procedurally as it fundamentally changed the evidence post SEF without any warning to interested parties; secondly, it used an inappropriate surrogate

[54] http://www.afr.com/news/politics/bluescope-accused-of-hyprocacy-over-60m-handout-20151022-gkgfzu
[55] http://www.premier.sa.gov.au/index.php/media-centre/19-tonne-koutsantonis-mp/5121-high-powered-steel-taskforce-to-secure-whyalla-s-future
[56] https://www.viclabor.com.au/mediareleases/laborslocaljobs100australiansteeel/

measure; thirdly, it failed to make appropriate adjustments to that measure to afford a true comparison with export prices. Each issue is addressed in turn.

Ground 2.1: The Commission erred in law in concluding that it was entitled to allow a surrogate benchmark for the cost of producing billet

181. The Commission disregarded Valin's costs to produce billet in favour of the Latin American benchmark billet costs, on the basis that Valin's costs to produce billet were unreliable.[57]

182. Even if the Commission was correct to find a situation in the PRC that renders sales in that market as unsuitable for use in determining normal value as per s 269TAC(2)(a)(ii), in such circumstances, normal value must be determined under either s 269TAC(2)(c) or (d). On this occasion, the Commission has purported to utilise subsection (c) but has not actually followed its dictates. That provision stipulates that except where paragraph (d) applies, normal value is the sum of "such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export" (emphasis added) plus administrative, selling and general costs associated with a hypothesised domestic sale and profit on that sale.

183. Thus attention must be limited to costs in the country of export, that is, PRC, not Latin America. This is supported by the reference to the cost of production or manufacture of "the" goods, which also relates to the goods the subject of the anti-dumping application, on this occasion, WRIC from China. The cost of production of WRIC involves the cost of production of billet by Valin, not the cost of production in Latin America.

184. This is supported by other statutory provisions. Section 269TAC(5A)(a) indicates that cost of production or manufacture must be worked out in such manner, and taking account of such factors, as regulations provide for the respective purposes of ss 269TAAD(4)(a) and (b). Section 269TAC(5B) draws attention to regulations in relation to determining profit. Regulation 43 of the *Customs (International Obligations) Regulation* 2015 sets out the method of determination of cost of production and manufacture. If the producer keeps records in accordance with generally accepted accounting principles in the country of export which "reasonably reflect competitive market costs associated with the production or manufacture of like goods," then the Minister must work out the amount by using that information.[58] Regulation 43(8) allows the Minister to disregard any information that he or she considers to be unreliable.

185. Administrative, selling and general costs are calculated pursuant to Regulation 44. Profit is determined under Regulation 45.

186. Nothing in these Regulations provides for third country surrogate costs of making the major proportion of the goods under consideration.

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[57] The Commission Report, p 18.

[58] Australia's Regulation 43 is also incompatible with the Anti-Dumping Agreement given that it inserts a requirement to reflect "competitive" market costs rather than to reasonably reflect the actual costs as required under ADA.

187. It is particularly disconcerting that the Commission does not address this legal question and simply presumes the entitlement to apply a surrogate. This is most unreasonable procedurally, as this issue has been raised over and over again in anti-dumping and countervailing cases dealing with China over the last three to four years. Eminent lawyers acting for the Government of China and Chinese exporters have continually noted the lack of legislative basis to apply a foreign surrogate and the inconsistency of this approach with Australian law and WTO provisions. At the very least, if the Commission believes to the contrary that such a power exists, it should at least articulate that in its PAD, SEF and Final Report.

188. It seems reasonable to hypothesise that the same factors are relied upon in each case to conclude that there is a particular market situation, without any refinement based on contrary submissions received. In such circumstances, ADRP should be able to reject the Commission's view based on a proper reading of the legislation. In the alternative, ADRP should call on the Commission for a further report explaining the legal basis of its position.

189. It is not appropriate to see the decision in *Panasia* as supporting this approach as seems to be contended for in the ADRP Zinc Coated Steel Review para 62. All the court decided was that Customs had found that the Regulation 180(2) circumstance did not apply. A surrogate power must still come from somewhere and be consistent with ADA. In such circumstances, ss 269TAC (6) and (9) might be considered but this has not occurred. It is clear that if there is any impediment, the most reasonable alternative should be as close as possible to the system primarily designated.

190. Thus, even if a surrogate benchmark was permissible, which is denied, its selection should follow the principles enunciated by the Appellate Body in *Softwood Lumber IV* under a different provision, whereby the investigating authority must "ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, (as required by Article 14(b) ASCM)." No attempt has been made to meet such stipulations.

Ground 2.2: The Commission was wrong to ignore billet prices, but accept PRC conversion costs to WRIC

191. The Commission report notes that it used Latin American billet benchmark prices instead of Valin's own billet costing, but then used quarterly conversion costs for Valin to convert billet into WRIC, then added domestic selling, general and administration costs based on Valin's quarterly records and then used production data to calculate actual profit.

192. No compelling reasoning is given as to why billet is more affected by alleged government interference in the market than WRIC. The Commission simply makes a vague assertion that the key influence occurs at the input level. At one point it makes unsubstantiated allegations that the Government of China has promoted excessive blast furnace capacity. At another point it references interference with the cost of raw materials. It is true that if these allegations

were substantiated, they apply at the billet level and not at the level of conversion to WRIC. As noted above, however, the Commission has failed to validly substantiate these elements.

193. The Commission's approach in ignoring billet costing alone is more problematic again when only broad reference is made to plans and a host of alleged subsidy regimes. There is no clear indication of which if any of these would apply to billet production or conversely, conversion of billet into WRIC. Preferential treatment of corporations would apply to both, given that Valin is an integrated manufacturer. The same would be so for preferential energy prices or preferential land costs. Hence the Commission has failed to justify a proper basis for ignoring billet costs in China, but then accepting conversion costs in that jurisdiction.

194. The Commission's conclusion is also not supported inferentially by commercial data. The inconsistent rejection of billet costs but not value added costs for WRIC, was undermined by the Commission's own finding that the monthly average price for both had fallen by 50% since December 2011 to November 2015.[59]

195. It is also clear that the Commission's approach has no commercial relevance to Valin. Valin is an integrated producer. It does not purchase billet. Hence it is unreasonable to impose a hypothesised billet cost on it. That could only be justifiable if the government interference was some preference for billet itself. That is not the case that is alleged. If instead, the interference is with an input commodity, such as iron ore, then the Commission should have assessed the per tonne benefit provided and utilised Valin's costs entirely, with at most an adjustment to its iron ore purchasing price. Alternatively, the Commission could have used the adjustment provisions to incorporate this benefit into the analysis.

196. The submission by Dowway and Partners on behalf of Valin dated 7 March 2016 makes the additional point that should have been accepted, that if and only if raw material prices were affected by government behaviour, that is no justification for replacing the entire billet cost to make and sell, with Latin American billet prices. Distortions in the value of inputs of raw material do not impact on the conversion cost or demand for billet, that goes to the very conversion costs and raw materials to the billet stage.

197. That submission also noted the inconsistency with the treatment in the case of *Hot Rolled Plate Steel from China*, where a benchmark price for the cost of coking coal was utilised rather than an intermediate product.

198. As noted above, the Federal Court in *Enichem* and *Hyster* considered that even non-arm's length transactions are not ipso facto rendered unsuitable as a distortion. In any event, Valin enters into arm's length transactions for input products, not billet.

[59] Final Report 301, page 56.

WRIC figures on verification should show billet was acceptable

199. The Commission engages in a verification exercise, which could test its preliminary hypotheses about market interference, the impact on the cost of billet manufacture and the lack of impact on conversion costs. No attempt is made in Final Report 301 to indicate why the cost of input materials compared to world raw material prices was unsuitable, or otherwise, why billet prices were inappropriate, but conversion costs were not.

200. Broad hypotheses drawn from vague government plans and unsubstantiated subsidy regimes, needed to be tested against the actual data of the manufacturer. In the published Final Report, the only reference to that data was an adverse finding based on the manufacturer not differentiating between different types of coal. For the above reasons, it is inappropriate and inconsistent to ignore those figures, which could in any event have been differentiated by examination of the purchase orders for the different types of coal. More importantly, iron ore and energy prices would have demonstrated the inappropriateness of rejecting actual data and the finding that this was unsuitable.

Ground 2.3: It was improper to change the surrogate after the SEF and without warning

201. The Commission considered that because of the market situation finding, the cost to produce billet was unreliable and was discarded in favour of Latin American benchmark billet costs purportedly determined under Regulation 43(8).[60] It made this determination without any advice to the parties concerned.

202. While the Commission can change its mind if that is justified on the facts, which is denied in this case, it makes no sense to only come to that conclusion after the date of the SEF, as it has flowed from the conclusion that there is a particular market situation making all Chinese prices inappropriate, including South East Asian benchmarks that include China figures. Stated differently, there was nothing that the Commission became aware of after the SEF that could not have been part of its considerations before that time and included in its SEF findings.

203. Article 6.9 of ADA provides:

> "The authority shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

204. There is nothing in the WTO Agreement that stipulates that this obligation disappears once an SEF is published. That cannot possibly be so. It is an ongoing obligation that applies whenever the authorities change or form their

[60] Final Report para 5.5.1.2, page 18.

views about essential facts. In the normal course of events, this all occurs at the SEF stage and Article 6.9 is naturally complied with. If to the contrary, the Commission wishes to change its methodology after the SEF, it still must comply with Article 6.9 ADA.

205. The ADRP has previously considered the issue of a change of approach after the publication of the SEF. In ADRP Report No 13 it said:

> [58] BlueScope asserts that it was not forewarned that the Commission would adopt a different approach from that outlined in the SEF and was not provided with an opportunity to comment on the change …
>
> [59] While it would have been preferable for the Commission to have at least notified the applicant of this and invited comment a failure to do does not provide a sufficient reason of itself to recommend the Minister's decision should be revoked on that ground.

206. Even if ADRP was correct to conclude that such a failure is not a sufficient reason "of itself" to overturn a decision, it ought to be particularly concerned to evaluate the evidentiary findings where these have not been tested by interested parties.

207. Furthermore, it is particularly disconcerting that the Commission, after being made aware that ADRP's ruling in Report No 13 was that "it would have been preferable for the Commission to have at least notified (interested parties) of this and invited comments …", nevertheless chose not to adopt that eminently reasonable suggestion on this occasion.

208. There is an added concern with its procedural failure in terms of the powers available to ADRP. While it is stipulated that ADRP is not to look at matters that were not before the Commission, that cannot be allowed to justify a decision by the Commission to enter into a line of factual inquiry after the SEF, without notifying interested parties that it intended to do so and without giving them an opportunity to respond. Stated differently, if the Commission does not tell parties what they should be making submissions in relation to, the failure to make those submissions cannot be held against those parties. As an example, the Commission failed to adjust the Latin American benchmark for freight. Yet how can Vicmesh now provide data as to a proper adjustment, never having been allowed to know this was an issue.

209. This issue should be considered in the context of the evidentiary obligations on the Commission and the Assistant Minister. It is clear from the Anti-Dumping Agreement that interested parties need to be given a full opportunity to present their case. All discretionary determinations by the Commissioner as to how to conduct an investigation, should be subject to these overriding requirements.

210. Most importantly, as noted, there was no reason to engage in a new line of inquiry after publication of the SEF. Every factor relevant to the argument that South East Asian benchmark prices would be skewed by figures pertaining to China, ought to have been known to the investigator prior to the SEF.

211. In any event, properly adjusted, the South East Asian benchmarks should have been utilised.

The benchmark used was a particularly unreasonable one

212. By ignoring the cost in the actual jurisdiction concerned and utilising figures from a jurisdiction with particularly high published prices, the Commission calculated a dumping margin of 44.1% in its Final Report. Yet at the PAD stage, an anticipated dumping margin was only 9.5%, with securities being sought to that level. At the time of the SEF, the dumping margin was revised to 32.1%.

213. The Latin American index is clearly an inappropriate index that has led to the inflated margin. Once again Vicmesh could not provide this data at the time, but is now aware that through PUI, Latin American prices tended to lag behind falling world prices by up to 3 months.

214. It is necessary to consider how the Commission came to use such an inflated measure with no commercial relevance to the real scenario involved. The Commission rejected the East Asian steel billet prices that it had previously relied upon. It did so by a comparison with the World Steel Report and noted a substantial number of references to commentary regarding the Chinese "influence" on the East Asian benchmark and to a lesser extent, the purchase benchmark.[61] If these comments simply were as to influence by reason of volume and excess capacity, this should not be seen as a particular market situation.

215. No reason is given for the conclusion that "(i)t is highly likely that Chinese billet prices have distorted steel billet prices in both the East Asian and Turkey steel billet industries."[62] That would only be so if the degree of distortion was found to be higher than the export tax on steel billet from China, if that is the cause of the distortion. The Commission simply does not address this issue.

216. The Commission suggests that the Latin American benchmark is appropriate because of the significant volumes of crude steel production, reserves of iron ore and volumes of iron ore exported to China. The Commission also considered that the size of the Latin American market and the geographic distance from China minimised the potential distortions of GoC influenced billet prices.[63] Latin America is a very unique market and is less open than Asian markets.

217. The Final Report notes that world iron ore prices may not be distorted, but "the billet benchmark will also be based on the same raw materials which are subject to the same competitive world spot prices."[64] That conclusion is all the more remarkable, albeit true, given that elsewhere, the Final Report considers that the greatest influence of GoC is in raw material pricing. If raw material

[61] Final Report para 5.4.3.1.
[62] Final Report pare 5.4.3.1, page 16.
[63] Final Report para 5.4.4, page 17.
[64] The Commission Final Report para 5.4.2.1, page 12.

prices worldwide instead are compatible, then the Commission must find some other reason to ignore Valin's own cost of making billet.

218. Even if this logical flaw could be overcome, there are other reasons why a Latin American billet index would be inappropriate. As noted above, the Commission considers it to be reliable because of the same raw material prices worldwide. Little other justification is given for the reliance on the Latin American billet index. Just because all billet prices are based on world competitive iron ore prices, does not mean that one is a proper substitute for another. For example, choosing another country that may not have identical market distortions, but which has much higher pricing structures, as it is nowhere near the scale or competitiveness of China, is not a fair and reasonable surrogate. It may also have other distortions.

219. Nor is such a surrogate input price a matter expressly allowed under Australia's legislation.

220. The Commission concludes that by using benchmark billet prices "(t)he practical outcome of this position is that there would be no uplift at the raw material level beyond market competitive values."[65] Once again, this ignores other reasons why the Latin American benchmark is an unrealistic comparator. If the Commission can identify the distortion, it should simply adjust for it. If it cannot do so, it cannot know whether a benchmark is a suitable surrogate or not.

221. Stated differently, if the Commission found a hypothetical dumping margin of 44.1% by ignoring actual Chinese costs and instead, utilising Latin American costs, that benchmark would only be appropriate if the 44.1% equated to the inappropriate government support that the Commission considered to be a particular market circumstance.

222. A further reason why use of Latin America billet prices would be unfair is in comparison with the OneSteel costing policy. As is shown in the OneSteel cost graphic submitted to ADC, OneSteel begins with the Asian raw material prices then adds Asian conversion costs, freight to Australia, manufacturer import margins, forex, trade measures and a local premium. If both the Chinese and the Australian pricing start with Asian raw material prices, that is the basis for a proper comparison. If instead, the Commission begins with Latin American billet prices, it should make an adjustment for the differences between those and the input cost to OneSteel.

223. For all the following reasons, the Commission and Assistant Minister erred in assessment of normal value and identification of a dumping margin.

Ground 2.4: Even if it was legally valid and factually appropriate to use the Latin American benchmark, the Commission failed to make required adjustments

224. It is unclear from para 5.5.1.2 as to what adjustments the Commission made from this Latin American benchmark. It was suggested above that where

[65] Final Report, para 5.4.2.1, page 14.

adjustments can be made to account for any market interference, local costings should be utilised in any event. It has also been argued that there is no legal basis to utilise surrogate pricing. Even if that was allowed, adjustment should be made to such surrogate pricing to allow for a proper comparison between normal value and export price. Such an obligation is clearly mandatory. Reference is made to adjustments for weighted average inland transport and handling costs and for non-refundable VAT.

225. The following matters should all have been adjusted for.

Adjustments should not include billet profit

226. The Final Report paragraph 1.5 suggests that SBB Latin American billet benchmark prices were used and then adjusted by removal of an appropriate rate of profit to obtain a benchmark for competitive costs.[66] If the aim was to utilise actual Latin American costs, there should have been an attempt to identify actual profits in that market.

Freight costs

227. The Commission erred in failing to adjust for freight costs. The Commission was wrong to use a Latin American FOB billet price to equate to a domestic integrated mill cost to make billet. An FOB price would include the cost of transport from a factory to the wharf.

228. The Commission accepts the argument in principle that freight cost should be subtracted from Platts benchmarks, but states that it is impossible to remove the freight cost with a sufficient degree of certainty. This should not be so. Normal freight rates payable by the exporter on a non-subsidised basis, would be an appropriate deduction, At the very least, it was inconsistent methodology for the Commission to refuse to remove a hypothesised freight amount without direct evidence, but pick a hypothesised rate of profit to adjust Latin American billet benchmark prices.

229. It is made clear in Article 2.4 of ADA that a proper comparison should ideally be made at the ex-factory level. It also provides that "the authority shall indicate to the parties in question what information is necessary to ensure fair comparison and shall not impose an unreasonable burden of proof on those parties". The Commission should not have imposed an undue burden in relation to making freight deductions.

230. Even if the Commission was entitled to do so, Article 2.4 still requires other adjustments to make a fair comparison. If a freight component is included in the surrogate price, then an estimate of a freight component should be added to export price for comparative purposes.

231. The Dowway submission of 7 March 2016 pointed out that the Platts prices are delivered to port, which are inappropriate for an integrated manufacturer that makes billet and converts it to wire rod in the same facility. Even if a

[66] Para 1.5, page 2.

benchmark of that inappropriate nature was utilised, there is then an obligation to make adjustments as required under ADA and domestic legislation to make the figures truly comparable. OneSteel is an integrated producer as is Valin. In neither case should a false profit or inappropriate transport cost be built into hypothetical cost to make and sell. Hence, comparisons must occur at the ex works level.

The verification visit would have shown inconsistencies between the findings in this case and in the investigation on debar

232. The Commission approach in this case is also inconsistent with its approach in *Case 300*, dealing with debar, where the same integrated manufacturer, Valin, was only found to have a dumping margin of 15.2%.

233. Final Report 301 paragraph 5.2 states that for each of the co-operating exporters, the Commission conducted on-site verification of costs, domestic sales, and exports to Australia during the investigation period.

234. An analysis of the questionnaires in Investigations 300 and 301 and follow-up questions to Valin, would have made it clear that there were similar costs to produce rebar and WRIC, with rebar being slightly more expensive owing to the requirement of ribbing and certain certification. The Commission would also have noticed that the export prices of Valin to Vicmesh between these two products differentiated by some (confidential figure)%, roughly equivalent to the cost differentials to produce.

235. In such circumstances, it makes no sense for contemporaneous investigations to find 15.2% dumping margin in one case and nearly three times the amount in the present case.

Labour and overhead differential

236. By using foreign billet prices rather than drawing attention to any input commodity that distorts pricing, the Commission wrongly utilises Latin American labour and other manufacturing overheads rather than those pertinent to China.

237. For the foregoing reasons, even if Latin American prices were permissible as a surrogate, the Commission failed to make a range of required adjustments.

Ground 3: The Commission generally failed to recommend appropriate adjustments to normal value to make a proper comparison with export price

238. The arguments above as to adjustment of Latin American prices also raise a more fundamental question about the circumstances when it can be said that a particular market situation arises. The Australian legislation dealing with prices that may be "unsuitable," should be read in the context of the language of Article 2.2 of ADA on which it is intended to be based. That provision provides for alternative methods of determining normal value where "such sales do not permit a proper comparison …". If sales figures can be adjusted for a distortionary practice, then a proper comparison can still be made. The

essential issue is the ability to properly compare, and not simply whether a particular price is a wholly independent market price unconstrained by some government action.

239. Article 2.4 of the ADA provides:

> "A fair comparison shall be made between the export pricing and normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. 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. (reference omitted) In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authority shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authority shall indicate to the parties in question what information is necessary to ensure fair comparison and shall not impose an unreasonable burden of proof on those parties."

240. It is clear that Article 2.4 of ADA calls for all relevant matters to be adjusted for, so as to make a fair comparison. The Appellate Body has made clear that a fair comparison must be impartial, even-handed and unbiased.[67]

241. As a result, if a factor can be adjusted for, it cannot be the basis for a conclusion of unsuitability.

242. The approach adopted is also inconsistent with the way the Commission has treated the determination of export prices. The Commission has verified Valin's figures and has made a site visit. It has accepted export price data. Yet if GoC influence distorted Valin's domestic prices in some way, it is logical to presume that it would also have distorted its export prices. Once again, either they should be constructed in some different manner, or an adjustment should be made on the export price side to account for identical concerns on the normal value side.

243. Adjustments are called for under s 269TAC(8) and (9) and include circumstances where prices are modified in different ways by taxes or the terms or circumstances of the sales to which they relate. In such cases, the prices must be adjusted in accordance with Ministerial directions "so that those differences would not affect its comparison with that export price."

244. Here the obvious direction, as noted above, is to try and ascertain the amount of any modification by way of taxes and the like, and not simply take an

[67] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 138.

unrelated billet price in Latin America and deem it to apply. There are simply no deeming provisions for such purposes.

245. Furthermore, s 269TAC(9) requires the Minister to make such adjustments as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.

246. For example, even if there was proof of a subsidy such as preferential rates for electricity, a contention not made out by the Commission, this would apply both to domestic and export markets. The same would be so for preferential land use rates. The same would be so for assistance for the establishment of blast furnaces.

247. The TMRO in the HSS Review, in seeking to give examples to illuminate depressed as to a particular market situation, noted that an event which would increase both domestic and import prices should not render the domestic prices unsuitable for a comparison.[68] This should mean that the particular market situation cannot be said to arise unless there is some materially different impact upon the domestic and export markets by the alleged government interference, although as noted below, ADRP has taken a different view, but only then by acknowledging adjustment obligations.

248. Even a refusal to rebate VAT on export would not satisfy this test, as it would mean that both exported and domestic goods pay the same consumption tax.

249. The TMRO gives as an example of an intervention that may well satisfy the criteria, as the provision of free or subsidised raw materials. Even then, the TMRO makes the important observation that the question is whether or not there is sufficient evidence of a sufficiently distorting intervention.[69]

250. It is not an appropriate response to argue against the TMRO logic by asserting that if a distortive input subsidy is adjusted against both export price and normal value, it would then be ignored entirely. This is because a distortive subsidy should be addressed through the subsidy provisions, and not the anti-dumping provisions through an inappropriate methodology applied to "market situation" findings.

251. Of course there may be circumstances where governmental interference only applies domestically and not on export prices, but it is for the investigating authority to come to such conclusions after proper evidence and analysis.

252. If that view is rejected, the importance of the obligation to make adjustments has been noted by ADRP in its review of the Galvanised Steel investigation. The ADRP noted:

> "The situation in the market identified for the purpose of subparagraph 269TAC(2)(a)(ii) does not have to assess the domestic prices differently to the export price. Adjustments are made under subsections

[68] TMRO HSS Review para 60.
[69] Ibid, paras 86-7.

> 269TAC(8) and (9) for differences affecting the comparability of the export price and normal value."

253. The logic behind ADRP's observation is that there is no need to read words into Article 2.2 that are not there and read it down to only cover particular market situations found in the export country that do not apply to the exported goods, because distortions that apply to both must be accounted for in any event under the mandatory adjustment provisions. Once again, this argument has been raised in numerous investigations and it is highly problematic that the Commission simply does not address its adjustment obligations.

254. Required adjustments would alleviate all concerns. Other adjustments were required for holding costs and SGA.

255. As noted above, Australia has notified steel subsidies to the WTO. Not only is it unfair treatment to ignore China's prices by reason of vague reference to subsidies when Australia has clearly delineated subsidies to this industry, importantly, even if the Commission was justified to find a particular market situation in China, it should have found a similar market situation in Australia and made adjustments accordingly. Stated differently, if the Commission felt a need to remove any subsidy from the China pricing, it needed to remove the subsidy from OneSteel's pricing to make appropriate determinations of injury.

Ground 4: The Commission and Assistant Minister made erroneous conclusions in relation to material injury

256. Even if the Commission and Assistant Minister were correct in identifying the dumping margin as outlined in the Final Report or some other degree of dumping, they fail to make proper conclusions as to material injury and causation.

257. Overall, the Commission found injury in the form of:

> Price depression;
>
> Price suppression;
>
> Less than achievable profits and profitability;
>
> Reduced employment; and
>
> Reduced value of assets employed in the production of RIC.

258. The Commission improperly identified a uniform market and erred in conclusions on each of the above forms of alleged injury. These are addressed in turn.

Ground 4.1: The Commission wrongly identified the market and failed to differentiate trade exposed versus non-exposed sectors

259. The Commission erred in failing to properly differentiate between trade exposed and non-trade exposed market segments. This caused it to wrongly

cumulate imports, to wrongly make erroneous conclusions about the nature of injury and the level of trade at which it would occur, and to wrongly make erroneous conclusions as to causation.

260. It is important to understand what the product is used for and how Vicmesh competes directly or indirectly with the applicant.

261. The Commission would be aware that the applicant owns two separate processing operations for value adding to the product in issue, namely OneSteel reinforcing and ARC. Like Vicmesh, these make wire mesh for the construction industry. Those subsidiaries operate independently from each other, but are major competitors of Vicmesh.

262. If the applicant is making wire rod for value adding by subsidiaries, it is not particularly concerned with where it makes profit, as long as it makes it somewhere along the chain. Most importantly, its demand for wire rod will be dependent on the demand for the value added product from its subsidiaries. As noted in Staughton's submission of 21 October 2015, the Arrium presentation refers to OneSteel rod and bar being a manufacturer "into our chosen distribution channels …". The company is clearly admitting that it chooses the channels through which to distribute its product via value adding entities, in particular, its own two subsidiaries.

263. The Commission had material before it that showed how other jurisdictions approached such issues of market segmentation. While we assert that the EU (EC) decision No 703/2009 cannot be relevant to a vastly different time period, some of the methodology employed by the EU should have been adopted by the Commission. In particular, the EC report shows the need to properly account for a producer's internal transfers, described in the EC report as "captive use" of subject goods by integrated producers. At paragraph 54 of the EC report, it notes that such captive consumption is not included in general consumption figures. Paragraph 106 of the EC report suggests that price comparison should be at the "ex-works" level.

264. The Commission itself differentiates between trade exposed and non-trade exposed markets, but has not done so consistently when identifying injury and analysing causation. This is so for the following reasons.

265. It is clear that Vicmesh imports from Valin, only enter domestic consumption in Australia after value adding and only after complete transformation into welded mesh. These wire rod imports are not offered to independent third parties who might otherwise purchase WRIC from OneSteel. Hence there is no competition and no injury in the "trade exposed" market for WRIC.

266. As a result, realistic injury can only be considered through the interrelationship between Vicmesh and its competitor welded mesh producers, primarily OneSteel's two subsidiaries. The onus would then be on OneSteel to explain how this can satisfy a dumping case against WRIC.

267. Even if that were legally possible, the most important consideration is that OneSteel is not simply seeking to sell WRIC profitably, but is instead seeking

to ensure that its subsidiary mesh manufacturers are profitable, have regular and cost-effective supply of WRIC, with a strong customer base. OneSteel can also wish to sell other WRIC to third parties. Importantly, where third parties are concerned, given that the bulk of WRIC is used to make mesh, OneSteel is selling WRIC to entities that compete with its mesh subsidiary. If it competes aggressively for that market, it undermines the profitability of its mesh subsidiary. Trade remedies allow it to force up import prices and allow the OneSteel pricing formula to achieve higher and higher levels.

268. The Final Report notes that the majority of sales by OneSteel were to related parties. Obviously OneSteel sale prices to its related parties are confidential. Hence it is difficult to respond to its assertions that its sales to related parties "remain subject to market forces regarding price," and to also challenge the Commissioner's conclusion that its own testing "confirmed that sales to both related and unrelated parties are based on market pricing."[70] Given that OneSteel has a strict pricing formula that builds on import pricing, it is not clear what is meant by the Commission's conclusion that its related party sales are "based on" market prices. It is important to consider whether the related parties may negotiate on price and whether they have done so successfully on a significant number of occasions. It is important to know if different prices are as a result, found between the two subsidiaries. To merely say that related party pricing is "based on" market pricing, does not demonstrate a conclusion that it is in fact equal to an arm's length negotiated market price. The Commission could provide such an analysis without divulging confidential information pertaining to OneSteel's business. ADRP can at least analyse the confidential data to this end.

269. These conclusions by the Commission are also inconsistent with the finding that "transfer prices internally are recognised at the lower of cost or market price."[71] If OneSteel is selling product to its wholly owned subsidiaries at cost, it is clearly not doing so to Vicmesh, and hence is offering a differing pricing structure that would make it impossible for Vicmesh to buy from it and still be competitive with its wholly owned mesh producers.

270. The failure to properly differentiate between trade exposed and non trade exposed elements of the domestic market means that incorrect decisions are them made about cumulation. Injury is also analysed in part at the wrong level of trade and causation analysis is equally flawed. These issues are addressed in turn.

Ground 4.2: The Commission wrongly cumulated all imports

271. Vicmesh imports total only around (confidential figure) tonnes out of a total market of something in the order of 630,000 tonnes. This is a very small percentage of the total market. Nevertheless, the Commission cumulated imports from Valin with those from another Chinese manufacturer.

[70] Para 4.2 Final Report.
[71] Final Report, para 8.4, page 40.

272. It was inappropriate in these circumstances to cumulate trade exposed and non trade exposed shipments. This is because, as noted above, the two categories compete with OneSteel in completely different ways. Imports of WRIC by Vicmesh do not affect OneSteel's immediate ability to sell WRIC to anyone other than Vicmesh. To understand the impact of such imports, one would need to consider what price OneSteel would be prepared to sell to Vicmesh at, in turn to then allow it to compete in the welded mesh market with OneSteel's own subsidiaries.

273. When the non trade exposed sector is properly separated out, it then becomes easier to conclude properly that any injury felt by OneSteel, results from its own decision not to sell to Vicmesh at prices that would undermine OneSteel's subsidiary mesh making operations.

Ground 4.3: The Commission erred in its findings of injury

274. The following sections deal with the particular injury elements considered by the Commission.

Price undercutting

275. The Final Report noted a high level of price competition in WRIC.[72] The Commission asserts that it found that sales of RIC exported to Australia undercut OneSteel's prices.[73] The Commission found price undercutting because Chinese RIC has been imported at the lowest price point per month in the Australian market, had been recorded at price points below other export country offers, had taken a significant share of the import market, OneSteel's revenue per tonne had reduced over the period and that Chinese RIC has gained significant market share.[74] Yet elsewhere, the Commission has found that China imports partially replaced other imports, not OneSteel share. It is simply impossible to understand how these conflicting statements can be reconciled.

276. The calculation of the undercut price was unfair in two ways. First, additions were not made to calculations presented in Vicmesh submissions to properly account for interest, administration and perhaps selling cost. In comparing prices, the Commission did not properly allow for the significant holding costs in maintaining inventory, that was noted by it in its approach to injury analysis, in paragraph 6.2, page 23.

277. Secondly, the pricing methodology of OneSteel was inflated, given their system of starting with imported goods FIS prices, then adding domestic price premiums and other factors. The Staughton's submission of 21 October 2015, highlighted the public presentation by the applicant parent company, Arrium, which pointed out its domestic pricing policy for steel products. As noted in that submission, OneSteel starts with the apparent FIS price of the imported

[72] Final Report, para 4.2.
[73] Final Report, para 7.1, page 32.
[74] Final Report page 33.

product, that is, an import parity price policy. It then adds to the import parity price three additional elements, namely:

(a) An amount for forex because of a three month lag from order (date of sale) to arrival into store (to account for anticipated forex expenses of its import competitors;

(b) An amount for dumping duty, described as "trade measures"; and

(c) An amount for local premium.

278. The Commission concludes that OneSteel's pricing decisions are heavily influenced by import offers in the market.[75] Even that is at most technically correct as OneSteel itself chooses to be influenced in that way, building its pricing on such offers, rather than trying to price via its costs plus intended profit.

279. The Commission then concludes that Australian industry's prices were undercut and that it would have achieved higher prices in the absence of sales of RIC exported from China at dumped prices. Here again it is unrealistic to describe local prices as being undercut by imports, where the local prices utilise a formula that starts with import price as a base and then intentionally adds a range of other price elements. If the applicant would start with the import price and then add various components through its own actions, it is guaranteeing that import prices must always be lower. To then assert that the import prices are undercutting OneSteel's own prices, is in substance a nonsense. Stated differently, OneSteel intends that circumstance, not the importers.

280. Furthermore, to add the full amount of dumping duty shows a wish to hide behind the protection level to the fullest extent possible. Here again, the company instead should be costing its product based on cost to make plus targeted profit and return on capital.

281. The pricing approach utilised should also mean that the company is obviously equally or primarily hurt by competition from non-dumped imports that are not subject to trade measures, where the applicant builds a hypothetical amount of such measures into its own costing and applies this pricing to compete with non-dumped imports. Stated differently, it will have a lower price competing against a non-dumped supply country.

282. OneSteel would also be double dipping in their pricing policy, given that they include an amount for local premium, plus an amount for trade measures.

Did importers undercut to get volume or did iron ore and similar prices simply come down?

283. The Commission suggests that exporters have cut prices to get volume. It is nonsensical to speak of exporters in China seeking to maximise volume

[75] Final Report, para 6.3.2, page 26.

through lower prices. Those exporters simply respond to orders from importers. In turn, those importers simply respond to demand from their customers. It is clear that the construction sector determines demand, not foreign exporters. It is much more likely that prices have come down as iron ore and coking coal prices have come down.

284. That view is also consistent with other material before the Commission. The Arrium Limited annual report for 2015 notes its current cost and price environment is the lowest for at least 10 years. Low costs naturally lead to low prices. Hence it is inappropriate for the applicant to assert as a motivation, the wish to gain volume, rather than to pass on lower costs.

Price suppression

285. The Commission considers that an indicator of price suppression may be the margin between revenues and costs.[76] Here again this should not be appropriate where OneSteel freely uses a pricing formula that builds on import prices. It can vary that formula at will. Hence there is nothing in the way of price suppression.

286. That conclusion should be confirmed by other material before the Commission. The Commission notes that the recent price fall trends "align" with the commencement of Chinese imports in the fourth quarter of 2014.[77] Given that the Commissioner has found that the goods were substitutable regardless of source and that key costs are iron ore and coking coal, both falling in price, there is no justification for basing a conclusion as to price suppression on Chinese imports.

287. The Commission was also wrong to conclude that "it was reasonable to expect that OneSteel would have achieved prices that were sufficient to cover its cost to make and sell RIC" when securities were in place on exports of RIC from Indonesia and Taiwan. That ignored the fact that one key manufacturer was held not to be dumping and further, that New Zealand is not subject to anti-dumping duties and hence is not subject to security. Where price is concerned, as noted below, price is set by non-dumped imports or imports from New Zealand not subject to anti-dumping legislation.

Volume effects

288. Imports appear to have declined from 91,800 tonnes in year 2013, to something in the order of 48,000 tonnes during the investigation period. OneSteel grew its market share.

289. Faced with this data, the Commission obviously did not find injury by way of lost volumes or market share. The Commission has failed to address this to any degree in the Final Report as a countervailing factor to other injury allegations. At the very least, the Commission should be directed to do so. The Commission notes that while Chinese imports have grown, these have done so

[76] Final Report, para 6.3.1, page 24.
[77] Final Report, para 6.3.2, page 25.

by partially replacing other imports of RIC, rather than by replacing Australian produced RIC.[78] The Commission also "found no satisfactory evidence that proves that importers would have switched supply to OneSteel rather than to other exporters."[79]

290. Importantly, it is logically inconsistent to find material injury caused by price undercutting, but not find any adverse impact on volume.[80] The facts show clearly that OneSteel can command a premium and still grow market share.

291. It is also hard to understand how the Commission concludes that OneSteel has been able to increase its market share by replacing sales of RIC exported from Indonesia and Taiwan that are subject to anti-dumping measures,[81] while at the same time concluding that imports from China primarily replaced other imports rather than OneSteel volume.

Market share

292. The Commission found that the Australian market is growing.[82] Figures also show that OneSteel has increased sales and market share from 83% to 92%. Imports have gone down as have scrap and iron ore prices. Where market share is concerned, the Commission concluded that China imports had 10% of the market, which would be in the order of 63,000 tonnes. The Commission indicated that in volume terms, China was the third highest exporter behind New Zealand and Indonesia. That makes no sense as it would mean that New Zealand and Indonesia each would need to have more than 10%, making a total of at least 30%, when the Commission concluded that OneSteel had 80%.

293. As noted in Staughton's submission of 15 October 2015, figures 1 and 2 in the Consideration Report show that the applicant has increased its domestic sales in terms of both volume and market share and that this has occurred at the expense of imports from the previous investigation period, the majority of which has to have been non-dumped.

Capacity utilisation

294. The Final Report suggests that capacity has fallen over the period due to a reduction in rostered shifts.[83] At the very least, it is important not to double count injury factors. Capacity utilisation is properly measured by the percentage of use of the facility. In turn, that is impacted upon by supply and demand considerations, including price competition discussed above. If the applicant has a physical facility and has staff that could run such a facility if demand was there, it is meaningless to speak of reducing employee shifts as a further element of reduced capacity. The shifts are no doubt reduced because of reduced demand.

[78] Final Report, para 6.5, page 28.
[79] Final Report, para 6.5, page 29.
[80] Final Report, para 7.7, volume effects, page 37.
[81] Final Report, para 7.9.1.1, page 38.
[82] Final Report, para 4.3.
[83] Final Report, page 30.

Asset value

295. Paragraph 6.6.1 of Final Report 301 indicates that the Commission found injury was experienced through reduced value of assets. No figures or reasons were provided in that regard, save for an assertion that depreciated value of assets declined. It is meaningless to note that assets measured at the depreciated value declined from 2012 to 2015. Obviously at depreciated value, assets must naturally decline. In addition, all steel making assets are declining in value in a market experiencing oversupply.

Reduced employment

296. Paragraph 6.6.1 of Final Report 301 also indicates that the Commission found that injury was experienced in the forms of reduced employment. It is inappropriate to consider reduced employee numbers as injury per se, as the Commission also found increased productivity measures per shift, which in turn would be impacted upon by the number of workers.

Reduced or non-existent profit

297. The Commission erred in holding that "OneSteel's revenue from RIC over the investigation period was still less than CTMS,"[84] unless the statement is only about cumulative revenue and costs and not profitability in the last quarter.

298. The Commission refers to aggregated losses for the goods under consideration since 2011. It does note profit in the final quarter of financial year 2015. It concludes, however, that during that period, the profit generated was not sufficient to be sustainable. It makes this conclusion by noting that Arrium's cost to borrow is at USD Libor plus 7%, namely 8.2245% as at 17 March 2016. A distressed company in administration, that must borrow at inordinately high interest rates, cannot lead to the circumstance of those borrowing costs being blamed on imports. The industry's problem is its excessive borrowing costs caused by its historical losses in most of its divisions.

299. OneSteel also asserted that it was not meeting target benchmark return on profits within the Arrium group, due to the price and volume injury effects.[85] Given that the group is in administration and has trade remedy measures on most of the products it produces, it is hardly possible to blame an inability to meet target profit benchmarks on some (confidential figure) tonnes out of a market of 640,000 tonnes, when dumping margins were only calculated by using surrogate billet prices from one of the highest available alternatives. Only improper cumulation allows this to be challengeable.

300. The Commission's Final Report paragraph 6.3.1, figure 1, suggests that OneSteel has sold at a loss from 2011/12 financial year to 2014/15 financial year. Yet OneSteel through its pricing formula, is selling at much higher prices than its competitors. If the prices are too high and that is the reason why it is

[84] Final Report, para 7.9.1.1, page 38.
[85] Final Report, para 6.4, page 27.

losing profitable market share, this should be concluded to be the cause of its injury.

301. In addition, after noting that the steel division of OneSteel has not recorded a positive sales margin or positive earnings for the entire injury period, given that the Commission did not analyse price undercutting, suppression and depression for that entire period, it is inappropriate to conclude that "(t)he impact of the price effects has directly led to continued reduction in profits for the division."[86]

Ground 4.4: The Commission erred in its assessment of other causes of injury besides dumping

302. It is very clear under both ADA and domestic legislation, that careful attention must be given to ensuring that injury caused by factors other than dumping, is not attributed to goods found to be dumped.

303. While it is clear that dumped exports do not have to be the sole cause of injury, nevertheless, injury caused by dumped exports must itself be material and must not be attributed to other factors. The Appellate Body in *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Product from Japan*, WT/DS104/AB/R, para 223, pages 74-5, set out the importance of non-attribution.

Non-dumped imports and imports not subject to dumping laws

304. It makes no sense to conclude, simply based on OneSteel's sales data and import data, that there is no evidence suggesting that any other factor in the Australian RIC market would have caused material injury to Australian industry. The Commission was clearly aware of the important presence of non-dumped exports through other investigations it has conducted. It had to consider the degree to which such exports caused material injury. It is simply remarkable that the Commissioner's assessment of other factors that may have caused material injury, simply does not address the significant amount of imported goods not subject to anti-dumping duties.[87]

305. In this case, the most important injury factor is the significant market share held by non-dumped imports from Indonesia and goods outside of the dumping regime imported from New Zealand. The Commission rightly held that the WRIC market share is very much dependent on price. While it is fair to suggest that OneSteel competes on price and must do so to maintain production volumes, this must include competing on price with non-dumped imports as well as dumped imports. Exporters not subject to trade measures will set prices that need to be matched by all. The Commission acknowledged that "all others in the market must follow the lowest prices on offer …". Even if an anti-dumping duty applied to some exporters, those who are not subject to the anti-dumping regime will continue to set prices. As long as they have the capacity to take over the market share of dumped imports subject to

[86] Final Report, para 6.4, page 27.
[87] Final Report, para 8.7, page 41.

measures, price setting will remain at similar levels. In such circumstances, it is wrong to conclude that the hypothesised dumping by Valin could have caused any injury to OneSteel.

306. At the very least, the Commission should be called on to address this issue. In *Case No 240*, the Indonesian exporter appealed to ADRP. The ADRP requested more information from the Commission on 16 October 2015, seeking advice, inter alia, on the impact of non-dumped imports. The ADRP called for "particular attention to the levels and trends relating to prices and volumes between dumped and non-dumped exports." That is particularly relevant in this case where there are again larger numbers of imports from non-dumped sources or from countries not subject to the anti-dumping regime.

307. The Commission concludes to the contrary that but for sales of WRIC exported from China at dumped prices, the weighted average delivered prices from other exporting countries would not have dropped as much. Yet there has not been any correlation between the prices from various exporter countries.[88] The Commission never made a finding as to whether prices from non-dumped supply sources or from New Zealand would have undercut OneSteel's prices. If so, all injury was caused by non-dumped exports.

308. It is unsatisfactory to instead conclude in relation to undumped imports that dumped products "either undercut, or were equivalent to, the lowest priced imports from other countries."[89] There is a fundamental difference between "undercutting" or being "equivalent to". If it was only equivalent to, then removing the dumping does not remove the lowest priced non-dumped imports as the price setter. If dumped goods did in fact undercut such prices, then the degree to which they did so would be a reasonable consideration in determining the materiality of injury and the proper level of a non-injurious price. The Commission simply did not engage in this analysis or outline evidence it relied upon for its conclusions.

309. As a result, there was no reasonable basis to conclude that OneSteel would have been able to increase prices in a market not affected by WRIC exported from China at allegedly dumped prices based solely on use of Latin American surrogate billet prices, given the finding that there were significant low priced imports from other countries not found to be dumping or not subject to dumping duty.

Injury and refusal to supply

310. Mr Condon's submission of 5 April 2016, on behalf of OneSteel contains a confidential attachment outlining the sales history between the applicant and Vicmesh. Vicmesh should be given a copy of this attachment, as the confidential data relates to its own transactions, to at least be able to see if accurate data was presented to the Commission.

[88] Final Report, para 7.1, page 32.
[89] Final Report, para 7.1, page 32.

A consolidated analysis of various claimed injury factors

311. An important matter to consider when evaluating various individual claimed injury factors is the applicant's parlous financial circumstances, and its unilateral decision to utilise a pricing formula that automatically builds on import prices together with various premiums. In this context, such unilateral decisions undertaken by the applicant will inexorably lead to self-inflicted injury. If the self-generated pricing formula is too high, the applicant would necessarily lose market share, lose profit and decrease capacity utilisation.

312. One related important matter for consideration in the current commercial circumstances is Arrium's ongoing financial status given that there has been appointment of an administrator.

313. Another issue is its captive iron ore, being magnetite, requiring extra conversion costs.

Ground 4.5: The Commission erred in finding material injury

314. The Commission was wrong to conclude that "the number of factors in which the industry has suffered injury, when considered together, is not immaterial …". It is not the number of injury factors that determines materiality but instead, their extent.[90]

Ground 4.6: The Commission erred as to its recommendation of a non-injurious price and the Minister wrongly rejected such a price

315. The Commission noted that the Parliament Secretary is not required to have regard to the lesser duty rule in s 8(5B) of the Dumping Duty Act because of the application of s 8(5BAA) of the Customs Tariff (Anti-Dumping) Act 1975. Section 8(5BAA) provides that the Parliamentary Secretary is not required to have regard to the lesser duty rule where normal value is not ascertained under s 269TAC(1) because of the operation of subsection 269TAC(2)(a)(ii). Nevertheless, the Commission provided its non-injurious price (NIP) analysis, in case the Assistant Minister wished to exercise the discretion to consider the application of a non-injurious price. The Assistant Minister has refused to do so, simply relying on the finding under s 269TAC(2)(a)(ii), without separately considering a reason why she should or should not exercise a discretion to apply an NIP.

316. The Assistant Minister was wrong to fail to apply a non-injurious price. That would be the only reasonable conclusion in the circumstances.

317. The Commission notes that a non-injurious price is determined by considering an unsuppressed selling price, being a price that the Australian industry could reasonably achieve in the market in the absence of dumped imports.[91] That price would be determined by the prices known to the Commission from non-dumped imports or imports from countries not subject to anti-dumping duties.

[90] Final Report, para 6.8, page 31.
[91] Final Report, para 10.2, page 44.

318. The Commission calculated NIP based on July 2015 quarter CTMS plus a figure for profit. It is particularly inappropriate to conclude that the prices the Australian industry is likely to achieve in the absence of dumped imports from China would cover duty and borrowing costs. The prices the Australian industry was likely to achieve in the absence of dumped imports, would be set by the prices offered by non-dumped imports.

319. By concentrating on the July 2015 quarter, it also utilised lower cost and hence led to a lower NIP, which if accepted by the Assistant Minister, would have reduced the exposure of importers. Nevertheless, the Commission included what it described as "a sustainable rate of return" based on recent borrowing activity. An NIP should not be based on the excessive borrowing costs of a company that was close to administration.

320. Without a properly assessed non-injurious price, were the anti-dumping duty to remain, the outcome would be an insurmountable protectionist barrier. This can be clearly demonstrated. If one adds the proposed dumping duty to the actual importer's costs, one ends up with a landed cost of $(confidential figure) per tonne as against OneSteel's traditional selling price of $795.18 per tonne. That is clearly prohibitive and simply makes it impossible to import from China. That is not the intent of the anti-dumping regime.

Conclusion

321. For the foregoing reasons, ADRP should recommend that the dumping duty be revoked.

322. In the alternative, ADRP should at the very least call for a further investigation.

323. In *WRIC Case No 240*, the Indonesian exporter appealed to ADRP. The member requested more information from the Commission on 16 October 2015, seeking advice on the domestic price premium, the impact of non-dumped imports and the impact of the dumping margin.

324. If the member is not disposed to recommend to the Assistant Minister that the anti-dumping duty notice be revoked, at the very least, numerous elements need to be properly investigated before a fair and reasonable final decision can be taken.

Jeffrey Waincymer

For Vicmesh Pty Ltd