Australian Government
Anti-Dumping Review Panel

ADRP REPORT NO. 40

STEEL ROD IN COILS EXPORTED TO AUSTRALIA FROM THE PEOPLE'S REPUBLIC OF CHINA

December 2016

Review of a decision of the Parliamentary Secretary to publish a Dumping Duty Notice in relation to Steel Rod in Coils Exported to Australia from the People's Republic of China

Contents

Introduction

1. The following Applicants applied in terms of s.269ZZC of the *Customs Act 1901*(the Customs Act), for review of a decision of then Assistant Minister of Science and Parliamentary Secretary to then Minister of Industry, Innovation and Science (the former Parliamentary Secretary), to publish a Dumping Duty Notice pursuant to s.269TG(1) and (2) of the Customs Act in respect of steel rod in coils (RIC) exported to Australia from the People's Republic of China (China):

   a. Hunan Valin Xiangtan Iron & Steel Co., Ltd (Hunan Valin);
   b. Vicmesh Pty Ltd (Vicmesh);
   c. Jiangsu Shagang Group Co., Ltd (Shagang); and
   d. OneSteel Manufacturing Pty Ltd (Administrators Appointed) (OneSteel).

2. The Senior Member of the Anti-Dumping Review Panel (the Review Panel) directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

3. The applications for review of Hunan Valin, Shagang, OneSteel and Vicmesh were accepted and notice of the proposed review as required by s.269ZZI of the Customs Act, was published on 21 June 2016.

Background

4. Anti-dumping measures applicable to RIC exported from China were established following an anti-dumping investigation initiated on 12 August 2015 by the Anti-Dumping Commission (ADC).[1]

5. On 1 December 2015 the Commissioner of the ADC (the Commissioner) made a Preliminary Affirmative Decision (PAD) which resulted in the imposition of securities of between 9.5 and 18.4 per cent for RIC exported to Australia from

[1] Investigation No. 301

China. On 15 February 2016 the ADC issued the Statement of Essential Facts (SEF) for the investigation (SEF 301).

6. The final report to the Parliamentary Secretary was made by the ADC in Anti-Dumping Commission Report 301 (REP 301). The ADC recommended to the Parliamentary Secretary that a Dumping Duty Notice be published in respect of RIC exported to Australia from China. The Parliamentary Secretary accepted the recommendations and a Dumping Duty Notice under subsections 269TG(1) and (2) of the Customs Act was published on 22 April 2016.[2]

The Review

7. In accordance with s.269ZZK(1) of the Customs Act, the Review Panel must recommend that the former Parliamentary Secretary either affirm the decision under review or revoke it and substitute a specified new decision.

8. The Review Panel must determine whether the decision to publish was the correct or preferable one. If it is concluded that the decision is the correct or preferable one, then the Review Panel must report to the Parliamentary Secretary recommending that he or she affirm the decision. If the Review Panel is not satisfied that the decision was the correct or preferable decision, the Review Panel must report to the Parliamentary Secretary recommending that he or she revoke the decision and substitute a specified new decision.

9. In undertaking the review, s.269ZZ of the Customs Act requires the Review Panel to determine a matter required to be determined by the Parliamentary Secretary in like manner as if it was the Parliamentary Secretary, having regard to the considerations to which the Parliamentary Secretary would be required to have regard if the Parliamentary Secretary was determining the matter.

[2] See ADN No. 2016/47

10. An applicant is required to set out reasons for believing that the reviewable decision is not the correct or preferable decision, and failure to do so may result in rejection of the application. However, as it was stated in the ADRP Report No.15,[3] because an application is not rejected it does not follow that all grounds advanced in the application are to be viewed, or have been accepted as reasonable grounds for the reviewable decision not being the correct or preferable decision. It is also pointed out in the ADRP Report No.15 that the obligation on an applicant to set out the reasons is linked to the task the Review Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

11. In making its recommendation the Review Panel must not have regard to any information other than the *"relevant information"* as defined in s.269ZZK(6) of the Act, that is, information to which the ADC had regard or was required to have regard when making its findings and recommendations to the Parliamentary Secretary. The Review Panel must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application for review and any submissions received under s.269ZZJ of the Act.[4] In other words, the Review Panel does not undertake its own new investigation and is limited to the information that had been before the ADC.

12. In conducting this review I have had regard to the applications (including documents submitted with the applications) and to the submissions received pursuant to s.269ZZJ of the Customs Act insofar as they contained conclusions based on relevant information.

13. The Review Panel may, in making a recommendation under Section 269ZZK of the Act, also have regard to further information to the extent it relates to relevant

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[3] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16
[4] See s.269ZZK(4) of the Act

information obtained at a conference held under section 269ZZHA(1) and to conclusions reached at such a conference based on that relevant information.[5]

14. On 21 June 2016, a request was made to the ADC to provide copies of confidential documents which were referenced in REP 301 and SEF 301 or were created during the investigation. This correspondence with the ADC was made publicly available. Copies of the documents provided by the ADC were not made publicly available as they dealt with confidential information.

15. The time for submissions by interested parties under s.269ZZJ is 30 days after the public notice. As the public notice was given on 21 June 2016 the time for submission expired on 21 July 2016. Submissions were received in this period from:

- The ADC;
- Hunan Valin; and
- Shagang.

Non-confidential versions of the submissions were made publicly available on the Review Panel's website.

16. Unless otherwise indicated, in conducting this review, I have had regard to the applications (including documents submitted with the applications or referenced in the applications) and the submissions received pursuant to section 269ZZJ, insofar as they contained conclusions based on relevant information. I have also had regard to the REP 301, and information relevant to the review which was referenced in REP 301 and to information created during the investigation, such as visit reports. This also included information contained in Statement of Essential Facts No 301 (SEF 301).

[5] Section 269ZZHA(2)

17. The letter from Hunan Valin (referred to in paragraph 17 above) dealt with issues associated with the conduct of the review. As is normal practice in the reports of the Review Panel, the conduct of the review is outlined in this section of the report.

18. On 9 December 2016, I convened a conference with the ADC under section 269ZZHA of the Customs Act (the Conference) to obtain additional information in relation to the review, relevant to the calculation of the normal value used in the construction of the normal value for Hunan Valin and Shagang. This involved confidential information relating to co-operating exporters' normal values. A non-confidential summary of the conference was placed on the public record.

19. After reviewing the applications, submissions and other material described above, on 19 August 2016, pursuant to s.269ZZL of the Act, I required the ADC to reinvestigate various findings in REP 301. I requested the ADC's reinvestigation in this regard by 28 October 2016. In a letter to the ADC dated 28 October 2016, I advised that the reinvestigation report was no longer required on 28 October 2016, but that I now required the reinvestigation report on 14 November 2016. The request for reinvestigation and correspondence relating to the extended date were made publically available. A copy of the Reinvestigation Report, which was received on 14 November 2016 (the Reinvestigation Report), is attached as Annexure 1 to this report.

Grounds of Review

Hunan Valin

20. Hunan Valin is an exporter of RIC, which are the goods that are the subject of the reviewable decision application. Hunan Valin is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX of the Act.[6]

[6] See the definition of interested party in s.269ZX(c)

21. The grounds of review relied upon by Hunan Valin are as follows:

a. The steel billet cost substituted in Hunan Valin's costs of production was not determined in the country of export;

b. Improper consideration of whether Hunan Valin's records reasonably reflect competitive market costs;

c. The use of an incorrect cost in the construction of Hunan Valin's normal value;

d. Failure to adjust Hunan Valin's costs for cost offsets in the form of verified by-products and cost recoveries; and

e. Error in the amount of profit in Hunan Valin's constructed normal value.

Vicmesh

22. Vicmesh is an importer of RIC and is therefore an "interested party" in relation to a reviewable decision within the meaning of s.269ZX.[7]

23. The grounds of review relied upon by Vicmesh are as follows:

a. Error in conclusion that there was a particular market situation that justified ignoring Hunan Valin's actual cost to produce billet resulting from, amongst other things:
   - a failure to apply required evidentiary standards;
   - improper methodology in dealing with subsidy allegations as the basis of undue market influence; and
   - flawed reasoning on the evidence and conclusions drawn not justified.

[7] See the definition of interested party in s.269ZX(c

b. Improper normal value calculations for Hunan Valin resulting from, amongst other things:
   - an error in law in allowing a surrogate benchmark for the cost of producing billet;
   - an error in ignoring billet prices but accepting PRC conversion costs;
   - improper change of the surrogate after the SEF; and
   - a failure to make required adjustments to the benchmark.

c. Failure to make appropriate adjustments to normal value for Hunan Valin to make a proper comparison with export price.

d. Erroneous conclusions in relation to material injury and causal link resulting from, amongst other things:
   - an error in identification of the market and failure to differentiate trade exposed versus non-exposed sectors;
   - incorrect cumulation of imports;
   - error in findings of injury elements;
   - error in assessment of other causes of injury; and
   - error in finding material injury.

e. Error in rejection of non-injurious price.

Shagang

24. Shagang is an exporter of RIC and is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX of the Act.[8]

[8] See the definition of interested party in s.269ZX(c)

25. The grounds of review relied upon by Shagang are as follows:

a. Error in finding that a particular market situation existed and that as a consequence, domestic sales of RIC were unsuitable for determining normal values for Shagang;

b. Error in reliance on market situation assessment and findings to form the view that Shagang's steel billet costs did not reasonably reflect competitive market costs;

c. Error in interpretation of Regulation 43 by focusing on the costs themselves, rather than the records of Shagang, in rejecting its steel billet production costs;

d. Failure to undertake a proper assessment of whether Shagang's records reasonably reflect competitive market costs;

e. Error in making adjustments to constructed normal values for Shagang, for value-added taxes that did not affect price comparability; and

f. Error in determining material injury on the basis of a 'but-for' methodology which as a result incorrectly found that the applicant suffered material injury attributable to the subject goods.

OneSteel

26. OneSteel is the Australian manufacturer of RIC and is an "interested party" in relation to reviewable decision within the meaning of s.269ZX of the Act.[9]

27. The grounds of review relied upon by OneSteel are as follows:

[9] See the definition of interested party in s.269ZX(a)

a. Error in selection of prices based on export market conditions as appropriate benchmark for competitive market costs;

b. Error in subtracting a rate of profit from the selected benchmark; and

c. Error in failure to apply an alloying adjustment to the selected external billet benchmark.

Consideration of Grounds of Review

Hunan Valin

28. I will now deal with the grounds of review put forward by Hunan Valin.

The steel billet cost substituted in Hunan Valin's costs of production was not determined in the country of export

29. The first ground of review of Hunan Valin is that a cost of production such as, in this case, a steel billet cost, is required by s.269TAC(2)(c)(i) of the Customs Act to be *"such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export"* (emphasis added), and it was not such a cost.

30. In REP 301 the ADC adopted the Platts Latin American export billet prices in FOB terms, as the benchmark for steel billet, which it considered represented, "*the best available information on competitive market costs of steel billets*", based on, amongst other, "the *size of the market and the geographic distance from China minimising the potential distortions of Government of China (GoC) influenced billet prices"* [10] Hunan Valin contends that a Latin American FOB

[10] See REP 301, page 17

export billet price is not a cost of production "*in the country of export*" of Hunan Valin's RIC, that is, China.

31. Hunan Valin contends that although the ADC maintains in REP 301 that normal values were constructed under subsection 269TAC(2)(c) of the Customs Act and in accordance with the conditions of sections 43, 44 and 45 of the Customs (International Obligations) Regulation 2015 (the Regulation), there is nothing in any of these provisions which directs, allows or even suggests that the ADC could use, in the circumstances at issue, an export price of Latin American countries, as a cost of production of an exporter having China as its country of export. Hunan Valin claims that reading the relevant provision of the Customs Act to the effect that the cost does not have to be a cost in the country of export is to give those words – "*country of export*" – no meaning. Hunan Valin's concern and complaint is that the benchmark steel billet cost does not exist in the country of export, is not "of" the country of export, is formed by economic forces which are not evident in the country of export and has no relationship to the country of export. To the contrary, according to Hunan Valin, the ADC has attempted to do its best to ensure that the cost it used has nothing whatsoever to do with the country of export.

32. Hunan Valin in its application makes reference to a decision of the Panel in the WTO Case, *EU – Biodiesel* [11] which it contends confirms that the requirement that the costs of production for the calculation of normal value are those in the country of export. The dispute involved the EU's decision to resort to a constructed normal value in relation to exports from Argentina. In constructing the normal value the EU substituted a FOB price based benchmark cost for soybean into the Argentinian exporter's costs of production, on the basis that the Argentinian cost of soybean was distorted by various Argentinian Government regulatory measures. The Panel stated:

[11] *European Union – Anti- Dumping Measures on Biodiesel from Argentina*, WT/DS473/R ("EU - Biodiesel")

"In our view, it is plain from this that the cost used by the European Union is not a cost "in the country of origin". It was specifically selected to remove the perceived distortion in the domestic price of soybeans caused by the Argentine export tax system. This is because the prices prevailing in Argentina were considered to be artificially lower than international prices. In other words, the EU authorities selected this cost precisely because it was not the cost of soybeans in Argentina. [footnotes omitted]" [12]

33. Thus, the Panel decided that the costs used for constructing normal value under Article 2.2 of the Anti-Dumping Agreement must be based on the cost of production in the country of origin. The Panel ruled as follows:

" ...the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value." [13]

34. Hunan Valin contends that the Panel's finding in *EU - Biodiesel* is directly relevant and resolves any ambiguity, as it establishes that costs in the country of origin must be used for normal value purposes.

35. In its s.269ZZJ submission to the Review Panel, the Commissioner explained the reasons for using an external benchmark as a substitute for Hunan Valin's steel billet cost:

"Domestic prices of billets within China are not suitable as it is considered that these prices are affected by GoC influence. Similarly, import prices of billets into China do not constitute an appropriate benchmark to reflect competitive market prices due to their pricing being referenced against domestically produced goods which are influenced by the GoC policies. As a

[12] EU – Biodiesel, paragraph 7.258
[13] EU – Biodiesel, paragraph 7.260

result, consistent with the Manual, I consider that internationally sourced billet prices from a reliable source is the most appropriate benchmark for establishing the competitive market cost for steel billet production costs in China." [14]

36. The ADC in its submission also reiterated its view that using a benchmark from outside the country of export to adjust an exporter's reported costs is necessary in certain circumstances in order to arrive at a competitive cost of production and is consistent with ADC practice. The ADC referred to the decisions of the Federal Court in *Panasia*[15] and *Dalian*[16], which considered the use of a cost benchmark and included information from outside the country of export, and affirmed this approach.[17]

37. In REP 301, the ADC found that there is a particular market situation in the Chinese iron and steel industries which distorts the market and cost structure in these industries. Therefore the ADC was satisfied that domestic sales of RIC in China are not suitable to be used for establishing normal value, in accordance with s.269TAC(1) of the *Customs Act* and thus constructed normal value under subsection 269TAC(2)(c). I therefore turn to consider the text of s.269TAC(2)(c) in accordance with the approach set out by Nicholas J in *Panasia*:

"The provisions of Pt XVB of the Act are technical and complex. They must be interpreted in accordance with the settled principles of statutory construction. As always, the interpretative task begins with a consideration of the terms of the relevant legislation ..... Recourse to the international agreements will only be of assistance in resolving the questions of construction in this case where the relevant provisions are ambiguous, and

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[14] See ADC Sumission to the Review Panel dated 21 July 2016 (the ADC submission), page 7
[15] *Panasia Aluminium (China) Ltd v Attorney-General of the Commonwealth* (2013) 217 FCR 64 (Panasia) at [91]
[16] *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 (Dalian) at [41-42]
[17] See the ADC submission, page 7

where the international agreements may assist in resolving the ambiguity....." [18]

38. In circumstances where the normal value of goods exported to Australia cannot be ascertained under s.269TAC(1) of the *Customs Act*, s.269TAC(2)(c) provides for the normal value of the goods to be the sum of: *"(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export;"* (emphasis added). It seems clear from the legislative provision that the relevant amount is not simply "*the cost of production or manufacture in the country of export*", but what the *"Minister determines"* to be the cost of production or manufacture in the country of export".

39. Section 269TAC(5A) of the Customs Act provides for the cost of production or manufacture of the goods under s.269TAC(2)(c)(i) to be worked out in such manner and taking account of such factors, as the regulations provide. Section 43 of the Regulation is the relevant regulation relating to the determination of cost of production or manufacture. In s.43 there is no limitation on how the Parliamentary Secretary may determine the "*cost of production in the country of export"* in circumstances where the Parliamentary Secretary is not bound to work out the amount by using information set out in the records of the exporter, where such records are found not to "*reasonably reflect competitive market costs*", as was the case in respect of Hunan Valin. [19] There would therefore appear to be no reason why the Parliamentary Secretary could not use an external benchmark as a substitute cost for steel billets in China, where it was found that the cost of steel billets in China was distorted and did not reflect *"competitive market costs*".

40. This interpretation of s.269TAC(2)(i) as read with s.43 of the Regulation is borne out by the *Panasia* and *Dalian* cases, which both considered the use of a cost benchmark which included information from outside the country of export, as stated by the ADC in its submission. Also, of relevance are the comments of

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[18] See *Panasia* at [9]
[19] See s.43 of the Regulation

Moore, J. in *Metal Manufacturers vs Comptroller -General of Customs* [20] in considering whether the actual costs of production or manufacture should be used for the purpose of s.269TAC(2)(i):

> "'However the amount arising from the operation of s269TAC(2)(c)(i) is *"such amount as the Minister determines"*. S269TAC(2)(c) does not require the normal value to include the actual *"cost of production or manufacture"*. The determination by the Parliamentary Secretary, which for present purposes is the determination by the Authority, will necessarily involve matters for judgement. The exercise of that judgement permits of some approximation of the actual cost based on sufficient information." [21]

This would appear to affirm the wide discretion that the Parliamentary Secretary has to determine the costs of production *"in the country of export"* under s.269TAC(2)(c) of the *Customs Act*, without limiting such consideration to costs only in the country of export.

41. The issue was more directly addressed by Robertson J in the recent Federal Court decision of *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309, where it was claimed that the Commissioner, in using a benchmark price to determine the exporter's cost of production, in terms of s.269TAC(2)(c)(i) of the Customs Act, erred in law by using production information from steel mills outside the PRC (being the country of export). Robertson J stated:

> *"In those circumstances, the normal value of the goods for the purposes of Pt XVB is to be, relevantly, such amounts as* ***the Minister determines*** *to be the cost of production or manufacture of the goods in the country of export (emphasis added.) In my opinion, contrary to the applicants' submission, the*

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[20] *Metal Manufacturers vs Comptroller -General of Customs*, BC 9507720 13 April 1995 unreported, Moore,J
[21] Ibid, paragraphs 36 - 38

provision does not exclude the use of overseas data in an appropriate case. The object of the provision is to determine the cost of production or manufacture of the goods in the country of export but it does not follow that only the cost of production or manufacture of the goods in that country may be used, particularly where it has been found that the costs of HRC provided by Dalian Steelforce relating to the review period do not reasonably reflect competitive market prices..."[22]

42. It should be noted that the wording of Article 2.2 of the ADA and the relevant EC provision that the Panel (and Appellate Body) in *EC – Biodiesel* [23] addressed is different to s.269TAC(1)(c) as read with s.43 of the Regulation. There would appear to be no ambiguity in the Australian legislative provisions, which would require recourse to the relevant international agreement (that is the ADA and WTO jurisprudence relating thereto), in its interpretation, as per Nicholas J in *Panasia,* quoted above.[24] I therefore do not consider it necessary to analyse or take the decision *in EU – Biodiesel* into consideration, in making my determination.

43. Based on the above analysis I do not accept Hunan Valin's first ground of review that the substituted Latin American steel billet cost in Hunan Valin's costs of production was not determined in the country of export and was therefore not the correct or preferable decision.

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[22] At paragraph [111]
[23] It should be noted that subsequent to parties' applications and submission to the Review Panel, the Appellate Body handed down its decision in *EU – Biodiesel*, confirming the Panel's decision with regard to this issue, see WT/DS473/AB/R, paragraphs 6.82 and 6.83. It should be noted, however, that the Appellate Body specifically stated in paragraph 6.82 that the phrase *"cost of production in the country of origin"* in Article 2.2 of the ADA does not limit the sources of information or evidence that may be used in establishing the cost of production in the country of origin "*to sources inside the country of origin*".
[24] See *Panasia* at [9]

Improper consideration of whether Hunan Valin's records reasonably reflect competitive market costs

44. The decision to determine Hunan Valin's costs of production of RIC using a substituted steel billet cost was based on the ADC's finding that the financial records of Hunan Valin did not reasonably reflect competitive market costs, in accordance with s.43(2)(b)(ii) of the Regulation. [25] It was confirmed that Hunan Valin is a fully integrated steel manufacturer that produces its own billet from iron ore.[26] Hunan Valin contends that if there is no price, such as is the case where a manufacturer does not buy the input concerned, then there can be no determination made as to whether the cost for that input reasonably reflected competitive market costs. It contends that no finding was made as to the competitive market cost of the raw materials that Hunan Valin did actually purchase.

45. Hunan Valin refers to the list of inputs in the production of RIC set out in REP 301, followed by the statement:

> "*neither exporters' CTMS and raw material purchase information is provided in sufficient detail for the Commission to be able to conduct a comprehensive analysis of all these inputs*" [27]

According to Hunan Valin, it flows from the above extract from Report 301 that the ADC did not have the evidence to come to the conclusion that the price paid

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[25] Section 43(2) of the Regulation provides:

"If:
(a) an exporter or producer of like goods keep records relating to the like goods; and
(b) the records:
(i) are in accordance with generally accepted accounting principles in the country of export; and
(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
the Minister must work out the amount by using the information set out in the records."

[26] See Hunan Valin's application for review, page 12, and the reference in footnote 11 to Hunan Valin's Visit Report, EPR document 025 ("the Visit Report"), at page 10

[27] Se REP 301, page 13

for the inputs did not reasonably reflect competitive market costs. Moreover, Hunan Valin contends that it was entirely cooperative, and provided all of the information as requested by the ADC, including as to its iron ore, coal and coking coal purchases. Hunan Valin contends therefore that the ADC had no basis to find that Hunan Valin's costs of production of RIC did not reasonably reflect competitive market costs, since it ignored the costs that Hunan Valin did incur, and instead made a blanket decision, applicable to all Chinese exporters, that a foreign steel billet price would be substituted at a particular point in their cost of production, regardless of whether the exporter purchased that input or not.

46. Shagang's fourth ground of review, that the ADC failed to undertake a proper assessment of whether Shagang's records reasonably reflected competitive market costs is similar to Hunan Valin's ground of review. Shagang submits that the ADC failed to properly examine its relevant costs and establish, through positive evidence, that its actual costs were distorted or not reflecting competitive market costs. Shagang's arguments are set out in its application for review,[28] and it makes a number of similar arguments to Hunan Valin.

47. Shagang contends that in order to ensure that only those cost elements found not to reasonably reflect costs associated with production or sale are adjusted or replaced, the investigating authority is compelled to examine and analyse each and every particular cost element. According to Shagang, it is simply not open to the investigating authority to circumvent or derogate from this requirement by examining a single cost element and then making a broad finding in respect of all costs. Likewise, the investigating authority is not permitted to reject in its entirety, all of an exporter's production costs based on broad and general characterisations about the dynamics in the domestic market.

[28] See Shagang's application for review(unpaginated) in respect of Finding 4

48. In REP 301, the ADC explained its reasons for conducting an assessment of steel billet costs of cooperating exporters and for determining that the records of the RIC exporters do not reasonably reflect competitive market costs:

- It considers that the significant influence of the GoC has distorted prices in the steel industry and RIC market in China as well as the prices of production inputs;
- It considers 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 billets from which RIC is made;
- The ADC has found that steel billet costs comprise 80 to 85 per cent of RIC CTMS and represent all of the costs apart from the cost of conversion from billet to RIC and the cost of selling, while a raw material such as iron ore comprises only around 40 per cent of the total cost of RIC;
- While it is recognized that specific, single line items, such as iron ore, may be at competitive cost based on world spot purchase prices, the use of the billet index does not distort this position as the billet benchmark will also be based on the same raw materials which are subject to the same competitive world spot prices;
- A substitution at billet level is the most reasonable approach to capture the total impact of the influence of the GoC on the cost of producing RIC.[29]

49. The ADC further explained in its submission to the Review Panel that it undertook an assessment of the competitive market costs associated with the production of like goods, by comparing the cost records for the cooperating exporters with a competitive market based value for billet, since 80 to 85 per cent of all production costs of RIC are billet costs. The ADC considered that it was

[29] See REP 301, pages 11 - 14

open to make such a comparison as steel is a commodity product with converging prices, and an almost perfect correlation exists between the different price indexes. Further, the market situation assessment considered for this case reflected on a wide range of distortionary influences across the entire Chinese iron and steel industries, which RIC is a subset of. The ADC considered that the information considered for the market situation assessment is equally relevant to the assessment of whether records within the market will not reasonably reflect competitive costs due to the distortionary influences of the GoC.[30]

50. The ADC also confirmed, that as outlined in REP 301, it was satisfied that the records of each Chinese exporter that cooperated with the investigation did not reasonably reflect competitive market costs after completing this assessment.[31] The ADC further noted that, after having found that the costs and prices in domestic iron and steel industry and upstream input materials are distorted by the influence of GoC intervention, as per the Manual, the accepted approach is for the ADC to determine a substitute amount for the costs that are found to be influenced, having regard to all relevant information, irrespective of the actual cost incurred by the exporter or producer for that input.[32] The ADC considers that its approach complies with subsection 269TAC(2) as well as section 43 of the Regulation. In addition, the ADC pointed out that the methodology applied has been previously adopted by the Federal Court in the *Panasia*[33] and *Dalian*[34] cases. [35]

51. I have considered the detailed submissions of Hunan Valin and Shagang with regard to this ground of review, as well as the analysis and explanation of the approach taken by the ADC in both REP 301 and in the ADC submission. I consider that in the circumstances of the exporters being integrated

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[30] See ADC submission, pages 4 - 5
[31] See ADC submission, page 5
[32] See the Manual, page 45
[33] See paragraph [91]
[34] See paragraphs [41-42]
[35] See ADC submission, pages 5 - 6

manufacturers, the ADC's finding of a wide range of distortionary influences across the entire Chinese iron and steel industries, and that steel billet representing between 80% - 85% of the RIC cost, the ADC's approach to undertake the assessment of competitive market costs at the steel billet level, is reasonable. A substitution at billet level would appear to be a reasonable approach to capture the total impact of the influence of the GoC on the cost of producing RIC.

52. The ADC confirmed that it was satisfied that the records of each Chinese exporter that cooperated with the investigation did not reasonably reflect competitive market costs after completing this assessment, and I do not consider that it was a 'blanket decision' as contended by Hunan Valin. I consider that the ADC's decision was in accordance with s.269TAC(2) and s.43 of the Regulation, as interpreted and applied by the Australian courts in the *Panasian* and *Dalian* cases. I therefore do not agree with Hunan Valin and Shagang that the decision of Parliamentary Secretary in this regard was not the correct or preferable decision.

The use of an incorrect cost in the construction of Hunan Valin's normal value

53. Hunan Valin challenges the inclusion of an upward adjustment by the ADC to the surrogated steel billet cost with a "yield percentage" factor (on the basis that the Review Panel decides that a benchmark cost for steel billet can be used in the construction of its normal value). Hunan Valin contends that the ADC had separately calculated and applied a conversion cost percentage based on the actual cost difference between the unit cost of billet and the unit cost for RIC, as part of its inclusion of the surrogate steel billet cost in Hunan Valin's normal value construction. Hunan Valin claims that this conversion cost percentage incorporates a yield loss as well as other costs of conversion. Hunan Valin claims that the surrogate billet costs should not be further adjusted upwards in the normal value construction to account for the yield loss, as this would amount to double-counting.

54. Hunan Valin points out that at the time of the visit report, no "yield percentage adjustment appeared in the normal value calculations prepared by the ADC. At the time of SEF 301 it was provided with margin calculation spreadsheets prepared by the ADC and this was the first time that it was appraised of the "*yield percentage adjustment*", as it appeared in those spreadsheets. Hunan Valin in its comments on SEF 301, requested that the yield percentage uplift be removed, but claims that the ADC did not address its request concerning yield percentage uplift and did not remove such uplift. Hunan Valin refers to the statement in REP 301 that:

> "*The quarterly conversion costs for Hunan Valin to convert the billet into RIC are then added to calculate cost to make RIC.*"[36]

55. Hunan Valin contends that the yield percentage uplift is a double-counting and has been done in error, and that the correct or preferable decision is for the calculation to be redone without the yield percentage uplift.

56. As there was no explanation of the yield uplift in REP 301 (despite Hunan Valin's submission relating thereto in respect of SEF 301) and the issue was not addressed in the ADC submission, I requested the ADC to reinvestigate this issue, taking into consideration Hunan Valin's concerns and submissions, as well as other parties' submissions.

57. In the Reinvestigation Report, the ADC stated that it reinvestigated Hunan Valin's claim that the conversion cost percentage incorporated any yield loss. It found that Hunan Valin's conversion cost calculations in Confidential Appendix 1 includes, among other costs of conversion, a negative offsetting amount for by-products. That is, Hunan Valin records the value of by-products that are derived from the conversion of billet to RIC and offsets this against its conversion costs.

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[36] See REP 301, page 18

The ADC considers that this cost offsetting amount, contrary to Hunan Valin's claim, is effectively reducing Hunan Valin's cost of material that is lost in the conversion process. The ADC considers that the yield loss is an actual cost incurred by Hunan Valin in conversion of the billet to RIC and was not captured by Hunan Valin's in its conversion cost factor. Consequently, the ADC considers that it is reasonable to uplift the cost of billet after substitution with the verified percentage of yield loss.

58. As I was concerned that there may have been double counting with regard to the yield loss, I decided to request a Conference under s.269ZZHA of the Customs Act (the Conference) to obtain additional information and clarification from the ADC in relation to this claim. I was satisfied with the ADC's explanation and clarification in relation to Confidential Appendix 1 – Hunan Valin Conversion Cost, to the Reinvestigation Report. I agree with the ADC's finding that the yield loss was not captured by Hunan Valin in its conversion cost factor, and consider it reasonable to uplift the cost of billet, after substitution, with the verified percentage of yield loss.

Failure to adjust Hunan Valin's costs for cost offsets in the form of verified by-products and cost recoveries

59. Hunan Valin contends that the ADC failed to take certain cost offsets, or credits, into account in its calculation of the constructed normal value. Hunan Valin states that in its Exporter Questionnaire response it provided detailed breakdowns of its costs to make RIC, in the Australian CTMS and domestic CTMS spreadsheets. This breakdown included the following cost items which are in the nature of "cost offsets", such as: by product, pig iron recovery, and gas recovery. These cost items are by-products and cost recoveries generated as part of Hunan Valin's integrated production of RIC, and either recycled and reused or sold at market value. Hunan Valin claims that these cost credits relate directly to Hunan Valin's own RIC production and are internal production cost savings, arising due to its integrated production and its recycling efficiencies.

Further, Hunan Valin claims the information concerning its cost recovery system was thoroughly investigated and verified by the ADC and the accounting for those cost recovery items was well acknowledged in the Visit Report, and should be recognised in the constructed value, in the same way as the ADC has accepted and used Hunan Valin's other costs (eg conversion costs and yield percentage costs) in accounting for the actual costs of Hunan Valin's production arrangement and situation.

60. The ADC in its submission to the Review Panel pointed out that all the cooperating Chinese exporters produce steel billets using blast furnaces, as do many producers globally. The ADC therefore contends that that the by-products that are the result of molten iron and steel billet production are not specific to a single exporter's production methods and that the identified cost recoveries would be present for billet manufacturers globally, including the producers of the billet which the benchmark represents. Therefore, the ADC considers that any steel billet price, including the steel billet index that was used as a benchmark for billet costs in China in REP 301, would be adjusted for these cost recoveries.

61. I agree with the ADC's analysis and consider that its conclusion is reasonable. I do not consider that Hunan Valin has demonstrated in relation to this ground of review that the decision of the Parliamentary Secretary was not the correct or preferable one.

Error in the amount of profit in Hunan Valin's constructed normal value

62. Hunan Valin contends that there is an error in the amount of profit in Hunan Valin's constructed normal value that appears to have arisen by reason of a failure to "refresh" an Excel spreadsheet.

63. Hunan Valin claims in its application for review, that in calculating its constructed normal value, the ADC used a profit ratio based on the profitability of its domestic sales of like goods in the ordinary course of trade. Hunan Valin stated that the

supporting calculation for this profit ratio was contained in a spreadsheet provided by the ADC as an attachment to the Visit Report. Hunan Valin contends the problem on the ADC's part is that the excel spreadsheet needed to be "updated" or "refreshed", and that the ratio reflected has arisen due to an Excel spreadsheet command error, and should be a lower percentage.

64. In the ADC's submission to the Review Panel it acknowledged that upon reviewing this ground of review it identified a mathematical error in its calculation of the profit ratio, and that based on the updated calculations, the profit ratio should be the lower amount as contended by Hunan Valin.

65. In the Reinvestigation Request I noted the acknowledgement of the mathematical error by the ADC and requested it to include this updated profit calculation in the Reinvestigation Report and to recalculate the normal value for Hunan Valin, and also to make any consequential amendments to the dumping margin (and ascertained normal value) for Hunan Valin.

66. The ADC reinvestigated the calculation of profit in Hunan Valin's constructed normal value and confirmed that there was a mathematical error in the calculation of profit in REP 301. The ADC stated in the Reinvestigation Report that the correct rate of profit is [redacted] per cent and not [redacted] per cent as indicated in REP 301. The updated calculation is included in Confidential Appendix 2 – Hunan Revised Profit, to the Reinvestigation Report. The ADC re-calculated Hunan Valin's normal values and dumping margin following the changes in Hunan Valin's profit rate.

67. I therefore consider that the decision of the Parliamentary Secretary in regard to this ground of review was not the correct or preferable decision and I accept the recalculation of profit of Hunan Valin as set out by the ADC in the Reinvestigation Report and the consequential effect on the normal value and dumping margin of Hunan Valin.

68. I will now deal with the grounds of review put forward by Vicmesh.

Error in conclusion that there was a particular market situation that justified ignoring Hunan Valin's actual cost to produce billet

69. In its application for review Vicmesh addresses this ground of review under three subheadings: a failure to apply required evidentiary standards; the use of an improper methodology in dealing with subsidy allegations as the basis of undue market influence; and the ADC's reasoning on the evidence before it was flawed and did not justify the conclusions drawn. Vicmesh argues that the ADC's decision to find a particular market situation for RIC in China is wrong in law and fact.

70. Firstly, Vicmesh claims that the ADC used inappropriate evidence and evidentiary standards in its analysis and finding of a particular market situation, relying wrongly on irrelevant secondary sources and effectively shifting the burden of proof. Vicmesh's detailed submissions in regard to evidentiary standards are contained in its application for review.[37] In particular, Vicmesh is critical of:

- the methodology of the ADC to effectively see the lack of response by the Chinese government, as entitling it to rely on information from previously completed investigations;
- the age of some of the reports relied on, in some cases, years before the relevant period under investigation that applies on this occasion;
- the reliance by the ADC of foreign investigatory reports, such as an investigations conducted by the Canadian authorities and the European Commission.

[37] See Vicmesh's application for review, pages 1 - 15

71. Secondly, Vicmesh contends that the ADC used an improper methodology in dealing with subsidy allegations as the basis of undue market influence, in an anti-dumping investigation. Vicmesh claims that there are a number of particular aspects of the countervailing regime that have not been satisfied by the broad allegations in the complaint in Investigation No. 301 or by the very general reasoning of the ADC. [38] Further Vicmesh claims that even if its interpretation in this regard does not prevail, 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. And 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.

72. Thirdly, Vicmesh contends that the ADC's reasoning on the evidence before it was flawed and did not justify the conclusions drawn, providing detailed submissions on this aspect of the particular ground of review.[39] Some examples of what Vicmesh considers to be flawed reasoning on the evidence by the ADC are:

- The ADC provides no evidence for the conclusion that the GoC supported an increase in blast furnace capacity resulting in excess supply;
- There is no explanation whether any demonstrable GoC influence on input products and services, flows through to the selling price of the goods under consideration;
- The ADC 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";

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[38] Vicmesh refers to s 269T of the Customs Act in that 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
. No attempt was made by the
Commission to determine whether the subsidies alluded to, met each of these
tests.

[39] See Vicmesh's application for review, pages 18 - 31

- There is no support or evidence for the conclusion 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*";
- The conclusion that *"there are significant incentives for provisional and local governments to resist directives from the central government to remove excess capacity,*" is not supported evidence
- The ADC refers to the central role of GoC through numerous planning documents and directives without explaining why they are problematic;
- The ADC give examples of the types of subsidies provided to the Chinese steel industry, without any attempt to identify what 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;
- It was also inappropriate to rely on broad statements by the Government of China that the steel industry is significant.

73. Vicmesh therefore contends that the Review Panel should conclude that there is no justification for finding a particular market situation.

74. Shagang in its application for review makes a similar claim in its first ground of review in its application for review. It claims that the ADC's assessment involves little more than simply listing the various planning documents and directives. In Shagang's view, the mere existence of broad policies and guidelines aimed at the steel industry in China is not sufficient to be satisfied that distortion in the RIC coil market in China exists. Shagang points out that as stated by the GoC in previous steel investigations, these broad policies are aimed at fostering industry efficiency and reflect an aspirational future state of the steel industry in China. Shagang does not consider that the ADC has presented any evidence which would sufficiently establish that the policies and plans of the GOC, have materially distorted competitive conditions such that RIC domestic prices are

unsuitable for proper comparison with corresponding export prices. Shagang also criticises references to findings made by foreign agencies as support for the view that a market situation exists. [40]

75. The ADC in its submission to the Review Panel noted that the Customs Act does not provide any definition of particular circumstances or factors which would satisfy the Parliamentary Secretary that a 'market situation' exists, and that the ADA is similarly silent in relation to the definition of the concept of a 'market situation' referred to within Article 2.2. The ADC refers to the Manual which sets out a range of considerations which it had regard to in making a market situation finding. The ADC points out that:

- The analysis in REP 301 concludes that the GoC materially influenced conditions within the Chinese RIC market during the investigation period;
- The GoC declined to respond to the ADC's Government Questionnaire;
- The ADC obtained information from a wide range of independent and reputable sources in preparing its market situation analysis;
- It considers that, in the context of particular market situation analysis, evidence of government policies and programs whereby benefits specifically or indirectly flow to the Chinese iron and steel market, would have an effect on domestic commerce with respect to RIC and is relevant to the analysis;
- The RIC market is a subset of the overall iron and steel market within China, and as such the distortions identified across the broader market are equally applicable to the RIC market in China;
- The ADC found that the GoC influence distorted Chinese iron and steel market by: GoC directives; subsidy programs; involvement in strategic enterprises; and taxation arrangements;
- The findings and evidences relied on in reaching the conclusions are extensively discussed and explained in Appendix 1 of REP 301.

[40] See discussion under Finding 1 of Shagang's application for review (unpaginated)

76. Vicmesh and Shagang challenge the ADC's finding in REP 301 that there existed a market situation in the domestic market for RIC in China, such that the selling prices in that market were not suitable for determining normal value under subsection 269TAC(1)of the Customs Act. Section 269TAC(2)(a)(ii) provides for the normal value to be determined on a different basis where the Parliamentary Secretary is satisfied that *"the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection(1)"*.

77. I have reviewed Vicmesh's and Shagang's applications in regard to this ground of review, the ADC's market situation analysis in REP 301[41], the ADC's submission to the Review Panel and all other relevant documents and submissions to both the ADC and the Review Panel. While the ADC does rely to a large extent on previous investigations undertaken by the ADC and its predecessor organisations, and to some extent on investigations undertaken by foreign anti-dumping authorities, it is clear from REP 301 that the ADC considered and analysed all the material at its disposal, from a wide variety of sources, including OneSteel's application and information obtained through the ADC's own research and analysis. The ADC noted that with regard to previous investigations, its specifically focused on the recent market situation finding in steel rebar, Investigation No. 300, "*due to its timeliness, the similarity of products and the market forces impacting on both product lines*",[42] which I consider relevant. In addition, I consider that while the previous investigations related to different products in the iron and steel industry and different time periods, the ADC considered and applied its analysis to the Chinese RIC market and examined current conditions in the Chinese steel industry. The ADC came to various reasoned conclusions, supported by the evidence.

78. I consider that the assessment and analysis of the evidence by the ADC to reach the conclusion that a particular market situation exists in the RIC market in

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[41] See Section 5.4 and Appendix 1 of REP 301
[42] See Section 1.5 of Appendix 1 of REP 301, page 55

China, rendering domestic sales as unsuitable for normal value, is reasonable. The approach is in keeping with that required by the legislation, the Manual and Australian case law.

79. In particular, I note the decision and comments of Nicholas J in the *Dalian case*, relating to a similar finding by Customs and Border Protection (Customs) with regard to Hollow Steel Sections (HSS) exported from China, in REP 177. Nicholas J referred to the observations of Black CJ and Lockhart J in the La Doria case[43] that, *"... [t]he exercise in which the decision-maker must engage under s 269TAC(2)(a)(ii) is essentially a practical one" raising matters for determination by the decision-maker that "requires a broad judgment ... on questions of fact."* Nicholas J, then considered Customs' assessment in REP 177 stating that Customs did not merely identify a number of GoC policies and implementing measures and find that domestic prices were likely to have been influenced by them, but it sought to ascertain whether the GoC's involvement in the iron and steel market materially distorted prices for key raw materials used in the manufacture of HSS. He observed Customs' reference to the Manual and factors it may have regard to in relation to a particular market situation.[44] Nicholas J further stated:

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[43] *Minister for Small Business, Construction and Customs v La Doria di Diodata Ferraiolli SPA*(1994) 33 ALD 35 (La Doria), at [45] and the *Dalian* case at [21]

[44] Such factors listed in the Manual are:

- whether the prices are artificially low; or
- whether there is significant barter trade; or
- whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1) of the Act.

The Manual goes on to state that Government influence on prices or costs could be one cause of 'artificially low pricing' and that Government influence means influence from any level of government. Further, the Manual states that in investigating whether a market situation exists due to government influence, Customs and Border Protection will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. And further, a finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market. [REP 177 stated that it considered that the underlined text reflects the nature of Customs and Border Protection's assessment in relation to the existence of a market situation in the Chinese HSS market.]

"I do not think Customs either misconstrued or misapplied s 269TAC(2)(a)(ii). In particular, I am satisfied that Customs did not equate government influence on a market with unsuitability within the meaning of s 269TAC(2)(a)(ii). Rather, Customs' finding on this issue was in my view the result of a considered assessment of a factual question requiring "a broad judgment" namely, whether the impact of the various GOC influences on the Chinese iron and steel industry rendered domestic sales of HSS "not suitable" for use in determining normal value under s 269TAC(1) of the Act."[45] [emphasis added]

80. I consider that Customs' analysis and approach to the issue of market situation in regard to the iron and steel market in China, and its relationship with the HSS market in China in REP 177 is not dissimilar to the ADC's approach and analysis of the RIC market in China in REP 301. I therefore consider Nicholas J's findings and observations in relation thereto, to be relevant and applicable to the ADC's finding of a market situation with regard to RIC in REP 301. [46]

81. For the reasons discussed above, I do not consider that there was an error in the conclusion by the ADC that there was a particular market situation that justified rendering domestic sales of RIC not suitable for use in determining normal value under s.269TAC(1). Accordingly, I do not consider the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

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[45] See Dalian case at [26]

[46] It should be noted that the TMRO Report referred to and quoted by Shagang was a review of REP 177. The TMRO in his report had, amongst other, recommended that the Minister direct the CEO of Customs to reinvestigate the finding that there was a particular market situation in the Chinese iron and steel market. The Minister had accepted the recommendation and required the CEO to reinvestigate the matter, which was the subject of REP 203, confirming the finding of REP 177 with regard to particular market situation. REP 177 and REP 203 were the subject of challenge in the Dalian case with regard to the market situation finding, upheld by Nicholas J in his judgement.

Improper normal value calculations for Hunan Valin

82. I will address this ground of review under the same four subheadings set out in the application of review of Vicmesh.

An error in law in allowing a surrogate benchmark for the cost of producing billet

83. Vicmesh contends that in the application of s.269TAC(2)(c) of the Act, the ADC did not follow the dictation of the legislative provision that stipulates that 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. Vicmesh contends that attention must be thus be limited to costs in the country of export, that is, PRC, not Latin America.

84. This component of Vicmesh's second ground of review is essentially the same as Hunan Valin first ground of review. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the same reasons as expressed under that ground of review I find that there was no error in law in allowing a surrogate benchmark for the cost of producing billet.

An error in ignoring billet prices but accepting PRC conversion costs

85. Vicmesh notes that the ADC used Latin American billet benchmark prices instead of Hunan Valin's own billet costing, but then used quarterly conversion costs for Hunan Valin to convert billet into RIC. Vicmesh claims that the ADC has failed to justify a proper basis for ignoring billet costs in China, but then accepting conversion costs in that jurisdiction. Vicmesh claims that no compelling reasoning is given as to why billet is more affected by alleged government interference in the market than RIC, with the ADC making 'a vague assertion that the key influence occurs at the input level', 'unsubstantiated allegations' that the

GoC has promoted excessive blast furnace capacity and references to interference with the cost of raw materials.

86. Vicmesh also points out that the ADC's approach has no commercial relevance to Hunan Valin since it is an integrated producer and does not purchase billet. Hence it is unreasonable to impose a hypothesised billet cost on it. Vicmesh claims that if the interference is with an input commodity, such as iron ore, then the ADC should have assessed the per tonne benefit provided and utilised Hunan Valin's costs entirely, with at most an adjustment to its iron ore purchasing price. Alternatively, according to Vicmesh, the ADC could have used the adjustment provisions to incorporate this benefit into the analysis.

87. The ADC explains its approach in REP 301.[47] For the purpose of constructing a normal value under subsection 269TAC(2)(c), the Commissioner considers that the market situation does not reflect competitive market conditions and, because of that, accounting records do not reasonably reflect competitive market costs. The ADC considers that the significant influence of the GoC distorted prices in the steel industry and RIC market in China, including the prices of production inputs to make steel in China, rendering them unsuitable for cost to make and sell (CTMS) calculations.

88. While recognising that specific, single line items, such as iron ore, may be at competitive cost based on world spot purchase prices, the ADC considered the use of the billet index does not distort this position as the billet benchmark will also be based on the same raw materials which are subject to the same competitive world spot prices. The ADC considers that to limit consideration of GoC influence to input raw materials only does not capture the influence of the GoC on other costs associated with the conversion of raw materials to steel billet.

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[47] See Section 5.4 of REP 301, pages 11 - 14

89. The ADC considered that a substitution at billet level is the most reasonable approach to capture the total impact of the influence of the GoC on the cost of producing RIC.

90. I consider that the approach of the ADC in using a benchmark cost for steel billet and using Chinese exporters' own conversion costs (as well as their own selling, general and administrative costs (SG&A) and domestic profit rates) is reasonable and is not contrary to s.269TAC(2) of the Customs Act nor s.43 of the regulation.

Improper change of the surrogate after the SEF

91. Vicmesh contends that there was an improper change to the surrogate (from the South East Asian Benchmark to the Latin American benchmark) after the SEF and without warning or advice to the parties concerned. Vicmesh refers to Article 6.9 of ADA which 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.*"

Vicmesh further contends that there is nothing in the ADA that stipulates that this obligation disappears once an SEF is published. Vicmesh claims that if the ADC wishes to change its methodology after the SEF, it still must comply with Article 6.9 ADA.

92. Vicmesh further claims that the Latin American benchmark used is a particularly unreasonable one that has led to an inflated margin. It claims that Latin American prices tend to lag behind falling world prices by up to 3 months and that no reason is given by the ADC 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."* Vicmesh claims that little justification is given for

the reliance on the Latin American billet index other than that the ADC considers it to be reliable because of the same raw material prices worldwide. Vicmesh notes that REP 301 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*." Vicmesh considers this conclusion to be a logical flaw, "albeit true", given that elsewhere, REP 301 considers that the greatest influence of GoC is in raw material pricing. Vicmesh claims that there are other reasons why a Latin American billet index would be inappropriate, the details of which are set out in Vicmesh's application for review.[48]

93. The first component of Vicmesh's claim, that it was improper to change the benchmark after the SEF and without warning or advice to the parties concerned, appears to be directed at the process undertaken by the ADC or "*procedural fairness*" rather than at "*reviewable decisions*" by the Parliamentary Secretary, referred to in s.269ZZA of the Customs Act. This raises the issue of whether or not the Review Panel has the power to consider whether a denial of procedural fairness is a ground of review to find a reviewable decision is not the correct or preferable decision. This issue was considered by the Review Panel in ADRP Report No.16[49] which referred to *GM Holden Limited v Commissioner of the Anti-Dumping Commission*[50] in which Mortimer J considered that it was not part of the function of the Trade Measures Review Officer (TMRO). The following statement of her Honour was quoted:

> *"That being the function, there is no basis in the scheme to impose an obligation on the TMRO to consider and deal with a claim of denial of procedural fairness in its own terms. What the TMRO may need to do, as it did in this case, is examine an underlying factual and reasoning challenge*

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[48] See Vicmesh's application for review, pages 37 - 38
[49] ADRP Report No. 16, Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden, paragraphs 120 - 123
[50] [2014] FCA 708

articulated by the party said to have been denied procedural fairness in relation to a particular "finding" in the Chief Executive Officer's report." [51]

94. The Review Panel in ADRP Report No. 16 acknowledges that there are differences with a review by the Review Panel to that which was conducted by the TMRO, but did not consider that the differences are such that they would lead to a different conclusion to the one her Honour reached. Like the TMRO, the Review Panel only makes a recommendation to the Parliamentary Secretary.

95. I concur with the decision in ADRP No. 16 and consider that this procedural issue falls outside the scope of the powers of the Review Panel. I am limited to recommending that the former Parliamentary Secretary affirm or revoke the reviewable decision and substitute a specified new decision. I will therefore not make findings in respect of the first component of Vicmesh's claim.

96. I considered the second component of Vicmesh's claim that the Latin American benchmark used is '*particularly unreasonable'* and noting that there was a change in the selected benchmark between SEF 301 and REP 301 deciding to request the ADC to reinvestigate this issue, taking into consideration Vicmesh's claims in this regard. Since OneSteel also challenged the selection of the Latin American benchmark in its application for review [52], I requested the ADC to also take into consideration the claims made by OneSteel in this regard, in its are investigation, in particular, OneSteel's contention that that it is not consistent with World Trade Organisation (WTO) best-practice or even the ADC's policy and practice to base an external competitive benchmark for market costs on an 'export' price index, rather than a competitive price benchmark that is reflective of domestic market conditions (such as Mexican, Canadian or United States domestic billet prices available from MEPS (International) Lte (MEPS)). I also requested the ADC to take into account all other parties' submissions on this issue, both to the ADRP and to the ADC in Investigation No. 301.

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[51] Paragraph [175]
[52] See OneSteel's application for review, pages 6 - 8

97. In the reinvestigation report it was stated that the ADC's decision to change the steel billet benchmark was a result of new evidence that became available after the SEF that demonstrated that the East Asian billet benchmark was significantly influenced by billet exports from China, which are subject to the same distortionary effects discussed in the market situation finding in Investigation No. 301. Given the significant influence that exports of Chinese steel billet have on the East Asia billet benchmark, the ADC maintains that changing the steel billet benchmark was the correct and preferable approach.

98. The ADC stated that in SEF 301 it considered various alternative benchmarks to determine competitive market prices of steel billet, including domestic steel prices as well as import and export prices in China and other countries. It stated that it assessed the appropriate competitive market cost in accordance with the WTO Appellate Body findings, which suggest the following methods (in order of preference): private domestic prices; import prices; and external benchmarks. According to the ADC this is also consistent with the approach described in the Manual, which provides for various methods for ascertaining a substitute value, in the context of a major input being supplied by government, and a decision being taken that the supply is not reflecting a competitive market price of that input, including, amongst other things:

- the price of the major cost input supplied by a non-government owned enterprise in the country of export to other exporters in that country;
- the price of goods that are like the major cost input manufactured and sold for domestic consumption in a surrogate country; and
- the price of goods that are like the major cost input manufactured and sold for export consumption in a surrogate country.[53]

99. The ADC points out that in SEF 301 it was stated that private domestic prices of steel billet in China are affected by government influence and therefore do not

[53] See the Manual, pages 45 - 46

reflect competitive market costs. It was also stated that due to the lack of import penetration in China of steel billets and the likelihood that import prices were similarly affected by the GoC influence on domestic prices, import prices in China were not suitable substitutes to use as benchmarks for steel billet prices. The ADC points out that the approach in SEF 301 in respect of the selection of a suitable benchmark was maintained in REP 301.

100. The ADC found that trade remedy, safeguard and other non-tariff measures as well as government support on a wide range of steel products made from billet are in force in the USA, Canada, Mexico, India and South Africa. This indicates that steel billet in those countries is produced by industries operating in markets where prices do not reflect competitive conditions. As such, domestic prices of steel billet in those countries do not appear to be suitable benchmarks for the purpose of substituting Chinese steel billet costs. The ADC considers that an export price is more likely to reflect competitive market conditions and is more likely to be a suitable benchmark. The ADC, however, considers that export prices in those countries are also affected by that government activity and may not reflect competitive market conditions. As such, domestic and export prices of steel billet in those countries do not appear to be suitable to use as benchmarks for the purpose of substituting Chinese steel billet costs.

101. The ADC considered that steel billet markets in Iran, Pakistan, Taiwan, Canada, Mexico and South Africa are relatively small and, as such, do not have the same competitive characteristics as larger markets. The ADC also analysed the correlation between East Asian billet prices and Black Sea, Turkey and Latin America billet prices in the investigation period and found a high level of correlation between billet prices in all three areas and East Asian billet prices. However, the ADC notes that the degree of correlation of the Black Sea and Turkish billet prices to East Asian billet prices is higher than that of Latin America. The ADC considers that both Turkish and Black Sea billet prices have been distorted by Chinese steel billet prices and are not suitable benchmarks for the purpose of substituting Chinese steel billet costs in the investigation period.

The lower correlation coefficient for Latin America indicates that is it less likely that steel billet prices there are affected by Chinese steel billet prices.

102. In the Reinvestigation Report the ADC refers to and quotes its reasons in REP 301 for selecting a Latin American benchmark. In particular, the ADC considers that the Latin American benchmark is a competitive benchmark that has not been identified as being affected by Chinese prices due to the following factors:

- geographic distance from Asia limiting the distortionary effects of the GoC on the iron and steel industry;
- significant production levels generating a 'deep' trade market and a relatively high level of competition; and
- the existence of anti-dumping and trade remedy cases from Latin America on Chinese steel products.[54]

In its reinvestigation of this issue, the ADC considered that these reasons remain appropriate and therefore did not consider that changing the benchmark was required.

103. The ADC noted in the reinvestigation report that OneSteel indicated in its application that the ADC should have used information from MEPS, but pointed out that MEPS is not the only subscription service that publishes steel billet prices and that the ADC utilised another subscription based service, Platts SBB, to analyse potential benchmarks for billet costs. The ADC did not find any evidence to indicate that MEPS provides information that is superior to Platts.

104. Based on what it considers to be reliable information, the ADC has provided a detailed analysis and reasoned explanations for the following:

- The change in the selected benchmark(East Asian benchmark) from SEF 301;
- The use of an export price as a benchmark (rather than a domestic price);

[54] See Section 5.4.4 of REP 301, pages 16 -17

- The use of Platts as an information provider, rather than MEPS, as suggested by OneSteel; and
- Disregarding various other countries in the selection of a benchmark; and
- The selection of the Latin American export benchmark.

105. In my view this was open for the former Parliamentary Secretary (and the ADC) to determine an appropriate competitive market cost for steel billet to construct a cost of production. I consider the approach of the ADC in selecting the Platts Latin American export price as the benchmark to be reasonable in the circumstances and not contrary to Australian legislation or practice.

A failure to make required adjustments to the benchmark

106. Vicmesh contends that if "surrogate pricing" is allowed (which it disputes) then adjustments should be made to "such surrogate pricing" to allow for a proper comparison between normal value and export pricing. Vicmesh then refers to a number of issues which it claims should have been adjusted for. I will discuss each component claim under the same subheadings as Vicmesh, in its application for review.

Adjustments should not include billet profit

107. Vicmesh refers to REP 301, which 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*". Vicmesh claims that if the aim was to utilise actual Latin American costs, there should have been an attempt to identify actual profits in that market.

108. Vicmesh appears to be referring to the ADC's subtraction of a rate of profit from the Latin American Billet FOB Export price as supplied by Platts, and its statement in REP 301 that:

"The Commission considers it reasonable to deduct the verified average profit rate realised by Chinese exporters from sales of steel billets in order to calculate the competitive market costs for steel billets." [55]

Vicmesh provides no further clarification or substantiating evidence.

109. OneSteel, however, has a similar ground of review, which it elaborated on in detail in its application for review.[56] It challenges the ADC's reduction of *"the non - Chinese (Latin American FOB export) benchmark competitive billet cost"* by an amount of profit relevant to Chinese producers of billet sold into the Chinese domestic market. It contends that if a downward adjustment to the competitive benchmark billet cost is to be made (which it disputes), then it should be the verified profit of the non - Chinese seller of the billet, the subject of the competitive benchmark, and not the rate of profit earned by Chinese producers of billet. It contends that following the ADC's approach would be to apply a wholly irrelevant rate of profit applicable in one market (i.e. Chinese domestic market subject to a particular market situation) to a sale into a wholly unrelated market (i.e. the Commission's selected Latin American export market).

110. The requirement for a downward adjustment for billet profit was challenged by OneSteel in response to SEF 301[57] and it contends in its application for review that these reasons remain unchanged in respect of the adjustment in REP 301. OneSteel points out that the ADC did not make any reference to an assessment of profit on export sales of billet from Latin America in REP 301. It claims that it is not open to the ADC to reduce the value of the benchmark steel billet by an amount for profit not relevant to those goods or the market from which those goods are supplied and contends that if the ADC elects to apply an amount for profit, then it must be the actual data pertaining to profit realised for the given

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[55] See REP 301, page 18
[56] See Section 10.2 of OneSteel's application for review, ages 8 - 11.
[57] Document #033 of EPR 301, pages 15 - 16

product within the benchmark market, assuming any profit is earned on those sales.

111. Shagang, in its submission to the Review Panel, considers OneSteel's view and position on this issue to be unreasoned. In its view, the decision to make adjustment to the steel billet benchmark for profit is reasonably based upon the Appellate Body's interpretation 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'*.[58] Shagang notes that it is an integrated steel producer that does not purchase steel billet but instead sources the relevant raw materials necessary to produce steel billet. Therefore, Shagang's cost of steel billet would not incorporate or include an element of profit when transferred internally to be converted to rod in coils and Shagang claims that it is illogical to compare and replace Shagang's cost of steel billet with a steel billet price inclusive of a profit margin achieved by the surrogate steel billet producer. For this reason, Shagang submits that the ADC correctly identified the need for an adjustment to its surrogate benchmark, which would at the very least ensure that the benchmark reflected a cost of steel billet and not a price.

112. I consider it reasonable for the ADC to convert the price benchmark into a cost benchmark (since the exporters are vertically integrated and produce, not purchase, the billets, and the benchmark is a substitution for the billet 'costs' recorded in the exporters' CTMS). There appears to be nothing in the legislation or the Manual that limits the ADC's discretion to determine the appropriate benchmark and this would include making relevant adjustments to ensure that the benchmark is at the correct level. The question arises as to whether the ADC's decision to adjust the Latin American price benchmark to a cost

[58] It appears that Shagang is referring to the Appellate Body decision *in United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS 257/AB/R (US – Softwood Lumber IV), paragraph 106

benchmark, by adjusting for a profit rate realised by Chinese exporters from the sales of billet on the domestic Chinese market is reasonable.

113. As there appeared to be some merit in OneSteel's submissions on this issue, I decided to request the ADC to reinvestigate this issue. The ADC stated in REP 301 that the approach adopted is consistent with *"Commissioner's approach to utilising actual verified domestic profit rates in domestic sales of like goods when constructing normal values".* I considered that a more appropriate profit rate to deduct might be that of the Latin American producers that make up the benchmark price, as contended by OneSteel and Vicmesh. In the Reinvestigation Request I requested the ADC to reinvestigate this issue, and recalculate the cost benchmark by deducting an amount of profit of the Latin American sellers of the billet, instead of deducting the verified average profit rate of Chinese exporters. I was also concerned that the use of the *"verified weighted average profit figure from billet sales in China over the investigation period as found in case 300"*[59] appeared to be somewhat anomalous. This was in light of fact that the Chinese domestic steel rebar market was found to be subject to a particular market situation in REP 300, and the ADC considered that GoC influences affect Chinese manufacturers' cost to produce steel billet, resulting in the Chinese manufacturers records being regarded as not reasonably reflecting competitive market costs, leading to the adoption of the surrogate billet cost.

114. In the Reinvestigation Report, the ADC recalculated normal value by deducting a profit rate achieved by Latin American exporters of steel billets. The ADC identified five major steel exporting companies located in the Latin American region and given that the ADC was not in possession of any verified information in relation to any of these companies, the ADC calculated the average profit rate achieved during the investigation period of REP 301, using publicly available information published in these companies' 2014 and 2015 earnings releases and annual reports.[60] The ADC calculated that the average profit realised by these

[59] See SEF 301, page 21 with an explanation in footnote 22 on the same page
[60] These earning releases and annual reports were collated in Attachment 3 to the Reinvestigation Report.

Latin American steel producers was -1.7 per cent.[61] As the average profit rate is calculated to be a negative value, the ADC considered that the normal values of Chinese exporters should be re-calculated using an average profit rate of zero per cent. The ADC re-calculated each cooperating Chinese exporter's normal values and dumping margins based on the result of this reinvestigation finding.

115. After reviewing the Reinvestigation Report on this issue and its various relevant attachments,[62] I was not satisfied that the average profitability of selected Latin American steel producers, as calculated by the ADC in the reinvestigation, was based on reliable information or that it was the most appropriate profit ratio to convert the surrogate billet price to surrogate billet cost. Firstly, I was concerned that it appeared that the profitability margins for the respective companies were in respect of a broad range of steel products, not specifically billet. I also noted a wide discrepancy in profit margins between the companies, ranging from -[redacted]% to [redacted]%, which was indicative of the possible unreliability and randomness of the data. To address my concerns I decided to hold a Conference[63] with the ADC pursuant to s.269ZZHA of the Customs Act to seek clarification on various issues relating to the profit adjustment calculation, both in respect of the Chinese profitability calculation used in REP 301 and the Latin American profitability calculation used in the Reinvestigation Report.

116. During the Conference:

- The ADC confirmed that the profitability of the Latin American steel producers was based on a broad product basis, while the Chinese profitability calculation (in REP 301) was specific to billet sold on the domestic Chinese market;

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[61] The calculation of this profit rate is at Confidential Appendix 3 - Latin American profitability, to the Reinvestigation Report.
[62] See Attachment 3 to the Reinvestigation Report (collated earning releases and annual reports of Latin American manufacturers) and Confidential Appendix 3 - Latin American profitability,
[63] The Conference was held on 9 December 2016, with the ADC only as it related to confidential information of parties. A non-confidential summary of the meeting was placed on the public record.

- The ADC confirmed that the Latin American profitability calculations were based on annual reports and other public documents of the selected companies, while the Chinese profitability percentage was based on verified information in Investigation No. 300 and related to domestic sales of billet on the Chinese market;
- The ADC advised that it had compared this profit rate of steel billet to other steel producers in South East Asia and other jurisdictions during the investigation period, and that the profitability was comparable;
- The ADC provided clarification on the significant differences in the profit margins of the selected Latin American producers, stating that the selected companies were all based in different regions of Latin America, with different access to raw materials, technology, management and ports, resulting in wide ranging differences in costs and profitability;
- I enquired whether there was a more reliable profitability database for Latin America, such as a Platts profit index or any other data base relating to profitability. The ADC advised that it been unable to find any more reliable data. It advised that it had approached the Latin America Steel Association (Alacero) in this regard, but was unable to obtain more reliable information on the profitability of Latin steelmakers; and
- The ADC confirmed that the Chinese profitability calculation for the adjustment to the Latin American surrogate in REP 301 was based on actual company CTMS data for steel billet (from Investigation No. 300). It was confirmed that in that investigation a market situation existed and the normal value for steel rebar was calculated in accordance with the cost of production methodology (s.269TAC(c)(ii)), using a surrogate cost for steel billet.

117. I have concerns about the use of Chinese profit to convert the Latin American billet price to a cost, as expressed in the Reinvestigation Request and would have been open to consider the Latin American profit margin, if it was based on reliable data. However, it has become clear to me, for the reasons referred to above, that the Latin American profitability information is extremely unreliable,

possibly to the point of being meaningless, due to the fact that it is derived from broad, general and public information of a few selected companies, with a wide range of profit margins, and is in relation to a wide product base, rather than in respect of steel billet. The Chinese profit information on the other hand is based on verified information (from Investigation No. 300) and is specific to billet. While it is not ideal to use the Chinese profit information, which is unrelated to the Latin American price index, I consider it to be the best and most reasonable option in the circumstances. As stated above, there appears to be nothing in the legislation or the Manual that limits the ADC's discretion to determine the appropriate benchmark, I therefore consider that the ADC's decision in REP 301 to deduct the verified average profit rate realised by Chinese exporters from the surrogate Latin American Billet price, to be reasonable and not contrary to Australian legislation or practice.

Freight Costs

118. Vicmesh contends that the ADC erred in failing to adjust the surrogate Latin American FOB billet price for freight costs. It claims that a FOB price would include the cost of transport from a factory to the wharf. Vicmesh refers to the ADC's statement that it is impossible to remove the freight cost with a sufficient degree of certainty and claims that this should not be so, and that normal freight rates payable by the exporter on a non-subsidised basis, would be an appropriate deduction.

119. Vicmesh refers to Hunan Valin's submission in Investigation No. 301, which 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.[64] Vicmesh contends that there is an obligation to make adjustments as required under the ADA and domestic legislation to make the figures truly comparable.

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[64] See submission of Dowway and Partners on behalf of Hunan Valin dated 7 March 2016, EPR 301 Document #032

120. In the ADC's submission it is stated:

> *"In regard to the comments relating to freight cost not been removed from the Latin American benchmark, I make the following observations. Firstly, while it is not possible to remove all freight from the Latin American benchmark the ADC selected benchmark is at a level of trade which minimises additional freight costs. I consider the freight values of the benchmark are less distortionary in the currently utilised benchmark (FOB, Latin America) then they would be in the benchmark utilised in SEF 301 (CFR, East Asia). The CFR benchmark would contain additional overseas freight values which are not present in the FOB benchmark."* (emphasis added)[65]

121. By this statement, the ADC seemed to acknowledge that there are distortions in the benchmark. I considered that the emphasis should not be on the fact that there are less distortions than in the previously selected benchmark, but rather that such distortions be removed or adjusted, to ensure a fair comparison between export price and normal value. As it was not clear to me why the ADC considered that *"it is not possible"* to remove an estimated freight cost from the FOB benchmark, based on data of normal freight rates payable in the region of the origin of the benchmark, I requested the ADC to reinvestigate this issue, making an appropriate downward adjustment to the benchmark for the cost of transport from the factory to the wharf.

122. In the Reinvestigation Report, the ADC noted that the selected benchmark for steel billet prices pertains to the whole Latin American region. As the data for this benchmark is derived from a region rather than a single country, and as the exporters in the Latin American region are scattered around the entire Latin American region, the ADC does not consider it possible to accurately estimate an inland transportation cost that would reflect the actual inland transportation costs.

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[65] See ADC Submission, page 16

Instead, the ADC considers that an average verified cost of inland transportation expressed as a percentage of the FOB export price represents a reliable and reasonable estimation of typical inland transport costs. The ADC verified inland transportation costs of steel reinforcing bar manufacturers in seven different countries as part of Investigation No. 264. The ADC considers that the inland transportation costs of steel reinforcing bars and steel billets should be identical given that both commodities are transported in bulk using similar types of transport methods and equipment. The ADC calculated that the average cost of inland transport from the proportions of inland transport costs with respect to the FOB export price from the cooperating exporters of Investigation 264, being 1.08 per cent of the FOB export price.

123. The ADC therefore re-calculated the normal values and the corresponding dumping margins by deducting the cost of inland transportation from the Latin American steel billet benchmark for each exporter. I consider this to be the correct or preferable decision.

Inconsistencies between findings in REP 301 and REP 300

124. Vicmesh claims that the verification visit would have shown inconsistencies between the findings in this case and in Investigation No. 300 on Steel Rebar. Vicmesh also contends that the ADC approach in this case is also inconsistent with its approach in Investigation No. 300, where the same integrated manufacturer, Hunan Valin was only found to have a dumping margin of 15.2%.

125. According to Vicmesh, there were similar costs to produce rebar and RIC, with rebar being slightly more expensive owing to the requirement of ribbing and certain certification, and the export prices to Vicmesh between these two products differentiated by some [redacted]%, roughly equivalent to the cost differentials to produce. Vicmesh contends that 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.

126. I do not consider that there is sufficient evidence or particularlity relating to this claim to warrant further consideration.

Labour and overhead differential for billet

127. Vicmesh claims that by using foreign billet prices rather than drawing attention to any input commodity that distorts pricing, the ADC wrongly utilises Latin American labour and other manufacturing overheads rather than those pertinent to China. Vicmesh contends that even if Latin American prices were permissible as a surrogate, the ADC failed to make, *"a range of required adjustments."*[66]

128. It is not clear what adjustments Vicmesh is referring to, and there is no further evidence or justification relating to this particular claim of Vicmesh. I do not therefore intend to consider it further.

Failure to make appropriate adjustments to normal value for Hunan Valin to make a proper comparison with export price

129. Vicmesh refers to Article 2.4 of the ADA which provides for a fair comparison between export pricing and normal value and states that 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. Vicmesh therefore contends that if a factor can be adjusted for, it cannot be the basis for a conclusion of unsuitability. Vicmesh claims that the ADC has treated the determination of export prices inconsistently with this approach. It claims that if GoC influence distorted Hunan Valin's domestic prices in some way, it is logical to presume that it would also have distorted its export prices, and that 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.

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[66] See Vicmesh Submission, page 40

130. Vicmesh claims that s.269TAC(9) of the Act requires the Parliamentary Secretary 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. Vicmesh contends that a 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, and 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.

131. Vicmesh claims therefore that distortions that apply to both domestic and export sales must be accounted for in any event under the mandatory adjustment provisions. It claims that 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. Even if the ADC was justified to find a particular market situation in China, it should have found a similar market situation in Australia and made adjustments accordingly.

132. Vicmesh's arguments in respect of this ground of review appear to be theoretical and are not accompanied by clear evidence of what particular adjustments to normal value (or export price) that it contends the ADC failed to recommend, in order to make a proper comparison, as indicated in the heading of this ground of review. In REP 301, the ADC addressed all the various adjustments that were claimed by Hunan Valin. I therefore do not intend to consider this ground of review further.

Erroneous conclusions in relation to material injury and causal link

133. I will address this ground of review under the same three subheadings set out in the application of review of Vicmesh.

An error in identification of the market and failure to differentiate trade exposed versus non-exposed sectors

134. Vicmesh contends that the ADC erred in failing to properly differentiate between what it characterises as "trade exposed" and "non-trade exposed" market segments, which 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.

135. Vicmesh raised concerns about the vertically integrated nature of OneSteel, which owns two separate processing operations for value adding to the product in issue, making wire mesh for the construction industry, being major competitors of Vicmesh. Vicmesh claims that OneSteel is not concerned with where it makes profit, as long as it makes it somewhere along the chain, the implication being that it has "*chosen distribution channels*".

136. Vicmesh points out that its imports from Hunan 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 RIC from OneSteel. Hence Vicmesh claims that there is no competition and no injury in the "trade exposed" market for RIC. Vicmesh claims that OneSteel is not simply seeking to sell RIC profitably, but is instead seeking to ensure that its subsidiary mesh manufacturers are profitable, have regular and cost-effective supply of RIC, with a strong customer base. Vicmesh points out that if OneSteel is also selling RIC to other third parties, competing aggressively for that market, it undermines the profitability of its mesh subsidiary.

137. REP 300 notes that the majority of sales by OneSteel were to related parties. Vicmesh questions the assertions that its sales to related parties "remain subject to market forces regarding price," and challenges the ADC's conclusion that its own testing "confirmed that sales to both related and unrelated parties are based

on market pricing. Vicmesh claims these conclusions by the ADC are also inconsistent with the finding that "transfer prices internally are recognised at the lower of cost or market price.

138. Since a number of concerns about the injury analysis were raised by different applicants, I requested the ADC to reinvestigate various aspects of the injury and causation analysis. I requested the ADC to reinvestigate the causation finding in the light of various statements in REP 301 relating to the vertically integrated nature of Arrium Ltd, and of Vicmesh's submissions relating thereto, particularly in the light of the facts that:

- REP 301 notes that the majority of OneSteel's sales of RIC were to related parties over the investigation period, but states that OneSteel advised that sales to its related parties remain subject to market forces regarding price; and
- REP 301 refers to OneSteel's internal transfer pricing process and found that the cost methodology utilised by OneSteel reflected Australian accounting standards whereby transfer prices internally are recognised at the lower of cost or market price.

139. I also requested the ADC to explain how the Commission tested the assertion and confirmed that sales to both related and unrelated parties are based on market pricing, and to reconcile this with OneSteel's transfer pricing policy. I further requested that the ADC re-examine the implications of this factor on causation, bearing in mind the injury findings relating to price suppression and profitability.

140. In the Reinvestigation Report, the ADC stated that it reinvestigated the causation finding in the light of various statements in REP 301 relating to the vertical integrated nature of Arrium Ltd, and Vicmesh's submissions on what it characterises as a failure to differentiate trade exposed versus non-exposed sectors. The ADC pointed out that at the Australian industry verification visit it examined RIC sales from OneSteel to its related customers, which accounted for

over [redacted]% of all sales during the investigation period, listed as 'intercompany' sales. In order to test the assertion that sales to both related and unrelated parties are based on market pricing, the ADC verified the information provided by OneSteel in relation to its pricing details.[67] Based on the ADC's analysis of the sales data, it is satisfied that prices to OneSteel's internal customers are at arm's length. An examination of OneSteel's sales prices to its related entities shows that OneSteel complied with Australian accounting standards in relation to pricing its sales to related entities. It also found that OneSteel's prices to its related and unrelated customers demonstrate a very similar pattern,[68] indicating that the pricing decisions are not affected by the commercial relationship between OneSteel and its related customers, but are affected by other market forces, mainly the prevailing import price offers of RIC. Therefore, the ADC was satisfied that selling prices of RIC to both related and unrelated parties are subject to market forces based on competitive prices and can be relied upon in the assessment of the economic condition of the Australian industry. The ADC also therefore does not consider that a segregated market analysis is required for the purpose of injury assessment.

141. In response to Vicmesh's claims in its application that OneSteel is inflicting injury on itself due to utilising a pricing formula that automatically builds on import prices together with various premiums (import parity pricing), the ADC has found that OneSteel responds to price undercutting by lowering its prices in order to maintain sales volumes and production levels and remain in business. As the prices are lower than OneSteel's CTMS over most of the investigation period, OneSteel is being injured. The price premiums OneSteel is trying to maintain is a reflection of the extra service OneSteel, as a local supplier, offers to its customers such as stock holding and faster delivery compared to the three month delivery timeframe for RIC from overseas.

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[67] See Confidential Appendix 16 – Related party transactions, to the Reinvestigation Report.
[68] See Confidential Appendix 16 – Related Party Transactions, to the Reinvestigation Report

142. In response to Vicmesh's statement in its application that OneSteel is willing to make a loss on RIC as long as it makes profit in its mesh subsidiaries, the ADC in the Reinvestigation Report considered that it is reasonable to assume that any business aims to maximise profit unless there is compelling evidence to indicate otherwise. The ADC stated that there was no evidence suggesting that OneSteel is willing to make a loss to support its downstream businesses. The ADC verified that OneSteel's prices to related entities correlate with OneSteel's prices to independent customers, and found that RIC prices within the investigation period are based on what the market will pay. As indicated in the industry verification report, the ADC tested, and was satisfied, that the prices recorded in the information provided were effectively trade exposed as the external prices from unrelated customers were referenced in the calculation of all its prices. The ADC found that OneSteel, despite being part of the overall Arrium business, remained responsible as an individual corporate entity by ensuring that profits are maximised. Further, the ADC found that the 'related party' sales prices were set with reference to sales to non-related parties which compete with OneSteel's related parties. The ADC considers that the suggestion that prices are set to ensure profit for its mesh making subsidiaries is not supported by the available evidence.

143. I consider that the concerns and questions raised by Vicmesh in its application for review relating to vertically integrated structure of OneSteel and its sales to related parties, in the injury analysis in REP 300, have been addressed in the Reinvestigation Report. I consider that the ADC's analysis in this regard is sound and the conclusions reached are reasonable.

Incorrect cumulation of imports

144. Vicmesh claims that the ADC cumulated imports from Hunan Valin with those from another Chinese manufacturer, and it was inappropriate to cumulate trade exposed and non-trade exposed shipments, since the two categories compete with OneSteel in completely different ways. Vicmesh notes that imports of RIC by

Vicmesh do not affect OneSteel's immediate ability to sell RIC to anyone other than Vicmesh.

145. According to Vicmesh, when the non trade exposed sector is properly separated out, it then becomes easier to conclude 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.

146. This issue raised by Vicmesh was included in the reinvestigation by the ADC, and has been dealt with above. As stated above the ADC was satisfied that selling prices of RIC to both related and unrelated parties are subject to market forces based on competitive prices and can be relied upon in the assessment of the economic condition of the Australian industry. The ADC did not therefore consider that a segregated market analysis is required for the purpose of injury assessment.

147. I consider that the cumulation of imports by the ADC was reasonable.

Error in findings of injury elements

Price Undercutting

148. Vicmesh in its application for review challenges the price undercutting analysis in REP 301. It finds it difficult to reconcile the ADC's finding of Chinese price undercutting below other export country offers, with Chinese imports taking a significant share of the import market and OneSteel's revenue per tonne reducing and that Chinese RIC has gained significant market share. Yet elsewhere, the ADC found that China imports partially replaced other imports, not OneSteel share.

149. Vicmesh also claimed that the calculation of the undercut price was unfair in two ways. First, it contends that additions were not made to calculations presented in

Vicmesh submissions to properly account for interest, administration and perhaps selling cost, and in comparing prices, the ADC did not properly allow for the significant holding costs in maintaining inventory. Secondly, Vicmesh contends that the pricing methodology of OneSteel was inflated, given its import parity policy, that is, its system of starting with imported goods FIS prices, then adding domestic price premiums and other factors. Vicmesh states that the ADC concludes that Australian industry's prices were undercut and that it would have achieved higher prices in the absence of dumped Chinese 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, guaranteeing that import prices must always be lower. Vicmesh also contends that the pricing approach utilised means that the company is obviously equally or primarily hurt by competition from non-dumped imports that are not subject to trade measures.

150. Vicmesh challenges the ADC's suggestion that exporters have cut prices to get volume, which it regards as "nonsensical". It claims that those exporters simply respond to orders from importers, who in turn simply respond to demand from their customers, with the construction sector determining demand, not foreign exporters. In Vicmesh's view, it is much more likely that prices have come down as iron ore and coking coal prices have come down. Vicmesh claims that view is also consistent with other material before the ADC, such as the Arrium Limited annual report for 2015 which notes its current cost and price environment is the lowest for at least 10 years and low costs naturally lead to low prices. Vicmesh contends therefore that it is inappropriate for OneSteel to assert as a motivation, the wish to gain volume, rather than to pass on lower costs.

151. Taking into consideration Vicmesh's comments and concerns, I have reviewed the ADC's undercutting analysis in REP 301 and the information and analysis provided by the ADC in the Reinvestigation Report, supported by Confidential Appendices 13 and 14, to the Reinvestigation Report, which was part of the ADC's reinvestigation into the impact of non-dumped imports on injury. Based on its analysis in REP 301 and the further analysis in the Reinvestigation Report,

the ADC affirmed the finding that RIC exported to Australia from China at dumped prices significantly undercut OneSteel's prices which, in turn, resulted in lower prices achieved by OneSteel. The ADC also affirmed the finding that RIC exported to Australia from China at dumped prices undercut importers of RIC from other countries. In its analysis of causation, the ADC found that price undercutting caused injury in the forms of price depression and price suppression as well as less than achievable profits and profitability. The evidence used to conduct this analysis included verified data from OneSteel, importers and exporters of RIC as well from market intelligence and various other sources and databases. I consider the ADC's approach to and analysis of price undercutting to be reasonable and convincing.

Price Suppression

152. In challenging the ADC's price suppression analysis Vicmesh again refers to OneSteel's policy of import parity pricing and claims that where OneSteel freely uses a pricing formula that builds on import prices, which it can vary at will, there cannot be price suppression. Vicmesh refers to the recent price fall trends which the ADC aligned with the commencement of Chinese imports in the fourth quarter of 2014 and claims that given that the ADC found that the goods were substitutable regardless of source and that key costs being iron ore and coking coal, were both falling in price, there can be no justification for basing a conclusion as to price suppression on Chinese imports.

153. Shagang in its application for review also challenged the ADC's analysis and finding on price suppression. It noted that in March quarter 2015, the applicant's prices were at least on par with costs, before exceeding costs in June quarter 2015. It also noted that import volumes of RIC from China prior to the March quarter 2015, were negligible as they had only just entered the Australian market. Shagang claimed that any observed price suppression during the investigation period by the applicant, therefore occurred prior to the subject imports entering the Australian market. Further, Shagang claims that during the

second half of the investigation period when the subject imports had established themselves in the Australian market, OneSteel experienced no further price suppression.

154. The ADC in the reinvestigation considered Shagang's claims in relation to the price suppression analysis in REP 301. It concluded that although OneSteel achieved profitability in the last quarter of the investigation period, over the investigation period as a whole it was not profitable. The ADC acknowledges the statement made by Shagang in its application that OneSteel had experienced price suppression prior to the investigation period. However, the ADC considers that OneSteel's lack of profitability over the injury analysis period as a whole does not prevent a finding that exports of RIC to Australia from China at dumped prices resulted in price undercutting which, in turn, led to price suppression. In REP 301 the ADC noted that OneSteel's margin for RIC improved in the final quarter of 2014/15. OneSteel had indicated that the improvement was due to a decrease in its costs as a result of falling input material prices, and cost cutting and efficiency programs; as well as a reduction in import volumes of RIC from countries nominated in Investigation No. 240. The ADC had confirmed and verified that these reasons were correct. In the Reinvestigation Report, the ADC considered that its finding that, but for dumping, OneSteel would have achieved higher prices further supports the finding related to price suppression in REP 301, that is, OneSteel would have achieved better profitability, and less price suppression, but for RIC exported to Australia from China at dumped prices.

155. Taking into consideration Vicmesh's and Shagang's comments and concerns, I have reviewed the ADC's price suppression analysis in REP 301 and the information and analysis provided by the ADC in the Reinvestigation Report, supported by further data and information contained in Confidential Appendix 12 - ABF to the Reinvestigation Report. I am satisfied that the ADC's approach to and analysis of price suppression is reasonable.

Price Depression

156. Shagang also challenges the ADC's price depression analysis, claiming that it is misleading for the ADC to conclude that "since the start of the Q1 2014 the market has shown indications of significant price pressure at several times" when the ADC found in REP 240, the applicant's selling prices have been in decline since 2011. Shagang claims that to properly assess and explain the trends in the applicant's selling prices, the ADC ought to have revised its analysis to properly capture prices from the beginning of 2011 and to present the movement on an annual basis to remove any bias in the data. Shagang claims such a revised chart is also expected to discredit the ADC's finding that "[t]he most recent price fall trend aligns with the commencement of Chinese imports from Q4 2014 onwards". Shagang contends it is misleading to suggest that the entry of Chinese imports of RIC into the Australian market in Q4 of 2014, is in some way responsible for declining prices, when the applicant's prices have been, consistent with trends observed in various other markets, in decline since 2011.

157. In the Reinvestigation Report the ADC addressed Shagang concerns relating to the analyses of price depression in REP 301 and provided further data and analysis. It points out that the injury assessment period is from July 2011, with information from this period having been verified and does not consider it necessary to analyse injury factors prior to July 2011. The ADC's analysis indicates that OneSteel's RIC prices have declined on an annual weighted average basis since financial year 2012 despite short-term fluctuations. The ADC acknowledged that OneSteel's RIC prices have been in decline over the injury analysis period as a whole. Contrary to the expectation expressed by Shagang in its application, the price fell in Q4 of the 2015 financial year (April – June 2015) and over the 2015 financial year as a whole, consistent with the ADC's statement in REP 301 that the most recent price fall trend aligns with the commencement of Chinese imports from Q4 2014 onwards. The ADC considers that the decline in RIC prices over the injury analysis period as a whole does not prevent a finding

that exports of RIC from China at dumped prices resulted in price undercutting which, in turn led to price depression.

158. The ADC considered that despite prices falling globally, Australian prices have fallen further than they would have otherwise but for RIC exported to Australia from China at dumped prices. The ADC found that the dumped goods were undercutting the entire market for RIC in Australia during the investigation period, and that the lowest price point was used by OneSteel's customers as a leverage point when negotiating their domestic purchase prices. If the goods from China were not dumped, the lowest price which OneSteel's customers would have been able to leverage would have been higher, allowing OneSteel to negotiate a higher price and generate an increased return. The levels of dumping indicate that, if Chinese RIC was not dumped, this increase in price would have been significant and would have not only had a direct impact, by moving the lowest international price to a higher point, but also would likely have had a flow-on impact of taking pressure off importers of RIC from other countries to reduce their prices. In the Reinvestigation Report the ADC affirmed its finding on price depression in REP 301.

159. Taking into consideration Vicmesh's and Shagang's comments and concerns, I have reviewed the ADC's price depression analysis in REP 301 and the further information and analysis provided by the ADC in the Reinvestigation Report, supported by additional charts and data contained in Confidential Appendix 15 – Graph Data to the Reinvestigation Report. I am satisfied that the ADC's approach to and analysis of price depression is reasonable.

Volume Effects and Market Share

160. Vicmesh refers the ADC's finding that imports declined during the investigation period and the fact that the ADC did not find injury by way of lost volumes or market share. Vicmesh contends that the ADC should have addressed this as a countervailing factor to other injury allegations. Vicmesh considers it logically

inconsistent to find material injury caused by price undercutting, but not find any adverse impact on volume.

161. Shagang in its application for review also noted that the ADC had concluded that there was not sufficient evidence to support OneSteel's claim that it suffered injury in the form of lost sales volumes or reduced market share. It stated that it supported this finding and made some further comments.

162. Since the ADC did not find that OneSteel suffered material injury in the form of volume effects or market share, and neither Vicmesh nor Shagang are challenging these findings, I do not consider it necessary to deal further with these issues. I do, however, wish to point out that I do not agree with Vicmesh's statement that it is logically inconsistent to find material injury caused by price undercutting, but not find any adverse impact on volume.

Capacity utilisation

163. Vicmesh criticises the ADC's analysis and measurement of this factor of injury. I consider that there is some merit in the criticism and am of the view that the ADC should have done a better and more thorough analysis of capacity utilisation. However, I do not consider that this affects the overall finding of material injury since capacity utilisation has not been a major injury factor in this investigation, with the ADC emphasising other more relevant factors in its analysis and conclusions, such as price depression, price suppression and less than achievable profits and profitability.

Asset value

164. Vicmesh criticises the ADC's analysis and reasoning relating to its finding of injury in the form of reduced asset value. I consider that there is some merit in the criticism and am of the view that the ADC should have done a better and more thorough analysis of this injury factor. However, I do not consider that this

affects the overall finding of material injury since asset value has not been a major injury factor in this investigation, with the ADC emphasising other more relevant factors in its analysis and conclusions, such as price depression, price suppression and less than achievable profits and profitability.

Reduced employment

165. Vicmesh criticises the ADC's analysis and reasoning relating to its finding of injury in the form of reduced employment claiming that it is inappropriate to consider reduced employee numbers as injury per se, as the ADC also found increased productivity measures per shift, which in turn would be impacted upon by the number of workers. I am of the view that it is not inappropriate for the ADC to consider reduced employee numbers as an injury factor. Indeed, it is a relevant economic factor specifically provided for in the legislation [69] and the Manual.

Reduced or non-existent profit

166. Vicmesh notes that the ADC refers to OneSteel's aggregated losses for the goods under consideration since 2011, noting profit in the final quarter of financial year 2015 but concluding that the profit generated was not sufficient to be sustainable, due to its excessive borrowing costs. Vicmesh makes the point that 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.

167. Vicmesh refers to OneSteel's assertion that it was not meeting target benchmark return on profits within the Arrium group, due to the price and volume injury effects. Given that the group is in administration and has trade remedy measures on most of the products it produces, Vicmesh considers that it is hardly possible

[69] See reference to, "the number of persons employed" in s.269TAE(3)(h) of the Customs Act and page 17 of the Manual

to blame an inability to meet target profit benchmarks on some 11,000 tonnes out of a market of 640,000 tonnes Vicmesh contends that its prices are too high and that is the reason why it is losing profitable market share.

168. Shagang also challenges the ADC's injury finding on profit. Shagang refers to the ADC's finding in REP 301 that OneSteel's "steel division has not reported a positive sales margin or EBIT for the segment" over the entire injury period. Given that subject imports had not entered the Australian market prior to the December quarter of 2014, all losses incurred during these prior years cannot be attributed to the subject imports. Shagang notes that during the investigation period, the applicant's earnings and sales margin improved when compared to the performance in the previous two financial years.

169. Shagang highlight that the applicant's aggregated losses are even greater when including the applicant's losses during 2010 and the first half of 2011, when OneSteel's losses were at their greatest. Shagang claims that the recent improvement in the applicant's profit performance is then even further magnified. According to Shagang, the primary issue that the ADC should have examined and explained is why the applicant's sales of RIC have historically and consistently been unprofitable.

170. Although I did not request the ADC to reinvestigate this issue, the ADC has made reference to and provided further clarification and analysis in respect of profit and profitability, in its discussions on related issues in its injury reinvestigation. The ADC found that OneSteel's attempts to maintain volume have had an impact on profits and profitability as OneSteel has been forced to reduce prices to remain competitive. This had a demonstrated impact through the price suppression, price depression, and undercutting and resulted in the revenue for RIC being lower for the same level of production than it would be otherwise. OneSteel recorded losses over the investigation period on a weighted average basis, and improvement in profits in the form of reduced losses were driven by cost efficiencies as prices continued to fall.

171. The ADC points out that the steel division of OneSteel which produces and sells RIC, did not report a positive sales margin or positive earnings before interest and tax (EBIT) for the division. When profitability is restricted to the goods under consideration, there are significant aggregated losses. Despite the recent improvement in profitability, the losses are compounding, and over the financial year a net loss was recognised for RIC. In the final quarter of financial year 2015 there was a slight improvement in performance for RIC, driven primarily by cost saving measures undertaken by OneSteel. However, during that period, the profit generated was not sufficient to be sustainable. The ADC found that the Australian industry has suffered injury in the forms of less than achievable profits and profitability. This in turn has impacted negatively on OneSteel's profits and profitability over the investigation period. The ADC considers that OneSteel's unit revenue would have improved if the price suppression and depression were not occurring. Therefore, the Commissioner considers that OneSteel has suffered injury in the forms of reduced profits and profitability and that injury was caused by sales of RIC exported from China at dumped prices.

172. Taking into consideration Vicmesh's and Shagang's comments and concerns on the injury analysis relating to profit, I have reviewed the ADC's analysis on profit and profitability in REP 301. I consider that the ADC's approach and analysis of profit and profitability and profit effects is reasonable and thorough, and the conclusions reached are convincing.

Error in assessment of other causes of injury

173. Vicmesh points out 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. Vicmesh refers to the Appellate Body in *US – Anti-Dumping Measures on Certain Hot-Rolled Steel*

Product from Japan[70] *(US – Hot Rolled Steel)*, which sets out the importance of non-attribution.

Non- dumped imports and imports not subject to dumping laws

174. Vicmesh contends that ADC's assessment of other factors that may have caused material injury, should have addressed the significant amount of imported goods not subject to anti-dumping duties. Vicmesh considers the most important injury factor to be the significant market share held by non-dumped imports from Indonesia and goods outside of the dumping regime imported from New Zealand. Vicmesh claims that 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. Vicmesh disputes the ADC's conclusion that, but for sales of RIC exported from China at dumped prices, the weighted average delivered prices from other exporting countries would not have dropped as much. Vicmesh notes that there has not been any correlation between the prices from various exporter countries, and the ADC never made a finding as to whether prices from non-dumped supply sources or from New Zealand would have undercut OneSteel's prices. As a result, Vicmesh contends that there was no reasonable basis to conclude that OneSteel would have been able to increase prices in a market not affected by RIC exported from China.

175. Shagang made similar submissions in its application for review referring to s.269TAE(2A) of the Customs Act, the Ministerial Direction on Material Injury and the Appellate Body decision in *US – Hot rolled steel*, pointing out the ADC is required to isolate the effects of other known factors. For this reason, Shagang contends that the ADC's material injury finding is defective as there has been no consideration of the effects of non-dumped imports, let alone any attempt to isolate those effects. Shagang contends that the ADC's brief discussion of non-dumped imports in SEF 301 is both misleading and a distortion of the facts

[70] WT/DS184/AB/R, paragraph 223

accepted by the Parliamentary Secretary in REP 240, for the reasons set out in Shagang's application.[71] Shagang made particular reference to imports from New Zealand and Indonesia.

176. Since both Vicmesh and Shagang raised this issue in their applications for review, and since, on reviewing REP 301, I had some concerns about the ADC's analysis in this regard, I requested the ADC to reinvestigate the impact of non-dumped imports on injury, in accordance with s.269TAE(2A)(a) of the Customs Act, and directed that any such injury must not be attributed to the exportation of these goods.

177. The ADC conducted a detailed reinvestigation of this issue and provided its analysis in the Reinvestigation Report, supported by a number of charts based on data from the Australian Border Force (ABF) import database.[72]

178. The ADC stated in the Reinvestigation Report that it reinvestigated the impact of non-dumped imports on injury in accordance with subsection 269TAE(2A)(a) having regard to Shagang and Vicmesh's applications for review. It pointed out that both Shagang and Vicmesh had stated that injury must not be attributed to the exportation of non-dumped goods and referred to imports from New Zealand and Indonesia and the significant market share they represent. In its reinvestigation:

- The ADC provided charts showing imports of RIC between 1 January 2011 and 30 June 2015, indicating that the volumes of RIC exported to Australia from New Zealand and Indonesia have declined while China increased its RIC exports significantly during the investigation period. The ADC considered that this supports the attribution of injury to RIC exported to Australia from China rather than to other countries, particularly New Zealand and Indonesia;

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[71] See discussion under Finding 6 of Shagang's application for review (unpaginated)
[72] See details set out in Confidential Appendix 12 - ABF Import Statistics, Confidential Appendix 13 – Price undercutting analysis and Confidential Appendix 14 – Further Price Undercutting Analysis.

- A further chart indicated that the weighted average price of imports of RIC from all other countries have been well above the weighted average prices of RIC from China in 2014 and 2015. It is evident from the chart that Chinese RIC has been imported at the lowest price points;
- The ADC also reviewed verified data from importers of RIC from China and affirmed that Chinese RIC offers have been consistently recorded at price points which are below those from other countries;
- A further chart indicated that the lowest price offers for RIC in the Australian market between July 2014 and September 2015 were consistently for Chinese RIC compared to OneSteel's prices. It also indicated that the number of occasions that Chinese RIC has been offered in the Australian market has grown since April 2015 indicating increasing activity by importers of Chinese RIC in the Australian RIC market;
- A further two charts indicated that since July 2014 Chinese RIC consistently undercut RIC from other countries and the price advantages of imported RIC over OneSteel. This also indicated that the amount of undercutting of OneSteel's RIC prices by Chinese RIC was consistently greater than the amount of undercutting by RIC from other countries; and
- The ADC also conducted further analysis of price undercutting by imports of RIC from China and other countries.[73]

179. Based on the evidence described above, the ADC affirmed the findings as described in REP 301, that over the investigation period:

- Chinese RIC has been imported at the lowest price point per month within the Australian market;
- Chinese RIC offers in Australia have been recorded at price points which are below other export country offers;
- Chinese RIC has taken a significant share of the import market, demonstrating the success of the price undercutting strategy;

[73] See Reinvestigation Report, pages 18 - 21

- OneSteel revenue per tonne over the period has reduced and would have been higher but for dumping;
- Exporters of Chinese RIC have acknowledged that prices are set based on marginal costing domestically, and export prices are based upon the domestic prices received; and
- Since entering the market, Chinese RIC has gained significant market share at the expense of other exporting countries.

180. The ADC affirms the finding that RIC exported to Australia from China at dumped prices significantly undercut OneSteel's prices which, in turn, resulted in lower prices achieved by OneSteel. The ADC also affirms the finding that RIC exported to Australia from China at dumped prices undercut importers of RIC from other countries.

181. I consider that the ADC's reinvestigation of the impact of non-dumped imports on injury is methodical, thorough and supported by evidence. The approach and analysis of the ADC is reasonable and the conclusions are persuasive. I am satisfied that my initial concerns about the analysis have been addressed in the reinvestigation.

Injury and refusal to supply

182. Vicmesh refers to a confidential attachment to a document submitted by OneSteel which relates to Vicmesh. Vicmesh claims that it should be provided with a copy.

183. It would appear to relate to an issue of procedural fairness rather than a reviewable decision by the former Parliamentary Secretary, referred to in s.269ZZA. I consider that this procedural issue falls outside the scope of the powers of the Review Panel. As discussed above, under Vicmesh's ground of review relating to "Improper change of the surrogate after the SEF", I am limited

to recommending that the Parliamentary Secretary affirm or revoke the reviewable decision and substitute a specified new decision.

A consolidated analysis of various claimed injury factors

184. Vicmesh under this 'sub-ground' of review refers to OneSteel's "parlous financial circumstances' (and the appointment of an administrator) and its 'unilateral decision to utilise a pricing formula that automatically builds on import prices together with various premiums'. Another issue mentioned by Vicmesh is "its captive iron ore, being magnetite, requiring extra conversion costs."

185. I do not consider that there is sufficient particularity with respect to any of these issues, in Vicmesh's application for review, to warrant further consideration.

Error in finding material injury

186. Vicmesh claims that the ADC was wrong to conclude that "the number of factors in which the industry has suffered injury, when considered together, is not immaterial...".[74] Vicmesh contends that it is not the number of injury factors that determines materiality but instead, their extent.

187. Again, I consider that there is not sufficient particularity with regard to this claim to warrant further consideration. However, I note that Shagang in its application has a claim relating to materiality of injury which I will address when dealing with its grounds of review, below.

[74] Vicmesh refers to Section 6.8 of REP 301, page 31

Error in rejection of non-injurious price

188. Vicmesh contends that the ADC erred as to its recommendation of a non-injurious price (NIP) and the former Parliamentary Secretary wrongly rejected such a price.

189. Vicmesh states that the ADC noted that the Parliamentary Secretary is not required to have regard to the lesser duty rule in s.8(5B) of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) because of the application of s.8(5BAA) of the Dumping Duty Act, which 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 s.269TAC(2)(a)(ii).

190. Vicmesh points out that nevertheless, the ADC provided its non-injurious price (NIP) analysis, in case the Parliamentary Secretary wished to exercise the discretion to consider the application of a NIP. Vicmesh points out further that the Parliamentary Secretary did not 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 a NIP. Vicmesh contends that the Parliamentary Secretary was wrong to fail to apply a non-injurious price, which would be the only reasonable conclusion in the circumstances.

191. Vicmesh points out that the ADC calculated NIP based on July 2015 quarter CTMS plus a figure for profit or "a sustainable rate of return", based on recent borrowing activity. Vicmesh contends that 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 excessive borrowing costs of a company that was close to administration. Vicmesh contends further that 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.

192. Vicmesh contends that without a properly assessed NIP, if the anti-dumping duty were to remain, the outcome would be an insurmountable protectionist barrier.. Vicmesh claims that it is clearly prohibitive and simply makes it impossible to import from China, which is not the intent of the anti-dumping regime.

193. The ADC in its submission to the Review Panel notes that:

- s.8(5B) of the Dumping Duty Act provides, inter alia, that if the Parliamentary Secretary is required to perform the function under s.8(5) of the Dumping Duty Act in respect of goods the subject of a notice under 269TG(1) or (2) of the Customs Act, and NIP is lower than the ascertained normal value, the Parliamentary Secretary is required to have regard to the desirability of specifying a method such that the sum of the export price and the interim dumping duty payable does not exceed the NIP, sometimes referred to as mandatory consideration of the lesser duty rule;
- The mandatory requirement to consider the lesser duty rule does not apply in the circumstances listed in subsection 8(5BAA) of the Dumping Duty Act, with one of those circumstances being where the normal value of the goods was not ascertained under s.269TAC(1) of the Customs Act because of the operation of s.269TAC(2)(a)(ii), where a particular market situation exist;
- In this instance, normal values of RIC were ascertained under s.269TAC(2)(c) due to the operation of s.269TAC(2)(a)(ii) and the presence of a situation in the market for RIC in China made sales in that market not suitable for determining normal values under subsection 269TAC(1);
- Therefore although the NIP was lower than the exporters' ascertained normal values, the Parliamentary Secretary was not required to have regard to imposing a lesser rate of duty that did not exceed the NIP due to the exception under s.8(5BAA) to the requirement in s.8(5B) of the

Dumping Duty Act. It was, however, open to her to do so under subsection 8(5B), as noted on page 45 of REP 301; and

- The discretionary nature of the power gives the Parliamentary Secretary the ability to exercise the power as she sees fit, which is different to an obligation to exercise a power.

194. The ADC points out that in any event it notes that decisions that are reviewable by the Review Panel are listed in subsection 269ZZA(1) of the Act. These reviewable decisions do not include a decision under the Dumping Duty Act to impose duties at an amount that reflects the dumping margins in full rather than the NIP. The ADRP's jurisdiction to review certain decisions of the Parliamentary Secretary is limited to those decisions listed in subsection 269ZZA(1) of the Act, which the ADC states was recently affirmed in ADRP Report No. 16 and ADRP Report No. 20. Both those reviews involved a decision under the Dumping Duty Act to determine that interim dumping duty be worked out in accordance with a particular method, which was not part of a list of reviewable decisions in subsection 269ZZA(1).

195. I will address the preliminary issue raised by the ADC. The ADC is correct in that in ADRP No. 16 and ADRP No. 20 (and a number of subsequent decisions) the Review Panel found that a decision made with respect to the 'form' of the anti-dumping measures is not part of the reviewable decision, namely the decision to issue the Dumping Duty Notice. As pointed out in ADRP No. 16, the various methods by which the dumping duties can be imposed are set out in the (then) Customs Tariff (Anti-Dumping) Regulation 2013. A decision as to which of those methods are to be applied is made by the Parliamentary Secretary pursuant to s.8(5) of the Dumping Duty Act. Thus, the decision with respect to the use of the ad valorem method was one made under s.8(5) of the Dumping Duty Act and not under s.269TG(1) or (2) of the Act. As a result, the decision was not considered to be part of the reviewable decision and the Review Panel has no power to review it.

196. However, the Reviewing Member continued in Report No. 16, stating:[75]

> "*18. A similar argument could be made regarding the decision with respect to the NIP. However, the Parliamentary Secretary was required to determine whether to apply a NIP, and at what level, before the Dumping Duty Notice could issue. S.269TG(3) requires a notice issued under s.269TG(1) or (2) to include the amount of NIP ascertained at the time of publication of the notice.*
>
> *19. The consideration of the NIP is part of the findings to be made leading up to the decision to issue a notice declaring that s.8 of the Dumping Duty Act applies. As Justice Rares noted in Siam Polyethylene Co Ltd v Minister for Home Affairs [footnote omitted] the scheme of the legislation:*
>
> *20. ... requires the Minister to ascertain the normal value, export price and non-injurious price for the purposes of the declaration and the consequent imposition of anti-dumping duties under the Dumping Duty Act".*

On balance, I believe that the better view is that a finding with respect to the NIP falls within the scope of a reviewable decision under s.269ZZA(1)(a).

197. Therefore, on the "better view", the Review Panel may have the power to review a NIP finding. I consider that the approach of the ADC in REP 301 with regard to the NIP was correct. The Parliamentary Secretary was not required to have regard to imposing a lesser rate of duty that did not exceed the NIP, due to the exception under s.8(5BAA). It was, however, open to her to do so, under subsection 8(5B). As pointed out by the ADC, the discretionary nature of the power gives the Parliamentary Secretary the ability to exercise the power as she sees fit, with no actual obligation to exercise the power. I do not consider that Vicmesh has put forward convincing reasons as to why the Parliamentary Secretary should have exercised the particular power to impose a lesser rate of

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[75] ADRP Report No. 16, paragraphs 18 – 20. The omitted footnote is a reference to "[2009] FCA 837 at para 21"

duty not exceeding the NIP, when the legislation specifically does not require it because of the operation of s.269TAC(2)(a)(ii), as in the present case.

198. I consider the approach of the ADC and the Parliamentary Secretary to be reasonable and in no way inconsistent with the legislation.

Shagang

199. I will now deal with the grounds of review put forward by Shagang

Error in finding that a particular market situation existed and that as a consequence, domestic sales of RIC were unsuitable for determining normal values for Shagang

200. Shagang's claim in this regard has been discussed above under Vicmesh's first ground of review, 'Error in conclusion that there was a particular market situation that justified ignoring Hunan Valin's actual cost to produce billet'.

201. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the reasons discussed above, I do not consider that there was an error in the conclusion by the ADC that there was a particular market situation that justified rendering domestic sales of RIC not suitable for use in determining normal value under s.269TAC(1). Accordingly, I do not consider the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

Error in reliance on market situation assessment and findings to form the view that Shagang's steel billet costs did not reasonably reflect competitive market costs

202. Shagang claims that in deciding to reject Shagang's steel billet costs, the ADC appeared to rely solely on its market situation findings, referring to various statements in REP 301.[76] Shagang disagrees with what it considers to be the

[76] Shagang referred to statements on pages 17 and 87 of REP 301

ADC's noticeable effort to link the market situation assessment with the determination of an exporter's costs. It contends that the issue of market situation is concerned entirely with the suitability of domestic sales and whether the 'situation' found to exist, does not permit a proper comparison with the corresponding export prices. Shagang contends that the market situation assessment is not, as the ADC has outlined, used to determine whether an exporter's costs are suitable for construction of normal values. If it were the case, a market situation finding based on government influence in the domestic market would almost always lead to an exporter's costs being rejected, which would allow the investigating authority to bypass the normal rules governing the dumping provisions and instead implicitly utilise alternative rules which are clearly designed to only be applied in exceptional circumstances. In Shagang's view, the Commission's approach to the determination of normal values in this case is akin to the exceptional methodologies available only to non-market economies.

203. I agree with Shagang that the ADC cannot only rely on its market situation assessment to consider whether the requirements of s.43 of the Regulation are met and ultimately reject its costs as not reasonably reflecting competitive market costs. The market situation analysis is different to the assessment of competitive market costs. However, I do not agree with Shagang that the ADC has failed to undertake a separate analysis. After making the finding that there is a particular market situation,[77] the ADC describes the process and analysis undertaken by the ADC to arrive at the conclusion that the exporters' records do not reasonably reflect competitive market costs, at the steel billet level.[78]

204. In its submission to the Review Panel, the ADC stated that it undertook an assessment of the competitive market costs associated with the production of like goods for cooperating exporters in light of the significant distortions that, exist within the Chinese iron and steel market. This was completed by the ADC

[77] This analysis in in Non-Confidential Appendix 1
[78] See Sections 5.4.1 and 5.2 of REP 301, pages 11 - 14

comparing the cost records for the cooperating exporters with a competitive market based value for billet. The ADC stated in its submission:

> *"As 80 to 85 per cent of all production costs are billet costs, the ADC conducted a comparison of steel billet costs in China with other comparable price indexes around the globe. As steel is a commodity product with converging prices, and an almost perfect correlation exists between the different price indexes, I am of the view that it was open to make such a comparison. The comparison showed that the price of steel billet in China, while perfectly correlated, was significantly lower than global indices, and accordingly, the Chinese domestic price of steel billet did not reasonably reflect competitive market costs associated with the production or manufacture of like goods.*
>
> *The assessment was undertaken at the billet level, because at that level the cost accounting records would capture any and all distortions to raw material inputs as well as capturing a substantial level of processing cost distortions through the relevant billet production facilities."*

205. Further, the ADC stated that, as outlined in REP 301, it was satisfied that the records of each Chinese exporter that cooperated with the investigation did not reasonably reflect competitive market costs after completing this assessment.[79]

206. It seems to me that the above analysis related to competitive market costs and is separate from the ADC's analysis of the particular market situation in Appendix 1 to REP 301. It should be noted, however, that the ADC did make the point that the market situation assessment reflected on a wide range of distortionary influences across the entire Chinese iron and steel industries, of which RIC is a subset and it considered that the information was equally relevant to the

[79] See ADC Submission, page 5

assessment of whether records within the market will not reasonably reflect competitive costs due to the distortionary influences of the GoC.[80]

207. Based on the above, I consider that the ADC did undertake a separate analysis of the market situation and the competitive market costs and I do not consider that the ADC relied on the market situation assessment and findings to form the view that Shagang's steel billet costs did not reasonably reflect competitive market costs. I do not consider the approach of the ADC to be unreasonable. Accordingly, I do not consider the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

Error in interpretation of Regulation 43 by focusing on the costs themselves, rather than the records of Shagang, in rejecting its steel billet production costs

208. Shagang claims that the ADC erred in its interpretation of s.43 of the Regulation by focusing on the costs themselves rather than the records of Shagang, in rejecting its steel billet production costs.

209. Shagang states, in its application for review, that Article 2.2.1.1 of the ADA is the relevant provision that is enacted into Australian legislation by s.43 of the Regulation and the rules of Article 2.2.1.1 require that the costs to be normally used in construction of normal value are to '*be calculated on the basis of records kept by the exporter or producer under investigation*', where those records are kept in accordance with GAAP and "*reasonably reflect the costs*" associated with the production and sale of the goods under investigation. Shagang distinguishes the corresponding conditions outlined in the Regulation which require the exporter's records to "*reasonably reflect competitive market costs*" associated with the production or manufacture of like goods (emphasis added). As noted by Shagang it is evident that a comparison of the relevant text reveals the inclusion of *'competitive market'* in the second condition within the Regulation. Shagang

[80] See ADC Submission, page 5

notes that the ADC's interpretation of the requirements of Regulation 43 appears to place emphasis and importance on these two additional words, apparently holding the view that the inclusion of these words transfers the assessment of reasonableness from the exporter's records to the actual costs themselves. Shagang strongly disagrees with this interpretation.

210. Shagang refers to *EU - Biodiesel* where the dispute centered around whether Article 2.2.1.1 of the ADA required investigating authorities to examine whether the records reasonably reflect the costs associated with production or whether the costs themselves were reasonable. Shagang noted that the Panel did not find support for the interpretation that it is the costs themselves that must be reasonable. The Panel stated:

> *"On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in – within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred."*[81]

[81] See *EU – Biodiesel*, paragraph 7.242. It should be noted that since the application of Shagang, the Appellate Body has issued its report, confirming the Panel's decision with regard to Article 2.2.1.1. See WT/DS473/AB/R, paragraph 6.10

211. Shagang contends that applying this interpretation and standard to Shagang's circumstances in the RIC investigation, it is clear that the ADC's finding focused exclusively on the actual costs themselves, and provided no reason or evidence to consider that the actual costs relevant to the production of RIC, were not reasonably reflected in its records. Shagang claims that the ADC therefore failed to properly comply with the requirements of s.43 of the Regulation and Article 2.2.1.1 of the ADA.

212. It is clear that under Australian law the reference in s.43(2) of the Regulation to "*reasonably reflect competitive market costs*," requires an examination of the costs recorded by an exporter to assess both reasonableness and competitiveness. The expression is different to Article 2.2.1.1 of the ADA, which uses the words "*reasonably reflect the costs*" associated with the production and sale of the product under consideration. The difference is unambiguously clear and the ADC's approach in REP 301 (and a number of other investigations) correctly gives effect to Australia's domestic legislation. This is in accordance with the *Panasia case*[82] which provides that WTO jurisprudence may assist in interpreting Australia's anti-dumping law only where a statute is ambiguous. The ADC's approach is also supported by Nicholas J in the Dalian case[83] where his Honour confirms his previous view and quotes from his judgement in the Panasia case with regard to Regulation 180(2), the predecessor provision to s.43 of the Regulation:

> *"[91] ... the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the*

[82] (2013) 217 FCR 64 at [9]
[83] [2015] FCA 885 at [39 – 42]

impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs" ..."

213. Based on the above discussion, I agree with the approach of the ADC in assessing whether the costs in the exporter's records reflect "competitive market costs" as required by s.43(2) of the Regulation. It is not for the Review Panel to comment *on EU - Diesel* or on any perceived inconsistencies between the ADA and Australian legislation.

214. I do not therefore consider that the ADC's approach is unreasonable or that the ADC erred in the interpretation of s.43 of the Regulation, by focusing on the costs themselves, rather than the records of Shagang, in rejecting its steel billet production costs. Accordingly, I do not consider the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

Failure to undertake a proper assessment of whether Shagang's records reasonably reflect competitive market costs

215. Shagang's claim in this regard has been discussed above under Hunan Valin's second ground of review, 'Improper consideration of whether Hunan Valin's records reasonably reflect competitive market costs'.

216. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the reasons discussed above, I do not consider that there was a failure by the ADC to undertake a proper assessment of whether Shagang's records reasonably reflect competitive market costs. Accordingly, I do not consider the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

Error in making adjustments to constructed normal values for Shagang, for value-added taxes that did not affect price comparability

217. Shagang contends that there was an error in making adjustments to the constructed normal values for Shagang, for value-added taxes that did not affect price comparability. REP 301 states that constructed selling prices were adjusted upward by the amount of non-refundable VAT 'incurred' on export sales to Australia during the investigation period, in accordance with s.269TAC(9) of the Customs Act.[84] Shagang submits that the ADC has erred in both its interpretation and application of subsection 269TAC(9) of the Customs Act.

218. According to Shagang, the purpose of the provision is to ensure that adjustments are made for factors that impact on the ability to properly compare the constructed domestic selling price and the corresponding export selling prices. According to Shagang this is consistent with the Manual which states that adjustments will be made if there is "*evidence*" that a particular difference affects price comparability. Conversely, according to Shagang, adjustments will not be made if there is no evidence that a particular difference affects price comparability.

219. Shagang accepts that differences in taxes are a legitimate ground for either an upward or downward adjustment. However, it contends that the critical consideration as to whether an adjustment of any kind is warranted, is whether that particular factor has affected price comparability.

220. Shagang referred to REP 254 in respect of Certain Hollow Structural Sections from Thailand where the exporter claimed an adjustment was warranted for taxes incurred and relevant only to domestic products. The ADC refused the adjustment stating that an adjustment should only be allowed when price

[84] Subsection 269TAC(9) of the Act requires that where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.

comparability of domestic and export sales have been affected, and that in order to determine if the adjustment is warranted, the ADC is required to establish whether duties paid for the imported input that is used in the manufacturing of domestically sold product, modified the exporter's pricing of like goods sold on the domestic market in contrast to the goods exported. [85]

221. Shagang also refers to ADRP Report No. 28 which was a review of REP 254 which confirmed the ADC's decision to refuse the adjustment, stating that *'[i]f a difference does not have a demonstrated effect, no allowance should be made in respect of it."*[86]

222. Shagang contends that the only justification presented by the ADC is that as the VAT liability is incurred on export sales, the ADC treats this liability as having influenced the export price due to the high absorbed cost of the goods subject to VAT. Shagang reiterates is view that its export prices were not modified by the VAT incurred but were affected by the following factors: [redacted]. Shagang contends that the contrasting decline in Shagang's export prices and the increase in the non-refundable VAT over the investigation period is further evidence that the ADC's conclusion that the VAT expense incurred by Shagang has modified the export prices. In Shagang's view the ADC has failed to comply with the requirements of the legislation and its own stated policy and practice, by making adjustment for taxes which were not demonstrated to have impacted on export selling prices and as such, affected price comparability.

223. In the ADC's submission to the Review Panel it noted that Shagang has raised an issue regarding VAT adjustments, and stated:

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[85] See REP 254, pages 26 – 27 (Document #054 of EPR 254)
[86] See ADRP Report No. 28, paragraph 49

"As the VAT liability is incurred on export sales, the Commission treats this liability as having influenced the export price due to the high absorbed cost of the goods subject to VAT as recognised by the Manual. [footnote omitted]

The Commission calculated the adjustment based on the difference in VAT rates for normal supply and the rate of VAT refund for export over the investigation period. I consider this approach to be consistent with the ADC's policy as set out in the Manual. Not making this adjustment would adversely impact on the comparability of trade and costs between domestic and export sales due to the difference in cost structures." [87]

224. Firstly, in my consideration of this matter, I noted that in the Manual there was a clear and detailed explanation of the policy relating to VAT on exports, with specific reference to VAT liability for goods exported from China.[88] It seemed to me to be a certain, known and standard adjustment to be made with regard to all exports from China in different investigations. I referred to both REP 254 and ADRP Report No. 28 that Shagang had referred in its application and noted that there were substantial differences in the circumstances and claim made in that case. The nature of the tax concerned was a drawback of duty on inputs in respect of the final product sold on the domestic market. The ADC had indicated that it had "concerns" that the selling price on the domestic market was modified because of the payment of duty on imported HRC for two reasons, firstly that there was an absence of financial records that allocated the cost of duty paid on imported HRC to HSS sold on the domestic market; and secondly, it considered that domestic prices were determined by market forces, as opposed to the cost of production. The ADC noted that the exporter's accounting records did not identify a cost differential between identical products sold locally and exported; and in its exporter response, it had allocated import duty expenses on the input across all its products, regardless of whether the HSS it produced was sold locally, or exported. The ADRP stated:

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[87] See ADC submission, page 11
[88] See the Manual, page 63

"In the circumstances, I am satisfied that the existence and the amount of any modification, to the normal value and the export price associated with drawback of duty on imported HRC used in domestic production was not sufficiently established. Consequently, it was not appropriate to make an allowance in respect of drawback in this case."[89]

225. During the Conference of 9 December 2016, I decided to request clarification from the ADC in respect of Shagang's adjustment for VAT. The ADC confirmed that the VAT adjustment was a very standard adjustment made in all anti-dumping investigations involving exports from China, being a direct cost, clearly observable in the exporters' accounts and directly affecting the cost structure. The ADC was well informed on the mechanics of the Chinese VAT and it was relatively easy to calculate.

226. I therefore consider that the VAT adjustment is reasonable and in accordance with s. 269TAC(9), as well as in accordance with the Manual. I do not consider that there was an error by the ADC in making the adjustment to the constructed normal values for Shagang, for value-added taxes. Accordingly, I do not consider that the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

Error in determining material injury on the basis of a 'but-for' methodology which as a result incorrectly found that the applicant suffered material injury attributable to the subject goods

227. I will address this ground of review under the same subheadings set out in the application of review of Shagang. In a number of instances, where Shagang has a similar claim to that of another applicant, the particular claim of Shagang, will have already been addressed together with the claim of that other applicant.

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[89] See ADRP Report No. 28, paragraph 55

But-for Methodology and Causal Link Between Subject Imports and Injury

228. In respect of this claim, Shagang expressed its concerns with the lack of detailed analysis and proper reasoning contained in REP 301 to support the ADC's preliminary findings. Shagang considers that the material injury assessment in REP 301 is not based on facts or positive evidence, but instead the findings "stem from conjecture and baseless assumptions", and as such, falls well short of the standard expected from an objective investigating authority.

229. I decided to request the ADC to reinvestigate the use of the "but for" methodology, in relation to causation, as detailed in Shagang's application for review. In particular, I referred the ADC to the discussion of this 'alternate analytical' method in Dumping and Subsidy Manual, November 2015 (the Manual), where it is stated that any alternate method 'will be required to be evidence based' and will require a 'compelling explanation' as to why causation exists notwithstanding the absence of any coincidence. I also requested the ADC to take cognisance of the discussion of the 'but for' analytical method in the Manual.

230. The ADC in its reinvestigation of the use of the "but for" methodology, provided the Review Panel with a comprehensive description of the use and application of 'the but' for method in its analysis of injury and causation.[90] It stated that it considers that despite there being a coincidence of dumping and injury, it was appropriate to also apply the but for method in its analysis of injury and causation:

- In order to determine if the injury caused by dumping was material, and to further consider causation issues, the ADC also conducted a 'but for' analysis. In this analysis it became apparent that OneSteel's prices were

[90] See Reinvestigation Report, pages 21 - 21

undercut by dumped imports of RIC from China and it would have performed better but for that dumping.

- The ADC indicated that dumped exports of RIC from China were a direct cause of price depression and price suppression suffered by OneSteel, as well as an indirect cause due to the effect on the prices of RIC exported from Investigation 240 countries, and that if the value of the dumping margin was added to the prices of imported RIC, no undercutting of OneSteel's prices would have occurred. The undercutting analysis was based on evidence that was positive, that is, the evidence is of an affirmative, objective and verifiable character and is credible.
- OneSteel provided comprehensive evidence to the ADC of its price setting practice, which indicates that it constantly monitors price offerings in the market and that a key determinant for its prices to external customers was the price of imports.
- In order to analyse and test further whether OneSteel would have performed better but for dumping, the ADC analysed the effect of dumping on injury in terms of price effects. This analysis confirmed that was the case and indicated that in the investigation period, if the value of the dumping margin was added to the prices of imported RIC, no undercutting of OneSteel's prices would have occurred.
- OneSteel recorded losses over the investigation period on a weighted average basis, and improvement in profits in the form of reduced losses were driven by cost efficiencies as prices continued to fall. This in turn has impacted negatively on OneSteel's profits and profitability over the investigation period, as the ADC considers that OneSteel's unit revenue would have improved if the price suppression and depression were not occurring. Therefore, the ADC considers that OneSteel has suffered injury in the forms of reduced profits and profitability and that injury was caused by sales of RIC exported from China at dumped prices.
- The ADC considers that it is reasonable for the Australian industry to expect to operate profitably and in REP 301 the ADC analysed whether, and how, the absence of sales of RIC exported to Australia from China at

dumped prices would have impacted on the Australian industry's performance. The ADC considers that it conducted this analysis in an objective manner and relied on facts and verified evidence as the basis for any inferences and findings made in REP 301 and in this reinvestigation report. The analysis was based on positive evidence and not on unsubstantiated assumptions.

- In its analysis of causation, the ADC analysed price undercutting and found that price undercutting caused injury in the forms of price depression and price suppression as well as less than achievable profits and profitability. The ADC listed the evidence used to conduct this analysis.[91]

231. I am satisfied with the detailed explanation provide by the ADC in the Reinvestigation Report, of its use of the 'but-for' methodology for the analysis of injury and causation. I am satisfied that the methodology is evidence based and that it provides a 'compelling explanation' on injury and causation. I therefore consider that the approach of the ADC and the conclusions reached are reasonable and I do not agree with Shagang that the findings "*stem from conjecture and baseless assumptions*".

Actual Injury Indicators

232. Shagang's claims in respect of price depression, price suppression, volume effects and profits have been discussed above under Hunan Valin's fourth ground of review relating to material injury, under the subheading, 'Error in findings of injury elements'.

233. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the reasons discussed under that section, I consider that the approach and analysis of the ADC was reasonable.

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[91] See Reinvestigation Report, page 23

Separation and Isolation of other known factors

234. Shagang's claim in respect of non-subject imports has been discussed above under Hunan Valin's fourth ground of review relating to material injury, under the subheading, 'Non- dumped imports and imports not subject to dumping laws'.

235. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the reasons discussed under that section, I consider that the approach and analysis of the ADC in regard to this issue, was reasonable

Materiality of Injury

236. Shagang noted that REP 301 contains no assessment of the materiality of the applicant's injury that is attributable to the subject imports from China. Shagang states that it appears that the ADC has simply assessed whether the hypothetical injury that it believes may have occurred, can be linked to the subject imports, and claims that this is insufficient to be satisfied that the injury caused by the subject imports is 'material'.

237. Further, Shagang claims that given the ADC's reliance on the 'but-for' analysis and its speculative assessment of the applicant's prices and profits, Shagang questions the reliability of any such assessment of the materiality of the injury attributable to the subject imports. It claims that, to understand the materiality of the injury caused by the subject imports in the context of the but-for argument presented by the ADC, it requires hypothesising on the extent to which prices of the applicant and non-subject imports would have been higher in the absence of imports from China.

238. Shagang's contends that it is insufficient for the ADC to simply assume that the applicant's sales would have replaced the subject imports in its entirety, and that other import sources would not have replaced a major portion of the subject

imports. A finding of materiality on that basis is clearly one not founded on facts or positive evidence but simply based on conjecture.

239. Since I had requested the ADC to reinvestigate the 'but for' methodology, at the same time, I requested the ADC to also reinvestigate the finding of 'materiality of injury', particular in the light of its reliance on the 'but for' methodology.

240. The ADC in the Reinvestigation Report pointed out that the 'but for' analysis had indicated that, but for dumping, OneSteel would have achieved higher prices and profitability, and that this had a negative effect on other injury factors. The ADC considers that these injury factors, when considered together are material and greater than likely to occur in the normal ebb and flow of business. As required by the Ministerial Direction on Material Injury 2012, the ADC points out there is no threshold capable of general application, and the ADC considers that the injury experienced by OneSteel is not immaterial, insubstantial or insignificant. It does not consider the injury to be 'hypothetical' as Shagang claims.

241. The ADC proceeded to provide an extensive analysis of the injury factors experienced by OneSteel, including price undercutting, price depression, price suppression as well as less than achievable profits and profitability, The ADC concluded that these injury factors experienced by OneSteel are of such a number and degree that when considered together are material and greater than likely to occur in the normal ebb and flow of business. The ADC considers that the injury experienced by OneSteel that was caused by RIC exported from China at dumped prices is not immaterial, insubstantial or insignificant and does not consider that this injury can correctly be described as hypothetical as claimed by Shagang.

242. Taking into consideration Shagang's concerns and claims, and the comprehensive analysis of the ADC in the reinvestigation, I consider that the approach and assessment by the ADC of the of materiality of injury in the reinvestigation, is sound, and the conclusions reached reasonable. Accordingly, I

do not consider that the Parliamentary Secretary's decision in this regard was not the correct or preferable one.

OneSteel

243. I will now deal with the grounds of review put forward by OneSteel.

Error in selection of prices based on export market conditions as appropriate benchmark for competitive market costs

244. OneSteel's claim in this regard has been discussed above under Vicmesh's second ground of review, 'Improper normal value calculations for Hunan Valin and in particular under the sub-heading, 'Improper change of the surrogate after the SEF'.

245. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the same reasons as expressed above, I find that there was no error in the selection of prices based on export market conditions as the appropriate benchmark for competitive market costs. As stated above, I consider the approach of the ADC in selecting the Platts Latin American export price as the benchmark to be reasonable in the circumstances and not contrary to Australian legislation or practice.

Error in subtracting a rate of profit from the selected benchmark

246. OneSteel's claim in this regard has been discussed above under Vicmesh's second ground of review, 'Improper normal value calculations for Hunan Valin' and in particular under the sub-heading, 'Adjustments should not include billet profit'.

247. I do not intend to repeat the analysis and considerations discussed under that ground of review. For the same reasons as expressed above, I consider that the ADC decision in REP 301 to deduct the verified average profit rate realised by

Chinese exporters from the surrogate Latin American Billet price, to be reasonable and not contrary to Australian legislation or practice.

Error in failure to apply an alloying adjustment to the selected external billet benchmark

248. OneSteel claims that the ADC failed to adjust the normal values of the exporters to reflect the physical differences between the domestically sold like goods and goods exported to Australia. OneSteel claims that the billets used to produce RIC exported to Australia are microalloyed with titanium chromium, or boron, whereas steel billets used to produce RIC for sale in the Chinese domestic market are not. OneSteel submits that an upward adjustment commensurate with the cost of the alloy additions must be made to the billet benchmark in order to ensure fair comparison to the export price. The details of this ground of review is set out in OneSteel's application for review.[92]

249. Shagang in its submission to the Review Panel states that it considers OneSteel's claim for adjustment of micro-alloys used in the production of steel billet particularly extraordinary in light of the ADC's decision to reject all of Shagang's raw material and conversion costs relevant to the production of steel billet, and replace it with a surrogate benchmark price. Shagang provides the example that the ADC has disregarded all of Shagang's imported iron ore purchase costs which were sourced primarily from Australia and Brazil at prevailing international spot prices.

250. The ADC in its submission to the Review Panel in this regard states:

> *"OneSteel's application suggests that a 'quality differential' within the Platts normalisation process for benchmarking would go to automatically remove alloy adjustments. Upon reviewing the documentation which has been publicly available, this cannot be readily ascertained to be the case. A 'quality*

[92] See OneSteel's application for review, pages 11 - 13

differential' could be a reference to a range of factors including tensile strength, shape, or production method as well as other factors. The ADC had no evidence available to it to suggest that the quality differences would only be accounted for by alloys, and that as the standard utilised in the benchmarking process did not require or restrict the alloy adjustments, the ADC was unable to recommend such an adjustment was required. Consequently, I do not consider that application of a wide-ranging alloy adjustment to normal values is required for price comparability of export sales and domestic sales." [93]

251. I do not consider that sufficient evidence was presented by OneSteel for the upward adjustment to be made and I consider the approach of the ADC to be reasonable. I therefore do not consider that the decision of the Parliamentary Secretary in respect to issue was not the correct or preferable one.

Recommendations / Conclusions

252. For the reasons set out above, pursuant to s.269ZZK(1) of the Act:

a) I consider that the reviewable decision in respect of Hunan Valin Xiangtan Iron & Steel Co., Ltd (Hunan Valin) was not the correct and preferable decision, in that:

i. There was a mathematical error in the calculation of Hunan Valin's profit in its normal value calculation, giving rise to an incorrect dumping margin; and

ii. There was an adjustment made to the surrogate benchmark to account for freight charges.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted in part, I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision using the correct profit margin and adjusting the surrogate benchmark cost for

[93] See ADC Submission, pages 8 -9

freight, with the dumping margin changing from 44.1% to 40.2% for Hunan Valin. The change to Hunan Valin's dumping margin is material.

The decision deviates from the new reinvestigated findings by the Commissioner in that a profit margin of [redacted]% has been deducted from the surrogate benchmark price to make it a benchmark cost. In the Reinvestigation Report the profit margin was calculated to be 0%.

b) I consider that the reviewable decision in respect of Jiangsu Shagang Group (Shagang) was not the correct and preferable decision, in that:

   i. There was an adjustment made to the surrogate benchmark to account for freight charges.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted in part, I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision adjusting the surrogate benchmark cost for freight, with the dumping margin changing from 37.4% to 36.1% for Shagang. The change to Shagang's dumping margin is material.

The decision deviates from the new reinvestigated findings by the Commissioner in that a profit margin of [redacted]% has been deducted from the surrogate benchmark price to make it a benchmark cost. In the Reinvestigation Report the profit margin was calculated to be 0%.

c) I consider that the reviewable decision in respect of Uncooperative Exporters was not the correct and preferable decision, in that:

   i. There was an adjustment made to the surrogate benchmark to account for freight charges

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted in part, I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision adjusting the surrogate benchmark cost for freight, with the dumping margin

changing from 53.1% to 49% for Uncooperative Exporters. The change to the Uncooperative Exporters' dumping margin is material.

The decision deviates from the new reinvestigated findings by the Commissioner in that a profit margin of [redacted]% has been deducted from the surrogate benchmark price to make it a benchmark cost. In the Reinvestigation Report the profit margin was calculated to be 0%.

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Leora Blumberg
Anti-dumping Review Panel Member
13 December 2016