

The RioTinto logo consists of the word "RioTinto" in a white, serif font, centered within a solid red rectangular background.

Application for a dumping duty notice in relation to certain railway wheels exported to Australia from the People's Republic of China and France

and

Application for a countervailing duty notice in relation to certain railway wheels exported to Australia from the People's Republic of China

Post-SEF Submission of Rio Tinto Limited

31 October 2018

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1. Introduction

1.1 Background

On 5 June 2018, Rio Tinto lodged its Initial Submission with the ADC. The 'Public Record' version of the Initial Submission appeared on the Public Record on 6 June 2018.

On 11 June 2018, Rio Tinto lodged a Supplementary Submission, the 'Public Record' version of which appeared on the Public Record on 15 June 2018. The Supplementary Submission was prepared in response to a request from the ADC that Rio Tinto provide it with further information and documentation in respect of Rio Tinto's 2017 tender process for the procurement of the Goods. The Supplementary Submission sought to provide context to assist the ADC's review of tender process documentation which had been provided by Rio Tinto on the same day.

On 18 June 2018, the ADC published the Commissioner's Preliminary Affirmative Determination. The PAD set out the ADC's preliminary assessment that the Goods were exported to Australia from China and France during the Investigation Period at dumped prices, that the dumping margins were not negligible, and that the volume of dumped Goods from each country was not negligible.¹

The PAD gave notice that the Commonwealth would require and take securities under s42 of the Act in respect of interim dumping duties that became payable in respect of Goods exported to Australia from China and France and entered for home consumption in Australia on or after 19 June 2018 and at the rates specified in the table of preliminary dumping margin assessments.² The PAD also set out the ADC's preliminary assessment that the Australian industry had experienced injury as a result of the dumping activity it had found.³ However, a preliminary affirmative determination was not made in respect of the publication of a countervailing duty notice in relation to Goods exported from China.⁴

On 5 September 2018, Rio Tinto lodged a Further Submission with the ADC, with the 'Public Record' version appearing on the Public Record on 6 September 2018. The Further Submission was prepared in response to submissions made by the Applicant in relation to non-price factors causing the Applicant's injury.⁵ The Further Submission also included submissions in relation to comparative advantage for the purposes of constructing normal value and in relation to the decision in the PAD to require and take securities under s42 of the Act.

On 11 October 2018, the ADC published the Statement of Essential Facts (**SEF**). The SEF included the Commissioner's proposed recommendation to the Minister that a dumping duty notice be published in respect of Goods exported from China and France, and that the level of securities to be taken in respect of interim dumping duties be revised from 17% to 19%.⁶ In addition, the SEF included the Commissioner's proposed recommendation to the Minister to

¹ PAD, p 12.

² Ibid, p 2.

³ Ibid, pp 19 and 25.

⁴ Ibid, pp 1 and 2.

⁵ Submission 020 on the Public Record.

⁶ SEF, pp 6 and 73.

terminate the investigation into the application for the publication of a countervailing duty notice in respect of the export of Goods from China.⁷

In these circumstances, Rio Tinto now makes these post-SEF submissions (**Post-SEF Submission**) which:

- (a) respond to the ADC's methodology for constructing normal value in the SEF;
- (b) respond to the ADC's methodology for attributing material injury to dumping in the SEF, as opposed to factors other than dumping;
- (c) address the validity of the ADC's decision in the PAD to require and take securities in respect of interim dumping duty; and
- (d) respond to the Commissioner's recommendation in respect of the most appropriate form of dumping duty to be applied to the Goods.

1.2 Interested party

Rio Tinto is cooperating with the ADC and makes this Post-SEF Submission as an 'interested party' in this Investigation, as an end user of the Goods imported by Masteel.

1.3 Definitions

Unless otherwise defined in Schedule 1 of this Post-SEF Submission, all capitalised terms used in this submission have the same meaning and definition given to those terms in the Initial Submission. Moreover, this Post-SEF Submission is intended to be read in conjunction with the Initial Submission, Supplementary Submission and Further Submission, as if those submissions are a single integrated document.

⁷ Ibid, p 7.

2. Executive Summary

Rio Tinto submits that no dumping duty notice, countervailing duty notice or other measure should be imposed by the ADC in relation to the Goods. It submits that the conditions for imposing measures under ss269TG and 269TJ of the Act do not exist. Therefore, Rio Tinto maintains its submission that the Investigation should be terminated pursuant to s269TDA of the Act.

By way of executive summary, and in addition to the submissions previously made by Rio Tinto, Rio Tinto now makes the following submissions in this Post-SEF Submission:

- (a) If the ADC continues to recommend that Valdunes' costs for steel billet be used instead of Masteel's, and if the exporters in this Investigation provide evidence or make submissions in respect of comparative advantage, the ADC is required to take into account such evidence and consider making corresponding adjustments for the purposes of determining Masteel's costs of production or manufacture in constructing a normal value for the Goods. It should also continue to consider any further information provided in relation to possible downward adjustments to 'normal value' to enable a fair comparison to be made between 'export price' and 'normal value' in accordance with s269TAC(9) of the Act.
- (b) The ADC has incorrectly administered the Act and Material Injury Direction by attributing to dumping material injury caused by factors other than dumping. The ADC must provide reasons why it is satisfied that a significant proportion of the price differential between the exporter's Goods and the Australian industry's Goods is attributable to dumping rather than to other factors.
- (c) The ADC's justification in the SEF for requiring and taking securities is *ex post facto* reasoning that does not indicate that the Commissioner was satisfied as to necessity at the time of making the PAD on 18 June 2018. No material injury has been identified which could have enlivened the power in s269TD(4)(b) of the Act for the Commissioner to require and take securities under s42 of the Act at that time. As a result, the Commissioner should withdraw his decision on 18 June 2018 to take securities under s42 of the Act and refund any duties paid, or release parties from undertakings given, in relation to Goods entered for home consumption between 19 June 2018 and 11 October 2018, the date of publication of the Amendment to Securities notice.⁸
- (d) If the Commissioner continues to recommend to the Minister that a dumping duty notice be published in relation to the Goods, which Rio Tinto submits the Minister should not, then the most appropriate form of dumping duty for the Goods is the floor price method set out in the Guidelines.

⁸ Anti-Dumping Notice No. 2018/159.

3. Submissions

3.1 Methodology in calculating 'normal value'

(a) Rio Tinto's initial submission

In its Initial Submission, Rio Tinto submitted that, should the ADC be unable to determine 'normal value' under s269TAC(1) of the Act, or using other suitable methodologies such as appropriate third country sales under s 269TAC(2)(d) of the Act, then a constructed 'normal value' under s 269TAC(2)(c) of the Act may be appropriate. However, Rio Tinto also submitted that the ADC must carefully follow the approach required by the Act and the Regulations.⁹

In particular, Rio Tinto submitted that:

- (i) if 'normal value' is to be constructed in accordance with s269TAC(2)(c) of the Act, the ADC must endeavour to use the exporter's actual records for calculating various inputs into the construction of 'normal value', provided that those records are kept in accordance with generally accepted accounting principles in the country of export and if those records reasonably reflect competitive market costs;
- (ii) only if the ADC is not so satisfied, might it be appropriate for the ADC to use a benchmark price from the costs of production of a third country producer or manufacturer; and
- (iii) the ADC should make appropriate adjustments to ensure that its constructed normal value is comparable to the 'export price' determined by the ADC.

(b) The ADC's approach to 'normal value' in the SEF for the Goods exported from China

In the SEF, the ADC determined that Masteel did not sell 'like goods' in the ordinary course of trade in China during the Investigation Period.¹⁰

Because of the absence of the sale of 'like goods' in China that would be relevant for determining 'normal value' under s269TAC(1) of the Act, the ADC considered it appropriate to calculate a 'constructed normal value' under s269TAC(2)(c) of the Act, by calculating the sum of the costs of production or manufacture of the Goods and the hypothetical amounts of the SG&A costs and profit on each sale had they been sold in China.¹¹

⁹ Initial Submission, p 15.

¹⁰ SEF, p 22.

¹¹ Ibid, p 23.

The ADC did not make a finding that there is a 'particular market situation' for railway wheels in China.¹²

(i) Cost of production

Subsection 43(2) of the Regulation requires that, if an exporter keeps records relating to 'like goods' to the goods under consideration, and which are in accordance with generally accepted accounting principles and reasonably reflect competitive market costs associated with the production or manufacture of like goods, then the cost of production must be determined using the exporter's records.

In the SEF, the ADC determined that Masteel's records relating to the purchases of raw material for railway wheels during the Investigation Period did not reasonably reflect competitive market costs, and so those records were not used to determine costs of production for the purposes of determining the constructed 'normal value' under s269TAC(2) of the Act.¹³ This finding was made on the basis of:

- (A) the Application;
- (B) the GOC's response to the ADC's government questionnaire;¹⁴
- (C) submissions made by interested parties;
- (D) previous ADC investigations in relation to steel products; and
- (E) recent analyses of the Chinese steel market undertaken by the ADC, by trade departments of the governments of the United States and the European Union, and by other authors, including KPMG and the OECD.¹⁵

The ADC therefore determined the costs of production for the purposes of the SEF by using the steel billet costs incurred by Valdunes, the French railway wheel producer also the subject of the Investigation.¹⁶

The ADC considered these costs to be 'competitive market costs of the particular grade of micro alloyed steel used in the production of the goods under consideration' and which were 'verified costs that [were] available to the Commission'.¹⁷ The ADC emphasised that, apart from steel billet costs, all other costs incurred by Masteel in the production of the Goods and recorded in

¹² See the Act, s269TAC(2)(a)(ii).

¹³ SEF p 23 and Non-confidential Appendix 2.

¹⁴ Questionnaire 011 on the Public Record.

¹⁵ SEF, p 81.

¹⁶ Ibid p 23.

¹⁷ Ibid.

Masteel's records were used to determine the cost of production or manufacture under reg 43 of the Regulation.¹⁸

The ADC considered whether it was appropriate to adjust the steel input costs of Valdunes to take into account the comparative differences between Chinese and French producers, but determined that it could not calculate accurately any such adjustments given the 'significant involvement of the GOC in relevant markets' and the lack of information or evidence on the subject provided by interested parties during the Investigation.¹⁹

However, the ADC stated that it would 'consider any information provided in response to this SEF on the appropriate level of adjustment to the steel costs used to replace the costs from Masteel's records.'²⁰ In particular, the SEF refers to differences including 'some element of profit and selling expenses', since Valdunes' steel input costs, unlike Masteel's, are based on the purchase of the steel from an unrelated supplier.²¹

(ii) Adjustments

To ensure the 'normal value' for the Goods was properly comparable to 'export price' the ADC, under s269TAC(9) of the Act, made the following adjustments:

- (A) domestic packaging expenses – downward adjustment;
- (B) export packaging expenses – upward adjustment;
- (C) export inland transport expenses – upward adjustment;
- (D) export handling and other expenses – upward adjustment;
- (E) export bank charges – upward adjustment; and
- (F) export credit expenses – upward adjustment.²²

(c) Rio Tinto's further submissions in relation to the calculation of 'normal value' for the Goods exported from China

Rio Tinto makes the following submissions in relation to the ADC's calculation of 'normal value' in the PAD in accordance with s269TAC of the Act; specifically, the comparative advantage and adjustments to 'normal value'.

¹⁸ Ibid, p 24.

¹⁹ Ibid.

²⁰ Ibid pp 24-25.

²¹ Ibid, p 24.

²² SEF, p 25.

Rio Tinto reiterates its submissions on these topics as set out in the Initial Submission and the Further Submission.²³

If the ADC continues to recommend to the Minister that Valdunes' costs for steel billet be used instead of Masteel's, and if the exporters in the Investigation provide evidence or make submissions in respect of comparative advantages enjoyed in their respective countries of export, the ADC must take into account such evidence and consider making corresponding adjustments for the purposes of determining Masteel's costs of production or manufacture in constructing a normal value for the Goods.²⁴

The ADC in the SEF has already suggested that if the exporters provide evidence or make submissions in relation to the 'element of profit or selling expenses' arising out of Valdunes' arms-length purchases of steel billet, the Commissioner will consider that information and also consider making corresponding adjustments.²⁵

In relation to other 'comparative differences that might be present in the Chinese market', the ADC concludes that 'such an adjustment would not be possible particularly given the significant involvement of the GOC in relevant markets'.²⁶ Rio Tinto submits the ADC must consider whatever information is submitted in respect of comparative advantages, and only then can it determine whether it is possible for adjustments to be made. It must not determine this issue in a conclusory fashion.²⁷

Further, the ADC should also continue to consider any further information provided in relation to possible downward adjustments to 'normal value' to enable a fair comparison to be made between 'export price' and 'normal value' in accordance with s 269TAC(9) of the Act.

3.2 Causal link between dumping and material injury

(a) Introduction

In the SEF, the ADC found that the Australian industry had suffered material injury in a variety of forms.²⁸ Rio Tinto does not make any further submissions in this Post-SEF Submission in relation to whether the Australian industry suffered material injury. However, for the avoidance of doubt, this should not be interpreted as a concession that Rio Tinto agrees that the Australian industry has suffered material injury. Rio Tinto

²³ Further Submission, p 11.

²⁴ Steelforce at [118] per Perram J; *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 2)* [2018] FCA 1135 at [86] per Griffiths J.

²⁵ SEF, p 24-25.

²⁶ Ibid, p 24.

²⁷ See *Biodiesel* para 6.73: 'an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects'. See footnote to that statement, fn231: 'Pursuant to Articles 12.2.1(iii) and 12.2.2 of the Anti-Dumping Agreement, a public notice of the imposition of provisional or final measures shall contain, *inter alia*, a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 of the Anti-Dumping Agreement. Thus, we understand that, with respect to any information or evidence used to determine the cost of production in the country of origin, an investigating authority is required to explain how the information or evidence informed the calculation of the cost of production.'

²⁸ Ibid, p 46.

agrees with the submissions on this topic contained in BHP's submissions dated 11 September 2018 and relies on its previous submissions on this topic in the Initial Submission.²⁹

Subsection 269TG(1) of the Act permits the declaration of a dumping duty notice where dumping is found and where that dumping causes material injury to an Australian industry. In its Initial Submission, Rio Tinto submitted that the material injury suffered by the Australian industry was caused (or at least materially contributed to) by other factors, and not by dumping or countervailable subsidies in whole or in part (for the purpose of s269TJ(1) of the Act). Rio Tinto made more specific submissions in relation to causation of material injury, in particular that:

- (i) material injury to the Australian industry had been caused by other economic factors affecting the price competitiveness of the Australian industry; and
- (ii) material injury to the Australian industry had also been caused by non-price factors in relation to the Goods manufactured by the Australian industry.

Having regard to the ADC's findings in the SEF in relation to causation of injury by non-price factors (such as the quality and safety of the Goods), and that the causation of wheel failures is 'not an issue for the Commission to resolve',³⁰ Rio Tinto does not make any further submissions on this topic. Again, this should not be interpreted in any way as a concession that Rio Tinto retracts its previous submissions on these issues which appear on the Public Record. Those submissions are re-affirmed.

Further, Rio Tinto does not make any additional submissions in response to the Applicant's submission 056 on the Public Record in light of the ADC's remarks in the SEF that it will not resolve this dispute.³¹ Rio Tinto considers that it has aptly demonstrated that non-price factors relating to the Goods have caused or contributed to the injury allegedly suffered by Australian industry.

However, Rio Tinto respectfully submits that the ADC has nevertheless erred in this section of the SEF as explained below.

(b) Rio Tinto's Initial and Supplementary Submissions

In its Initial Submission, Rio Tinto first submitted that certain historical features of the Australian industry had left it susceptible to the effects of competition during the Injury Analysis Period. Rio Tinto submitted that the fact that the Australian industry had operated in a monopoly market likely offers an explanation for all or some of the Australian industry's alleged material injury following an increased volume of foreign exports into Australia during the Injury Analysis Period.³² More specifically, Rio Tinto submitted that the Australian industry is now regarded as an inferior supplier of the Goods by end-users because of its lack of international competitiveness in plant

²⁹ Submission 049 on the Public Record.

³⁰ Ibid, p 61.

³¹ Ibid.

³² Initial Submission, p 18.

capacity, process efficiency, input cost efficiency and as a global strategic partner.³³ This has come at a time when Rio Tinto is in a period of major transformation as it seeks to achieve greater efficiencies, innovation and productivity to remain globally competitive.³⁴

Rio Tinto submitted that any alleged material injury to the Australian industry was actually caused or materially contributed to by the following economic factors that undermined the price competitiveness of the Australian industry, and which are not the result of dumping or countervailable subsidies:

- (i) a combination of lower labour, energy and raw material costs in China and Masteel's integrated supply chain;
- (ii) economies of scale available to Chinese manufacturers in the steel industry;
- (iii) lower tariffs as a result of the ChAFTA;
- (iv) foreign exchange rate movements; and
- (v) differences in environmental regulation between Australia and China.³⁵

(c) The ADC's approach in the PAD and SEF

In the PAD, the ADC did not attempt to separate the effect of alleged dumping from the other factors that could explain the price difference between Masteel's exports and the Goods produced by the Australian industry. The ADC merely stated that it would 'seek to ensure that any injury caused by any advantages overseas suppliers might have as a result of economic factors is not attributed to dumping and/or subsidisation'.³⁶

In the SEF, the ADC noted that, in accordance with the Material Injury Direction, injury caused by factors other than dumping must not be attributed to dumping.³⁷ However, the ADC did not indicate that it had attempted to calculate or quantify the extent of the injury caused by factors other than dumping. Instead, the ADC merely asserted that the Goods were found to be 'dumped at significant margins' during the Investigation Period, and that the 'Commissioner was satisfied that the procurement decisions by Comsteel's customers were predominantly based on price.'

(d) Rio Tinto's submissions in relation to causation of material injury by factors other than dumping

Section 269TG(1) of the Act provides for the publication of dumping duty notices, and includes the concept of causation as a natural implication of subparagraphs (1)(a) and (b). In short, the Minister must be satisfied that material injury is caused by dumping:

(1) [...] where the Minister is satisfied, as to any goods that have been exported to Australia, that:

³³ Ibid, pp 18 – 21.

³⁴ Supplementary Submission, p 7.

³⁵ Initial Submission, pp 31-40

³⁶ PAD, p 23.

³⁷ SEF, p 54.

PUBLIC RECORD

- (a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and
- (b) **because of that:**
 - (i) **material injury to an Australian industry producing like goods has been or is being caused** or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or
 - (ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 8 of the Dumping Duty Act--material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;

the Minister may, by public notice, declare that section 8 of that Act applies. (emphasis added)

Section 269TAE(1) of the Act provides for factors to which the Minister may have regard in determining whether material injury has been caused 'because of any circumstances in relation to the exportation of goods to Australia from the country of export'. Subsection (2A) sets out the Minister's 'non-attribution' obligation and factors to which the Minister may have regard to ensure that material injury is not attributed to dumping where it is actually caused by a factor other than dumping:

- (2A) In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:
 - (a) the volume and prices of imported like goods that are not dumped; or
 - (b) the volume and prices of importations of like goods that are not subsidised; or
 - (c) contractions in demand or changes in patterns of consumption; or
 - (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or
 - (e) developments in technology; or
 - (f) the export performance and productivity of the Australian industry;and any such injury or hindrance must not be attributed to the exportation of those goods.

Rio Tinto's previous submissions in the Initial Submission, as set out in Section 3.2(b) of this Post-SEF Submission, relate to paragraphs (d) – (f) of subsection (2A) set out above. The Minister 'must consider' whether these factors have caused material injury.

Ultimately, the Commissioner must be satisfied that material injury has been caused 'because of' dumping. This is the statutory language. The simplest notion of factual causation can be expressed as a 'but for' test – here, 'but for dumping, would material injury to an Australian industry producing like goods have been caused.' Or alternatively, would the Applicant's material injury have been caused regardless of the dumping?

Section 269TAE(1) provides a list of factors which the Minister may have regard to in assessing the causation of the material injury. Certain factors relevant to the Investigation are extracted below:

- (1) In determining, for the purposes of section 269TG or 269TJ, **whether material injury to an Australian industry has been or is being caused** or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially hindered, **because of any circumstances in relation to the exportation of goods to Australia from the country of export**, the Minister may, without limiting the generality of that section but subject to subsections (2A) to (2C), have regard to:
- (aa) if the determination is being made for the purposes of section 269TG--the **size of the dumping margin**, or of each of the dumping margins, worked out in respect of goods of that kind that have been exported to Australia and dumped;
 - [...]
 - (d) the **export price** that has been or is likely to be paid by importers for goods of that kind exported to Australia from the country of export; and
 - (e) the **difference between**:
 - (i) the **price** that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold **in Australia**; and
 - (ii) the **price** that has been or is likely to be paid for goods of that kind exported to Australia **from the country of export** and sold in Australia; and
 - (f) the **effect that the exportation** of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have **on the price** paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold **in Australia** [...] (emphasis added)

The method for ensuring non-attribution has been explained by the WTO Appellate Body in US – Hot Rolled Steel:

The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an **assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports**. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties.³⁸ (emphasis added)

Rio Tinto submits that 'other known factors' which are causing injury have been identified by Rio Tinto as set out at section 3.2(b) of this Post-SEF Submission.

The WTO Appellate Body also acknowledged the practical difficulty of separating and distinguishing the injurious effects of different causal factors, but this difficulty alone does not relieve the investigating authority of its non-attribution obligations:

³⁸ Appellate Body Report, *United States – Anti Dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (23 August 2001), para 223.

[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.³⁹

The ADC's conclusion about factors other than dumping does no more than assert that the dumping margin is 'significant', and that the procurement decisions of end users were 'predominantly based on price'.⁴⁰ With respect, this is not at all a conclusion about factors other than dumping; it is a conclusion about dumping.

If it is accepted that the end users' procurement decision-making was predominantly based on price, which Rio Tinto rejects, then it is necessary for the ADC to ascertain whether the price differences between the exporter, Masteel, and the Applicant are predominantly because of dumping, or predominantly because of other factors. Ascertaining the reason for the price difference to some extent separates and distinguishes the injurious effects of the other factors from the injurious effects of the dumped imports.

While s269TAE(1)(aa) of the Act refers to the size of the dumping margin as a relevant factor, it is not clear on what basis the ADC asserts that the dumping margin is significant. Rio Tinto submits that the 'significance' of the dumping margin is dependent on the extent to which the proportion of the price differential between the export price and the Australian industry price is attributable to dumping. This is a relevant factor referred to at paragraph (1)(e).

Rio Tinto submits that if this price differential is predominantly attributable to factors other than dumping, such that end users making procurement decisions predominantly based on price would procure the goods under consideration from the exporter even if dumping was not occurring, then the material injury to the Australian industry caused by those procurement decisions cannot be said to be 'because of' dumping. Taking a hypothetical and simplified example, if an exporter's price per unit is \$60 and the Australian industry's price is \$100, and a dumping margin of 20% is found, it is clear that \$12 of the price difference is because of dumping and \$28 of the price difference is because of factors other than dumping. Applying the legislation to this hypothetical scenario, Rio Tinto submits that it would not be available for the ADC, in such a situation, to conclude that dumping was causing material injury to Australian industry. That is because the significance of the price differential attributable to factors other than dumping would indicate that any injury suffered by Australian industry would have occurred irrespective of dumping. Put another way, it would not be established that, but for the dumping, injury would not have occurred. Rio Tinto submits that the ADC must undertake a similar evaluation in the Investigation to satisfy itself that dumping is, in fact, causing material injury to Australian industry. If it does not undertake this evaluation, Rio Tinto submits it has failed properly to exercise jurisdiction.

³⁹ Ibid, para 228.

⁴⁰ SEF, p 54.

Further, s269TAE(1)(f) of the Act refers to the effect that exportation has had on the price of the Goods in Australia. The ADC in the SEF concluded that the Australian industry has suffered injury in the form of price suppression.⁴¹ According to the ADC therefore, in the absence of dumping, the price of Goods produced by the Australian industry would be even higher than it is currently. It is therefore necessary for the ADC to consider the price differential between the exporter's Goods when not dumped and the price of the Australian industry's Goods where there is no price suppression (a price assumedly higher than what is currently being offered to Australian end users). The price differential because of factors other than dumping may be found to be even greater in this situation. The inference is that the dumping margin (and so the price difference because of dumping) would be even more insignificant in comparison to the price differential because of factors other than dumping.

Rio Tinto notes that the 'Commission is aware of competitive processes undertaken by Australian customers to purchase railway wheels in the months following the making of the PAD and decision to require and take securities'.⁴² Rio Tinto submits that the ADC should have regard to the initial administrative and logistical hurdles presented by the Commissioner's decision to require and take securities following the PAD, and should not assume that this initial effect will alter the long-term procurement decisions of Australian end users. The ADC's consideration of its non-attribution obligation should take this into account.

Rio Tinto submits that in order to comply with the Act and to be satisfied that material injury has been caused 'because of' dumping, the ADC is required to be satisfied that a significant proportion of the price differential is from dumping, such that if the dumping did not occur, the material injury to an Australian industry would be substantially less.

The ADC must be satisfied that the price paid by Australian end users for exported Goods (inclusive of interim dumping duty) is such that it would influence Australian end users to procure Goods from the Australian industry in preference to exporters. If, even in the absence of dumping, there still remains a material price differential between the exporter's price and the Australian industry's price for end users (so that the exporter's price is still significantly cheaper), then end users who make procurement decisions 'predominantly based on price' on the ADC's own analysis, will not alter their procurement decisions, and the material injury suffered by the Australian industry cannot, therefore, be said to be caused by dumping.

If this is the case, Rio Tinto submits that the condition under s269TG(1)(b) of the Act has not been satisfied and that a dumping duty notice must not be published.

3.3 The taking of securities in respect of interim duty

(a) The ADC's decision in the PAD

In the PAD, the Commissioner stated:

⁴¹ SEF, p 41.

⁴² Ibid, p 11.

Under subsection 269TD(4)(b), I am satisfied that it is necessary to require and take securities in relation to exports of the goods to Australia from China and France to prevent material injury to the Australian industry occurring while the investigation continues.⁴³

As a result, after 19 June 2018, securities were required and taken under section 42 of the Act in respect of interim dumping duties that became payable in respect of Goods exported from China and France.

(b) Submissions of interested parties and responses

In its letter to the ADC following the publication of the PAD, Masteel questioned what specific 'injury' the ADC was seeking to prevent by the taking of securities.⁴⁴ Masteel submitted that each of the Australian end-users it supplies to are a party to supply contracts with Masteel, so that the taking of securities will not result in lost sales volumes being returned to the Australian industry, and will not reduce or prevent any injury to Australian industry while the Investigation continues. Masteel correctly states that '[t]he supply of goods over the term of a contract does not "continue" to cause further injury during the investigation'.⁴⁵ The result of the taking of securities is therefore merely an impost on the Australian end-user and their customers.⁴⁶

The Commissioner responded to Masteel by stating: 'I do not accept your submission that the imposition of securities is not justified on the basis that any injury that might occur has already occurred [...] In my view, the commercial arrangements present in the Australian market for railway wheels do not preclude the prospect of the securities being effective in preventing injury to the Australian industry producing like goods.'⁴⁷

In response, the CCCME asked the ADC to elaborate on this statement. Specifically, the CCCME asked 'what injury would or could be prevented by the imposition of securities while the investigation continues' and 'how does a documentary security prevent [such] injury'?⁴⁸

BHP requested the Commissioner to withdraw the requirement that securities be taken in respect of interim dumping duty.⁴⁹ First, BHP questioned the basis on which the Commissioner could be satisfied that securities are necessary to prevent injury to the Australian industry, especially in light of the ADC's extension to the deadline for publishing the SEF because of the complexities of the Investigation. Secondly, BHP emphasised the significant administrative, legal, logistical and commercial burdens that the taking of securities has on importers and end users of the Goods.

In Rio Tinto's Further Submission, it was submitted that 'it is unsatisfactory administrative practice for such a burden to be placed on industry without transparent reasoning being

⁴³ PAD, p 2.

⁴⁴ Submission 019 on the ADC Public Record, p 2.

⁴⁵ Submission 027 on the ADC Public Record, p 5.

⁴⁶ Ibid, p 3.

⁴⁷ Submission 021 on the ADC Public Record.

⁴⁸ Submission 031 on the ADC Public Record, pp 4-5.

⁴⁹ Submission 033 on the ADC Public Record, p 2.

given by the Commissioner'.⁵⁰ Moreover, Rio Tinto submitted that if there was no reasonable basis for the decision given in the Commissioner's reasons in the PAD, it may be inferred by a court that the Commissioner was not 'in reality' satisfied of the requisite matters on which the power to require and take securities under s42 of the Act is conditioned, so that that the decision was made in jurisdictional error and is liable to be set aside.⁵¹ Rio Tinto submitted that the ADC must provide adequate reasons identifying how the taking of securities is necessary to prevent that injury, or else the requirement to take securities should be withdrawn with retrospective effect and with any securities already paid by importers refunded.⁵²

(c) The ADC's decision in the SEF

The ADC characterised Masteel and Rio Tinto's submissions as follows:

[B]ecause the sale of railway wheels is generally contract based, once such contracts are lost by the Australian industry, no further injury can occur or at least cannot be prevented by the taking of securities. This submission seems to rely on the proposition that all such contracts are exclusive, allow no variation to their terms or operation under any circumstances and are not subject to renegotiation in the course of the investigation.⁵³

The ADC found that the 'contractual arrangements currently in place in the Australian market do not exclude the possibility of customers purchasing railway wheels from the Australian industry'.⁵⁴ The ADC also stated its awareness of Australian end users' competitive processes undertaken to purchase Goods from the Australian industry since the PAD.

(d) Rio Tinto's submission

Rio Tinto reiterates its submission that s269TD(4)(b) of the Act grants the Commonwealth the power to require and take securities under s42 in respect of interim duty only if the 'Commissioner is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues'.

Any decision to require and take securities under s42 of the Act in respect of interim duty that is made before the Commissioner is satisfied of the necessity to do so is a jurisdictional error and should be revoked. As previously submitted in Rio Tinto's Further Submission, if there is no reasonable basis given in the Commissioner's reasons, it may be inferred that the Commissioner was not 'in reality' satisfied of the requisite matters or that there was an absence of any real basis for the decision.⁵⁵

The Commissioner's understanding at the time of the SEF of the contractual arrangements between Masteel and end users does not adequately demonstrate that the

⁵⁰ Further Submission (Official Use Only version), p 14.

⁵¹ Ibid.

⁵² Ibid, p 15.

⁵³ SEF, p 11.

⁵⁴ Ibid.

⁵⁵ Further Submission p 14. See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR at 623 [34] (per Gummow ACJ and Kiefel J).

Commissioner was 'satisfied' that it was necessary to take securities to prevent material injury at the time of the PAD. The Commissioner states that he is aware of competitive processes since the PAD supporting his satisfaction of the necessity to take securities, but logically, he could not have been aware of those events at the time of the PAD when the decision to require and take securities was made.

The Commissioner's decision to require and take securities may be made at the time of PAD or 'at any later time during the investigation', but is only a valid decision if the Commissioner is satisfied that it is necessary to do so to prevent material injury. If the Commissioner makes the decision to require and take securities during the PAD without any reasonable basis for being satisfied at the relevant time of the necessity to do so, then the Commissioner being properly satisfied at a later time after being made aware of new developments or information does not operate to validate the original decision.

Rio Tinto submits that the Commissioner's inability to substantiate his satisfaction that it was necessary to take securities to prevent material injury during the Investigation until the SEF indicates, without further reasons being provided, that he was not properly satisfied of that necessity at the time the decision to require and take securities was made in the PAD.

Rio Tinto submits that the ADC's justification in the SEF for requiring and taking securities is *ex post facto* reasoning that does not indicate that the Commissioner was satisfied as to necessity at the time of the PAD. The Commonwealth's power to take securities under s42 of the Act was therefore not enlivened at that time, and so the decision must be revoked, and securities taken or guaranteed (by way of an undertaking) in respect of interim duty before the Commissioner was properly satisfied must be refunded or the undertakings released, as the case may be.

3.4 The form of interim dumping duty

(a) The ADC's decision in the SEF

Following the PAD, the ADC required securities to be taken as an amount determined in accordance with the combination fixed and variable duty method.⁵⁶

In the SEF, the Commissioner recommended to the Minister that the combination duty method be used in respect of dumping duty.⁵⁷ The rationale for this recommendation was that the various models of the Goods are similar and do not exhibit a wide price range, and a falling market does not presently exist in relation to the Goods.

(b) Rio Tinto's submission

Rio Tinto submits that, in the event that the ADC continues to recommend the imposition of interim dumping duties, the most appropriate form of dumping duty for the Goods is the floor price method. As stated in the Guidelines and in the SEF, the floor price method prevents exporters from reducing their export prices in order to decrease the

⁵⁶ PAD, p 26.

⁵⁷ SEF, p 71.

amount of duty paid. In addition, the floor price method limits the punitive effect of price increases in the goods that result from the combination method. This limits the effect of the duty on downstream industries (i.e. end users). This method would therefore still achieve one of the purposes of the anti-dumping system – to address material injury caused to an Australian industry by dumping – while limiting the effect on Australian end users of export price increases. It also carries with it far less administrative burden on end-users compared to the combination duty method.

The combination duty method is considered appropriate where circumvention behaviour is likely (particularly because of related party dealings), where complex company structures exist between related parties, and where there been a proven case of price manipulation in the market.⁵⁸ Rio Tinto submits that these criteria have not been established in this case.

The floor price method is said to be ineffective where there is a rising market that causes the 'floor' (the normal value) to become out-of-date.⁵⁹ The ADC has not concluded in the SEF that there is a rising market for the Goods.⁶⁰ It has also expressly concluded that a falling market does not presently exist,⁶¹ which would otherwise make the floor price method inappropriate. It has therefore not been shown that the floor price method is unsuitable in this case. Indeed, the floor price method would ensure that there is an incentive for exporters to raise export prices closer to normal value, as interim dumping duty would not be collected if the export price were to be equal to or greater than the normal value. Interim dumping duty would therefore only be imposed where the export price remained at a 'dumped price' below the normal value. Dumping duty would therefore not continue to be imposed on Australian end users once dumping has ceased (i.e. when export prices are at or above normal value). This accords with the purpose of the anti-dumping system to impose dumping duties only where dumping subsists.

In all the circumstances, Rio Tinto submits that if the Commissioner continues to recommend to the Minister that a dumping duty notice be published in relation to the Goods, which Rio Tinto submits he should not, then a floor price method is the only appropriate method for collecting duty.

⁵⁸ SEF, p 72.

⁵⁹ Guidelines, p 8.

⁶⁰ SEF, p 72.

⁶¹ Ibid.

4. Conclusion and Recommendation

4.1 No imposition of measures

Rio Tinto submits that no dumping duty notice, countervailing duty notice or other measure should be imposed by the ADC in relation to the Goods. It submits that the conditions for imposing measures under ss269TG and 269TJ of the Act do not exist in this case.

4.2 Insufficient grounds for PAD

Rio Tinto submits that no material injury has been identified which could have enlivened the power in s269TD(4)(b) for the Commissioner to require and take securities under s42 of the Act on 18 June 2018 when he issued the PAD. As a result, the Commissioner should withdraw his decision to take securities under s42 of the Act on 18 June 2018 and refund any duties paid, or release parties from undertakings given, in relation to Goods entered for home consumption between 19 June 2018 and 11 October 2018, the date of publication of the Amendment to Securities notice.

4.3 Investigation should be terminated

For the reasons set out in this Post-SEF Submission, Rio Tinto recommends that the Investigation should be terminated pursuant to s269TDA of the Act.

Schedule 1 – Definitions

In this Submission, the following definitions apply:

CCCME means the China Chamber of Commerce for the Import and Export of Machinery and Electronic Products.

Further Submission means both versions of the Rio Tinto Submission lodged with the ADC on 5 September 2018, which appeared on the Public Record on 6 September 2018.

Guidelines means the ADC's *Guidelines on the Application of the Form of Dumping Duty 2013*.

Initial Submission means both versions of the Rio Tinto Submission lodged with the ADC on 5 June 2018, which appeared on the Public Record on 6 June 2018.

Material Injury Direction means the *Ministerial Direction on Material Injury 2012* (Cth).

PAD or **Preliminary Affirmative Determination** means Anti-Dumping Notice No. 2018/99 published by the ADC on the Public Record on 18 June 2018 and made under subsection 269TD(4)(a) of the Act which also gave notice of the Commissioner's decision to require to take securities under subsection 269TD(5) of the Act.

Supplementary Submission means both versions of the Rio Tinto Submission lodged with the ADC on 11 June 2018, which appeared on the Public Record on 15 June 2018.