Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 16

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QUENCHED AND TEMPERED STEEL PLATE EXPORTED FROM FINLAND, JAPAN AND SWEDEN

Review of a decision of the Parliamentary Secretary to the Minister for Industry to publish a dumping duty notice in relation to Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden

February 2015

Table of Contents

Introduction

1. The following Applicants have applied, pursuant to section 269ZZC of the Customs Act 1901 (the Act), for a review of a decision of the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) to publish a dumping duty notice in respect of Quenched and Tempered (Q&T) Steel Plate exported from Finland, Japan and Sweden:

    Bisalloy Steel Group Limited
    Nippon Steel and Sumitomo Metal Corporation (Nippon Steel)
    JFE Steel Corporation (JFE)
    Kobe Steel, Ltd (Kobe)
    Total Steel of Australia Pty Ltd (Total Steel)

2. The applications for review were accepted and notice of the proposed review as required by section 269ZZI was published on 22 December, 2015. The Senior Member of the Panel has directed in writing pursuant to section 269ZYA that the Panel for the purpose of this review be constituted by me.

3. One of the Applicants was represented by the law firm Baker & McKenzie. Before commencing the review I advised the Applicants and interested parties that I was formerly a partner in Baker & McKenzie and that as a retired partner I received a pension from Baker & McKenzie[1]. None of the Applicants or interested parties objected to my conducting the review.

Background

4. On 20 November, 2013 Bisalloy Steels Pty Ltd (Bisalloy) lodged an application, under s 269TB of the Act, requesting that a dumping duty notice be published with respect to Q&T steel plate exported from Finland Japan and Sweden. This application was eventually accepted and on 8 January, 2014 an investigation was initiated by the Commissioner of the Anti-Dumping Commission (the ADC). On 15 May, 2014 the ADC made a Preliminary Affirmative Decision (PAD) and securities were taken in respect of Q&T steel plate exported from Finland, Japan and Sweden[2]. On 27 August, 2014 the ADC issued the Statement of Essential Facts[3] (SEF) for the investigation.

[1] Letter to the Applicants and Notice to Interested Parties dated 22 December, 2014.
[2] Preliminary Affirmative Determination Report 234, May, 2014 and ADN 2014/42
[3] Statement of Essential Facts Report No. 234 dated 27 August, 2014

5. The final report to the Parliamentary Secretary was made by the ADC in October 2014 (the ADC Report)[4]. The ADC recommended to the Parliamentary Secretary that a dumping duty notice be published in respect of Q&T steel plate exported to Australia from Finland, Japan and Sweden. The Parliamentary Secretary accepted this recommendation and a dumping duty notice was published on 5 November, 2014 (the Dumping Duty Notice)[5].

Conduct of the Review

6. In accordance with s.269ZZK(1) of the Act, the Panel must recommend that the Minister (in this case, the Parliamentary Secretary) either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ requires the Panel to determine a matter required to be determined by the Minister in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

7. In carrying out its function the Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6)(a), i.e. information to which the ADC had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Panel is only to have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ.

8. Unless otherwise indicated 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 insofar as they contained conclusions based on relevant information. I have also had regard to the ADC Report and information relevant to the review which was referenced in the ADC Report. I have also had regard to the SEF and to documents referenced in the SEF.

9. After the applications for review of the Parliamentary Secretary's decision were accepted by the Panel, the ADC was asked to provide comments on the grounds raised in the applications for review[6]. The response from the ADC was received on 10 February, 2015.[7] Both the request to the ADC and the response were made publicly available, except for the confidential attachments. The response from the ADC was not received before the time for submissions expired under s.269ZZJ. I have had regard to the response only to the extent that the ADC has identified information to which it had regard in making its recommendation to the Parliamentary Secretary and which it considered responsive to the claims made by the Applicants.

[4] ADC Report No. 234 dated October 2014
[5] Public Notice dated 28 October,2014 and published on 5 November, 2014
[6] Letter from the Anti-Dumping Review Panel to the ADC dated 22 December, 2014
[7] Letter and attachments from ADC dated 8 February, 2015 received by email on 10 February, 2015

10. The following submissions were received pursuant to s.269ZZJ:

- Submission from the Japanese Mills[8]
- Submission from Total Steel[9]
- Submission from SSAB EMEA AB[10]
- Submission from Ruukki Metals Oy[11]
- Submission from JFE[12]
- Submission from Bisalloy[13]

11. As the submission from the Japanese Mills was with regard to the ad valorem issue raised by Bisalloy, which, as explained below,[14] was not considered part of the review, I did not have regard to that submission. I also did not have regard to that part of the submission from Total Steel dealing with that issue.

Grounds for Review

Bisalloy

12. There is some confusion in the application by Bisalloy as to the identity of the applicant for review. The application for review refers to Bisalloy Steel Group Limited being the applicant but a letter with the application refers to Bisalloy[15]. S.269ZZC of the Act provides that an interested party may seek review of a reviewable decision. The definition of an interested party is found in s.269ZX. Bisalloy certainly comes within the definition of an interested party as the applicant for the dumping duty notice.[16]

13. The Panel has treated the application for review as being lodged by Bisalloy Steel Group Limited on behalf of Bisalloy. Nothing turns on this as it is likely that Bisalloy Steel Group Limited had standing in any event as representing the industry producing like goods to the goods the subject of the reviewable decision,[17] Bisalloy being the sole producer in Australia of like goods.

14. The grounds upon which Bisalloy argued that the decision of the Minister was not the correct or preferable decision were:

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[8] Letter from Clayton Utz dated 19 January, 2015
[9] Letter from Total Steel dated 21 January, 2015 attaching submission by Baker & McKenzie
[10] Letter from Moulislegal dated 21 January, 2015
[11] Letter from Moulislegal dated 21 January, 2015
[12] Letter from Staughtons and attachment dated 21 January, 2015
[13] Letter from Bisalloy Steel Group Limited dated 20 January, 2015
[14] Paragraphs 15 to 17
[15] Letter to the Anti-Dumping Review Panel dated 2 December, 2014 from Bisalloy Steel Group Limited
[16] S.269ZX(a)
[17] S.269ZX(b)

- The form of the anti-dumping measures applicable to Finland and Japan had been applied on the basis of an ad valorem method; and
- The decision to apply the non-injurious price (NIP) on the basis of a particular unsuppressed selling price (USP).

15. A preliminary issue arises with Bisalloy's application. The Ministerial decisions which can be reviewed by the Panel are limited to those decisions set out in s.269ZZA of the Act. In this case, the review is of a decision of the Parliamentary Secretary to issue a dumping duty notice under s.269TG(1) and (2) of the Act. The preliminary issue is whether or not the decision made with respect to the form of the anti-dumping measures is part of the reviewable decision, namely the decision to issue the Dumping Duty Notice.

16. With its first ground, Bisalloy contends that instead of using the ad valorem method for the imposition of dumping duties on exports from Finland and Japan, the ADC should have recommended that the measures be applied to such exports on the combination (i.e. the fixed and variable) method as was used in applying measures to exports from Sweden.

17. The various methods by which the dumping duties can be imposed are set out in the Customs Tariff (Anti-Dumping) Regulation 2013. A decision as to which of those methods are to be applied is made by the Minister pursuant to s.8(5) of the Customs Tariff (Anti-Dumping) Act 1975 (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 is not part of the reviewable decision and the Panel has no power to review it.

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*[18] the scheme of the legislation:

    "… 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."

20. 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).

[18] [2009] FCA 837 at para 21

The Japanese Mills

21. Nippon Steel, JFE and Kobe lodged a joint application. JFE also lodged a separate application for review. When dealing with their joint application I refer to these applicants collectively as the Japanese Mills. The Japanese Mills appointed the law firm, Clayton Utz to represent them with respect to their joint application.

22. The application by the Japanese Mills does not specify the basis for their standing to make an application for review. JFE as an exporter of the goods the subject of the application is clearly an interested party as defined by the Act[19] and entitled to make an application for review. It is specifically named as an exporter during the investigation and in the Dumping Duty Notice. Nippon Steel also clearly meets the definition of interested party as there is evidence it was also an exporter of the goods the subject of the investigation[20]. The evidence is not as clear with regard to the standing of Kobe.

23. It is noted that the ADC treated the Japanese Mills as interested parties for the purpose of the investigation. It accepted submissions from Clayton Utz on their behalf and dealt with those submissions in the SEF and the ADC Report. The definition of interested party for the purpose of the investigation and a review by the Panel is similar in this respect.[21] Given this, and that JFE and Nippon Steel clearly have standing, the Panel has accepted the standing of the Japanese Mills collectively to make an application for review.

24. The Japanese Mills submit that the reviewable decision is not the correct or preferable decision by reason of the following issues:

- Errors in the consideration of material injury which did not adequately account for the effect of extraneous forces upon Bisalloy's business;
- Misapplication of s.269TAE of the Act;
- Failure to properly establish the requisite causal link between such injury and the presence of allegedly dumped goods in the Australian market.

25. While the submission prepared on behalf of the Japanese Mills identifies the three issues listed above (and a further issue related to the use of a Ministerial Direction[22]) when regard is had to the submission, the submission's contention is in summary that the ADC Report does not demonstrate that material injury suffered by the Australian industry was caused by dumping.

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[19] See the definition of interested party in para (c) of s.269ZX
[20] Export Questionnaire received by ADC on 3 March, 2014; SEF section 6.3.2, pages 31 and 32
[21] S.269T definition of interested party paragraphs (g) and (h) and s.269ZX(c) and (d)
[22] Ministerial Direction on Material Injury 2012/24

JFE

26. As noted above, JFE also lodged a separate application for review. This application lists ten grounds for the review able decision not being the correct or preferable decision.

27. The ten grounds relied upon by JFE are:

- The dumping duty notice incorrectly identified that the decision applies to goods falling outside the goods description contained in the s.269TB application;
- The ADC failed to adequately address differences in products and markets;
- The ADC failed to calculate the normal value for JFE goods in accordance with the Act;
- The ADC erred in the calculation of the export price;
- The calculation of the dumping margin would also have been erroneous;
- The ADC Report contains several errors in the ADC's findings on material injury and causation;
- The cumulation of exports was wrongly determined to apply;
- The ADC failed to take appropriate note of other factors that would have been likely to have caused injury;
- The ADC failed to appropriately determine a non-injurious price; and
- The public interest was not assessed.

Total Steel

28. Total Steel had standing to lodge an application for review as an importer of goods the subject of the investigation.[23] Total Steel authorised the law firm Baker & McKenzie to represent it in the review.

29. The grounds relied upon by Total Steel are set out in an annexure to its application. The six grounds it advances for the reviewable decision not being the correct or preferable decision can be summarised as:

- The ADC's decision to determine dumping duty for all exporters for Japan and Finland on an ex-works basis was flawed;
- The description of goods the subject of the Dumping Duty Notice is internally inconsistent and incapable of being used to identify the goods that are the subject of the investigation;

[23] S.269ZX(c)

- The ADC made errors in identifying an Australian industry producing like goods and failed to adequately deal with the product differences between goods
- The ADC's approach in determining normal value for JFE goods was flawed;
- The evidence did not support the existence of a causal link between any dumping of goods and material injury found by the ADC; and
- There were errors in the assessment of whether the thermo mechanically process steel plate (TMCP) fell within the scope of the goods identified for investigation.

Consideration of Grounds

Bisalloy

30. As noted above, the Panel does not have the power to review a decision under s.8(5) of the Dumping Duty Act. I deal below with the second of the reasons put forward by Bisalloy for the reviewable decision not being the correct or preferable decision.

31. Bisalloy seeks review of the Parliamentary Secretary's decision to apply, what it describes, as a less than adequate NIP on exports of Q&T steel plate from Finland and Sweden. It describes this less than adequate NIP as being based upon Bisalloy's cost to make and sell (CTMS) in 2013 plus an amount for profit. Bisalloy contends that the preferred decision is a NIP that reflects the full margin of dumping.

32. There are a number of difficulties with the reasons put forward by Bisalloy in support of its request for a review of the NIP.

33. The first one is that Bisalloy has proceeded on the basis that the ADC "maintained its position of a USP based upon the Australian industry's CTM&S plus profit from which a NIP was derived".[24] This was not the case. In the ADC Report, the ADC found that the NIP could be determined by establishing a USP equal to the Australian industry's weighted average selling price for a period unaffected by dumping. The period used by the ADC was the three immediate years prior to the investigation period, that is, the years 2010 to 2012.

34. The second difficulty I have is that the submission by Bisalloy takes findings made by the ADC in a different context and uses them to argue that as "a price rise equal to the minimum dumping margin would enable the Australian industry to operate at profit, it was critical that the non-injurious price be set at the full margin of dumping for each of the exporters."[25]

[24] Section B.2, page 7 of Bisalloy's application
[25] As above

35. The test to be applied in establishing a NIP is not whether or not it enables the Australian industry to operate at a profit but rather it is the minimum price necessary to prevent the injury or a recurrence of the injury caused by the exportation to Australia of goods at dumped prices.

36. For the reasons outlined below in response to the application by JFE[26], I consider that the approach taken by the ADC on the issue of the NIP to be a reasonable one. Bisalloy does not make any criticism of the methodology used by the ADC in choosing the years 2010 to 2012 for the USP. Its claim is that the NIP should reflect the full margin of dumping. This is, in effect, a claim that there should not be a NIP.

37. Bisalloy has not put forward a convincing reason why the ADC's approach to the NIP was not the preferable approach and the approach for which it contends is arguably inconsistent with the legislation.

The Japanese Mills

38. The Japanese Mills contend that the ADC Report avoided any real or meaningful consideration of two of the preconditions to the exercise of the power to issue a dumping duty notice, namely:

- That the injury be caused by the dumping; and
- That it be material.[27]

39. As well as the relevant international agreement,[28] the Japanese Mills specifically refer to s.269TAE of the Act in support of their contention that the above preconditions are required to be met. While s.269TAE deals with the determination of material injury, it is not the legislative source of the requirement that material injury be caused by the dumping. That requirement is to be found in s.269TG (1) and (2).

40. The Japanese Mills rely on s.269TAE in support of the contention they make that the findings as to dumping and a causal link to material injury must be supported by probative evidence[29]. The specific provision of s.269TAE which is relied upon by the Japanese Mills is s.269TAE(2AA) which provides that a determination as to material injury must be based on facts and not merely on allegation, conjecture or remote possibilities[30].

[26] Paragraphs 174 to 177
[27] Page 8, para 6.14 of the submission by Clayton Utz included with the application for review.
[28] General Agreement on Tariffs and Trade 1994 (GATT).
[29] Page 5, para 6.4 of the submission by Clayton Utz.
[30] Page 5, para 6.7 of the submission by Clayton Utz.

41. The submission by the Japanese Mills also refers to another error which it is contended was made by the ADC. This error is said to be the reliance by the ADC on a quote from the cover page to the Ministerial Direction on Material Injury 2012/24 regarding the impact of injury during an economic downturn and reduced rates of growth[31].

42. For the reasons set out below, I do not consider that any of the grounds put forward by the Japanese Mills establish that the decision of the Parliamentary Secretary was not the correct or preferable decision.

Failure to establish the requisite causal link

43. In support of its argument that the requisite causal link had not been established, the Japanese Mills point to the conclusion reached by the ADC that there was insufficient evidence to establish volume injury, it being unable to establish such injury in circumstances where rapid market decline had resulted in significant decline in demand.

44. The fact that the ADC still found that material injury was caused by dumping was, it is contended, the result of applying a wrong statutory test. The Japanese Mills refer to the finding of injury by the ADC being on the basis that "dumping need not be the sole cause of the injury" and they contend that this wrongly considers the test of causation to be made out if dumping had some injurious effect on the applicant.

45. The submission by the Japanese Mills is correct insofar as it contends that the statutory test for causation is not whether or not dumping had some injurious effect. It must, to satisfy the requirements of s.269TG, be material injury that is caused. The ADC is also correct however in taking the approach that dumping need not be the sole cause of the injury suffered by the Australian industry.

46. Did the ADC take the wrong approach to the test for causation as alleged by the Japanese Mills? The summary of the finding by the ADC on causation in response to the various submissions by the interested parties is found at section 8.9 of the ADC Report. The ADC refers to the price undercutting analysis it has carried out and concludes that dumping has caused injury to Bisalloy. This, of course, is not the required test. However, the ADC then goes on to state that there were sufficient grounds to establish that the price depression, price suppression, reduced profits and reduced profitability suffered by the Australian industry were caused by dumping and that the injury suffered by the Australian industry as a result of the dumping was material. This does satisfy the requisite statutory test.

47. The Japanese Mills also criticise the finding of material injury being caused by dumping on the basis that the ADC assumed that in the absence of dumping,

[31] Paragraphs 6.25 to 6.29, page 9 of the submission by Clayton Utz

the Australian Industry would have been able to raise prices and thereby operate profitably. The Japanese Mills contend that it cannot be automatically concluded that in the absence of dumping, the Australian industry would have raised its prices and operated profitably. The argument appears to be that this assumption cannot be made where there are dynamic international markets nor in domestic markets undergoing substantial transition and decline.

48. The relevant findings by the ADC to support its conclusion regarding dumping causing material injury can be summarised as:

- There was sufficient evidence from the price undercutting analysis to conclude that dumping created a competitive benefit to importers and demonstrates that the Australian industry faced price pressure from imported goods.[32]

- Based on the undercutting analysis the Australia industry was forced to reduce prices in order to compete with imported goods at dumped prices and to maintain its market share.[33]

- Without the presence of dumping it is likely that Bisalloy would be in a position to maintain pricing levels necessary to cover the increase in its CTMS caused by lower market demand.[34]

- The size of the market for Q&T steel plate in Australia was sufficient for Bisalloy to operate profitably during the investigation period, but for the importation of goods at dumped prices.[35]

- An increase in price, equal to the lowest dumping margin calculated (after taking into account the size of the market for Q&T steel in Australia) was sufficient for Bisalloy to operate profitably, if not for the importation of goods at dumped prices.[36]

49. The lowest dumping margin calculated by the ADC was 21.7% for exports from Finland[37]. The price undercutting analysis found that the undercutting of prices by importers was up to 27.3% and there was undercutting from at least one

[32] Section 8.5.2, page 61 of Report 234
[33] Section 8.5.3, page 62 of Report 234
[34] Section 8.5.3, page 62 of Report 234
[35] Section 8.6, page 63 of Report 234
[36] Section 8.9, page 74 of Report 234
[37] Section 6.4.1, page 38 of Report 234

importer from all nominated countries consistently across the investigation period.[38]

50. Given the importance of the price undercutting analysis to the finding of causation, I spent some time reviewing the analysis conducted by the ADC which was contained in Confidential Appendix 6 to the ADC Report. While the evidence of undercutting was mixed with some grades of imported product showing prices substantially higher than Bisalloy's prices, there was still substantial price undercutting by imports from those countries under investigation. Given the finding of dumping for exports from those countries and the degree of the price undercutting, it is not unreasonable to conclude that such undercutting was contributing to the injury being suffered and that the contribution was not immaterial, insubstantial or insignificant. Further the conclusions reached by the ADC were based upon fact and I do not consider that there has been any failure to comply with section 269TAE in that regard.

51. It is true that the causation analysis made by the ADC assumes that in the absence of dumping, Bisalloy would have been able to raise or maintain prices. In making this assumption the ADC had regard to market conditions. It found that the size of the Australian market for Q&T steel plate would have allowed Bisalloy to operate profitably (by raising prices to cover the CTMS), but for the importation of goods at dumped prices. In the circumstances outlined by the ADC in its causation analysis, I do not consider the approach it took, in making such an assumption, to be unreasonable.

Failure to assess extent of injury (materiality)

52. The Japanese Mills contend that no real evaluative process was undertaken to address the extent of the injury suffered by the Australian industry. They argue that although the ADC Report acknowledged that there was significant change and downturn in the market and the need to isolate the injury suffered by the Australian industry from such external factors, the report contained no credible analysis of how this was achieved.

53. For the report to have properly considered such external forces, they submit that there would have needed to have been some meaningful assessment of the tangible effect of those forces, including the extent:

- of the injury caused by the reduction in demand, other market forces and associated flow on effects;
- to which internal factors contributed to the injury claimed; and
- that projections may credibly be made for different scenarios in this market (with and without the alleged impact of dumping).

[38] Section 8.5.2, page 60 of Report 234

54. The Japanese Mills contend that without an exercise such as the above, the decision maker could not be reasonably satisfied that material injury had been caused by dumping within the meaning of the Act.

55. As is accepted by the Japanese Mills, the ADC did recognise its obligation to consider whether any injury to the Australian industry was being caused by factors other than the export of goods at dumped prices and not to attribute any such injury to the exportation of those goods. The ADC considered the following possible causes of injury:

- Volume and prices of imported like goods that are not dumped;
- Contractions in demand or changes in the patterns of consumption;
- Export performance and productivity of the Australian industry;
- The Australian industry's business model;
- Importation of completed and partially completed products; and
- Effects of a high Australia dollar.

56. The above factors were considered and the ADC concluded that weakened demand for Q&T steel plate from a downturn in the mining sector and, to a lesser extent, the decline in volume of export sales had impacted on Bisalloy's economic performance. In order to differentiate the impact from these other factors, the ADC examined the effect dumping had specifically on price and profit and concluded that the minimum amount of injury suffered by Bisalloy that could be directly attributed to dumped exports was reflective of the individual dumping margins[39].

57. Given the materiality of the dumping margins found by the ADC it concluded that the dumping was causing injury and the injury suffered by the Australian industry as a result of the dumping was material[40].

58. The approach taken by the ADC to differentiate the effect of factors other than dumping on the injury being suffered by the Australian industry by focusing on the effect that dumping was having on price and profit appears reasonable. It is true that other factors were found to have affected Bisalloy's performance and hence it is probable that they contributed to the injury being suffered by the Australian industry. The ADC rightly took the view that dumping does not have to be the sole cause of the injury being suffered. To be satisfied that material injury is being caused by dumping as required by s.269TG, it is sufficient that dumping is increasing the extent of the injury and that the additional injury being suffered is material.[41]

[39] Section 8.9 of Report 234, pages 73 to 74
[40] As above.
[41] *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564

Use of Ministerial Direction 201/24

59. The Japanese Mills raised one further argument as to why the decision of the Parliamentary Secretary erred. This is the reliance by the ADC upon the Ministerial Direction on Material Injury 2012/24. The submission claims that the ADC Report relied upon a statement on the cover page of the Ministerial Statement referring to the "greater impact of injury during periods of economic downturn and reduced rates of growth as an element of injury"[42]. The Japanese Mills point out that this quote is not in fact part of the Ministerial Direction.

60. It is true that the quote in the ADC Report was not part of the Ministerial Direction. It comes from the cover page. However, nothing turns on this. The Ministerial Direction relevantly states:

> "I understand that the law does not prevent judging the materiality of injury caused by a given degree of dumping or subsidisation differently, depending on the current economic condition of the Australian industry suffering the injury. In considering the circumstances of each case I direct that you consider that an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, weakened by other events,
> suffer material injury from the same amount and degree of dumping or subsidisation."

61. The ADC Report does not in fact purport to be quoting directly from the Ministerial Direction. It refers to "the guidance published, in introducing the Ministerial Direction"[43]. It is not clear why the ADC Report quoted the introductory words rather than the relevant part of the Ministerial Direction. The introductory words appear to be a summary of the requirement set out in the Ministerial Direction.

62. A more substantive attack made by the Japanese Mills is that there is no scope under the legislation for applying a differential test for causation because the market is in decline. The point is made that injury does not become material simply because the market is in decline. They also refer to the requirement in s.269TAE(2)(c) that injury caused by a contraction in the market must not be attributed to dumping. I think that this must have been intended to be a reference to s.269TAE(2A)(c) which provides in effect that injury caused by "contractions in demand or changes in patterns of consumption" should not be attributed to the exportation of dumped goods.

63. I do not consider that the Ministerial Direction, or the regard which the ADC had to it in the ADC Report, is contrary to the relevant legislative provisions. The Ministerial Direction is referring to the different impact which competition from dumped product could have depending on the health of the Australian industry.

[42] Para 6.25, page 9 of Clayton Utz submission
[43] Section 8.6, page 62 of Report 234

The injury must still be attributable to the dumped product and not to the economic factors affecting its health, such as a contraction in demand.

JFE

64. I deal below with the grounds put forward by JFE in its application. For the reasons given below, I do not consider that those grounds establish that the decision of the Parliamentary Secretary was not the correct or preferable decision.

Flawed Description of the Goods

65. Under this heading JFE attacked the decision of the Parliamentary Secretary on the basis of a flawed description of the goods under consideration. Two reasons are provided for this. First, that the goods under consideration were not described in a coherent and workable manner and secondly, that the inclusion of a different tariff classification category late in the process was not a proper exercise of power and the timing of the change adversely affected the due process and rights of the interested parties. JFE expands on this argument under five headings and I deal with each of these below.

66. However, as a preliminary point I need to deal with one contention put forward by JFE which is that the application under s.269TB by Bisalloy should have been rejected. This review is of the decision of the Parliamentary Secretary under s.269TG, not the decision by the ADC to accept the application. Decisions made by the ADC in the course of the investigation or in making the report under s.269TEA will only be relevant to the review to the extent that they affect the issue of whether or not the decision of the Parliamentary Secretary was the correct or preferable decision.

Flawed description contained in the application

67. The description of the goods contained in the application by Bisalloy was:

> "flat rolled products of alloyed steel plate commonly referred to as Quenched and Tempered ("Q&T") steel plate (although some Q&T grades may not be tempered), not in coils, not further worked than hot rolled, of widths from 600mm up to and including 3,200mm, thickness between 4.5-110mm (inclusive), and length up to and including 14 metres, presented in any surface condition including but not limited to mill finished, shot blasted, primed (painted) or un-primed (unpainted), lacquered, also presented in any edge condition including but not limited to mill edge, sheared or profiled cut (i.e. by Oxy, Plasma, Laser, etc.), with or without any other minor processing (e.g. drilling).
> Goods of stainless steel, silicon-electrical steel and high-speed steel, are excluded from the goods covered."

68. JFE takes issue with the description because it claims it is internally inconsistent and inconsistent with the tariff description identified by Bisalloy.

69. The description refers to Q&T steel plate that is "not further worked than hot rolled". JFE's argument is that there is no Q&T steel plate which is not further worked than hot rolled as quenching and tempering is itself further work that is done to hot rolled product. Issue is also taken with the reference to some grades not being tempered and to the reference to primed and lacquered goods as such goods would come within the description of goods further worked.

70. JFE also considers that the description is confusing because it refers to plate which is "commonly referred to" as Q&T steel plate. In support of the confusion, JFE refers to a finding at page 18 of the ADC Report which it claims is to the effect that terminology used to describe the goods differed within the industry. The reference at page 18 of the ADC Report does not however support JFE's argument. The ADC Report is there referring to the term "TMCP", which means thermo mechanically controlled process, which it notes may have different meanings within the industry.

71. As additional support for its argument, JFE refers to a further comment in the ADC Report which it contends is the ADC noting the problems with the description of the goods. The quote on which JFE relies is at page 20 of the ADC Report that the ADC "notes that the meaning of this particular component of the goods description is not made clear by Bisalloy as part of its application. As a result, the wording has created some confusion for interested parties in interpreting the scope of the investigation". This comment was however made by the ADC in relation to a particular product, namely quenched steel plate strip and whether or not it was part of the goods under consideration. It was not a reference to the term Q&T steel plate having caused some wider confusion among interested parties. I note that the ADC found that the volume of exports of quenched steel strip by cooperating exporters was relatively immaterial.

72. I am not convinced that the problems identified by JFE with the description of the goods in the application are significant. On a reasonable reading of the description it includes quenched steel plate which may or may not be tempered and which may be primed or lacquered whether or not these processes could be described as further worked than hot rolled. If this was not the case, JFE should have been able to point to confusion it or others had during the investigation with the description. The two examples given above do not demonstrate such confusion.

73. A real problem with the argument by JFE is that it has not pointed to any impact the alleged confusion had on the investigation. Any confusion over whether or not steel plate strip was included within the goods under consideration could not, given the immateriality of the volumes, have affected the investigation and such product was excluded from the goods under consideration. A review of the various submissions by interested parties and visit reports with exporters and importers does not reveal any confusion as to what is intended by Q&T steel

plate. Indeed the visit report for the visit by the ADC to JFE in May, 2014 shows that the JFE representatives understood what was intended by the term.

74. The second argument made by JFE is that the description of the goods was inconsistent with the tariff description given by the applicant, Bisalloy. In its application Bisalloy, in response to the question in the application form as to the classification and statistical code of the goods replied:

> "The goods are classified to subheading 7225.40.00, statistical codes 21 and 23. Some imported alloy steel Q&T has been incorrectly classified to 7225.40.00, statistical codes 22 and 24. Where imports under statistical codes 22 and 24 have been identified as the goods the subject of this application, Bisalloy has included the misclassified goods in its Australian market assessment.
>
> The subject goods imported from Japan, Sweden and Finland attract a 5 per cent rate of duty."

75. JFE contends that the goods description by Bisalloy is inconsistent with this tariff classification. The argument appears to be that the expression "not further worked" is found in the tariff classification and thus it is appropriate to apply the rules of construction for customs tariffs found in the Brussels Notes. When this is done, then the inclusion of this expression means that goods subject to further treatment in the form of tempering and similar treatments do not come within the tariff heading which is limited by that expression.

76. What is or is not included within the tariff classification is not a matter for this review. The only relevance the nomination of an incorrect tariff classification in the application could have is if it created confusion as to the goods under consideration so as to compromise the investigation to the extent that a decision based on it could not be considered the correct or preferable decision. As noted above, there does not appear to have been any confusion over the goods being investigated, except as to whether or not certain specific product, such as quenched steel plate strip, came within the description.

Incorrect classification was contained in the description

77. JFE contends that the application by Bisalloy was flawed because it wrongly identified the classification of the goods as coming with tariff heading 7225.40.00 instead of 7225.99.00, at least for some importers. This, JFE contends, should have led to the application being rejected.

78. As noted above, this is not a review of the decision of the ADC to accept the application made by Bisalloy for the issue of a dumping duty notice. It is not clear in any event that the wrong classification was provided in the application. It appears from the ADC Report that the ADC considered that the tariff heading

7225.40.00 was applicable but that it found that for a small volume of imports, the tariff heading 7225.99.00 was used[44.]

The ADC improperly changed the application

79. This argument by JFE is to the effect that the ADC wrongly modified the application so as to include retrospectively goods coming within tariff heading 7225.99.00. This is however not what occurred. There was no change to the goods that were the subject of the application and the investigation. That is something which cannot be done once an investigation is commenced.

80. What occurred is simply that the ADC during the course of its investigation came across evidence that goods coming within the description of those under investigation were also being imported under tariff heading 7225.99.00. This was first noted by the ADC in the PAD in May 2014. The PAD stated[45:]

> "The Commission has also identified that, in relation to a small volume of imports, Q&T steel plate has been declared under tariff subheading 7225.99.00 during the investigation period. The Commission will also seek further clarification on this matter during the course of the investigation."

81. Subsequently, in the SEF, the ADC referred to the issue identified in the PAD and stated:

> "The Commission was informed by an interested party that certain grades of Q&T steel plate did not apply to tariff subheading 7225.40.00, due to the requirement under tariff subheading 7225.40.00 that flat rolled products be "not further worked than hot-rolled". It was claimed that the tariff explanatory notes define 'heat treatment' as an example of further working and that tempering was considered to be 'heat treatment'. For this reason, certain grades of Q&T steel plate which had undergone 'heat treatment' were categorised to tariff subheading 7225.99.00.
>
> The Commission clarifies that, for the purposes of the goods description for this investigation (as outlined at Section 3.3.1), the wording "not further worked than hot rolled" was not intended to exclude products which are heat treated. The term "not further worked than hot-rolled" in the context of the goods description was intended to describe further processing and workings such as drilling, countersinking, welding etc. For this reason the Commission has included tariff subheading 7225.99.00 as an applicable tariff subheading for this investigation. The Commission does not consider that this clarification alters the goods description in any way."

82. All that has occurred is that the ADC has discovered during the course of the investigation that certain goods, coming within the description of the goods

[44] Section 3.4, page 7 of Report 234
[45] Preliminary Affirmative Determination Report 234, section 4.2, page 11

under consideration, had been imported under the tariff subheading 7225.99.00 and added a reference to this classification subheading in the ADC Report. The additional subheading was also noted in the Dumping Duty Notice.

83. It is important to note that the reference to the additional tariff subheading in the Dumping Duty Notice did not alter the goods which were the subject of that notice from those which were the subject of the application by Bisalloy. The description of the goods remained the same. It is simply that it was found that some of those goods were imported under a different tariff heading.

The added classification adds a further internal inconsistency

84. This argument is to the effect that by adding subheading 7225.99.00 as an additional tariff classification there is an inherent inconsistency with the description of the goods provided by the applicant, Bisalloy. This is because category 7225.99.00 covers goods which are further worked, whereas the description of the goods is limited to goods "not further worked".

85. For the reasons discussed above, I do not consider that the adding of the additional tariff classification caused any confusion as to the goods which were the subject of the investigation, and certainly not to the extent that it affected the investigation and recommendation to the Parliamentary Secretary. The goods which are the subject of the Dumping Duty Notice and which were subject of the investigation and recommendation by the ADC were the goods described in the application under s.269TB by Bisalloy. Clarification as to the tariff classification subheadings such goods are entered under for customs purposes did not affect that description.

ADC's faults in approach undermined due process and led to different conclusions

86. JFE contends that the approach taken by the ADC in adding the additional tariff classification subheading affected the due process of the investigation. It claims that it is improper to announce after all foreign visits, exporter questionnaires and primary analysis that a new classification was being incorporated. Potential interested parties it is submitted must be entitled to look at the application and notification of the ambit of the investigation and rely on a tariff advice that they are simply not affected.

87. It is correct, as JFE contends that it is important that there be a sufficiently clear description of the goods in the application under s.269TB and in the public notice of the commencement of an investigation so that potential interested parties can ascertain whether their goods are likely to be covered. Again for the reasons given above, I do not consider that the clarification as to the additional tariff subheading meant that potential interested parties were not put on notice of the ambit of the investigation.

88. The contentions put forward by JFE are simply not supported by the evidence. While JFE argues that the SEF was not an appropriate place to make a change to the tariff advice, the issue of the tariff classification was highlighted in the PAD in May, 2014 well before the publication of the SEF in August, 2014. There is no evidence to support JFE's contention that a revision of the application by Bisalloy to add the additional classification would "almost certainly have led to different products being analysed" leading to different normal values and dumping margins.

89. The goods covered by the investigation did not change and the clarification during the investigation that there was an additional tariff subheading, under which some of those goods were imported, did not have the effect for which JFE contends.

The ADC failed to adequately address differences in product and market

90. JFE submits that a proper analysis of the different properties of the imported goods, distribution chains and customer needs should have led to the ADC to conclude that the JFE product should not be included in the cumulation analysis. There are three grounds provided by JFE in support of this submission. I deal with each of them below.

JFE TMCP not within scope of goods identified for consideration

91. This argument is to the effect that the ADC erred when it found that the TMCP exported by JFE should not be excluded from the goods under consideration. JFE notes that similar plate from other suppliers was excluded. While JFE criticises a number of the findings made by the ADC on this issue, in essence its complaint is that there was no basis for finding that the JFE TMCP closely resembled the Q&T steel plate produced by Bisalloy or how that was consistent with other TMCP steel plate being excluded.

92. The basis upon which the ADC made its finding with regard to JFE's TMCP product is to be found at section 3.6 of the ADC Report. The ADC describes the process for the manufacture of Q&T steel plate. Relevantly, after the steel plates are passed through a plate rolling mill to obtain the required length and thickness, they are either:

    - taken offline to a separate production line and quenched (and if required tempered), similar to the production process of Bisalloy as described at Section 4.4. This process is often referred to as 'traditional' or 'offline' quenching and tempering; or
    - quenched (and if required tempered) as the plate continues through the plate mill. This process is often referred to as 'direct' quenching

and all cooperating exporters have 'direct' quenching facilities combining the rolling and heat treatment into a single process.[46]

93. It is clear from the ADC Report that the ADC considered that the form of TMCP which was produced by JFE came within the latter description above and therefore came within the goods under consideration description. The ADC distinguished this form of direct quenched steel plate with what it considered to be TMCP steel plate which was not covered by the description of the goods under consideration. This was steel plate manufactured by heating an alloyed slab to a high temperature and controlling the temperature of the plate during the rolling process. Produced in this way TMCP steel plate was not technically quenched as it did not involve rapid cooling. The desired mechanical properties of the plate were achieved through a combination of alloying chemistry and rolling process.

94. In coming to its conclusion that the JFE product was produced by the "direct" quenching process as distinct from other TMCP product, the ADC appears to have relied upon information provided by JFE during the visit by ADC representatives in May, 2014[47]. The explanation of the differences in manufacturing process in the ADC Report had to be limited to some extent due to confidentiality concerns. However, I am satisfied that the basis upon which the ADC found the JFE product to be part of the goods under consideration, as opposed to another form of TMCP, was adequately explained in the ADC Report, when this is read with the confidential version of the JFE Verification Report.

ADC erred in excluding TMCP of other exporter

95. This argument is similar to that put above. JFE complains that there was no basis for differentiating between TMCP processes and treating exporters who utilise direct quenching differently. As stated above, I have accepted the explanation for the difference between the Q&T steel plate product which is processed through "direct" quenching and the TMCP product which was excluded.

96. JFE's submission appears to rely on the footnote at page 18 of the ADC Report which refers to the submission of Ruukki Metals Oy (Ruukki), an exporter from Finland. Ruukki's submission was that direct quenching was a special case of TMCP.

97. I can find no basis for the allegation that the ADC treated exporters who used the direct quenching process differently. The footnote to which JFE referred does not support such an allegation. Goods produced through the direct quenching method were found to be the goods under consideration, whether the

[46] Page 17 of Report 234
[47] Verification Report of visit on 13-16 May, 2014. Non-confidential version Document No 079

process by which they were produced was or was not also described as a special form of TMCP.

98. Finally, on this point I note that in its submission[48]. Ruukki confirms that its product made using the direct quenching method was treated during the investigation as included within the goods under consideration.

ADC incorrectly applied incorrect tests for like goods and exemptions

99. This argument by JFE appears to be that an incorrect test was applied for the determination of whether or not the Australian industry was producing like goods to the exports being investigated. This argument relies on a reference in the ADC Report to the goods being "generally reflective". There is however no reference to the ADC Report given by JFE when making this argument so it was not clear what phrase in the ADC Report was relied upon by JFE. In its submission, Total Steel made the same point and provided a reference to the term being used in the ADC Report. I deal with the use of that term when considering the submission made by Total Steel.[49]

100. A review of the analysis by the ADC of the "like goods" issue shows it used the test as set out in the legislation, namely if the goods are not alike in all respects, they have characteristics closely resembling those of the goods under consideration.[50]

Failure to calculate the normal value of JFE Goods in accordance with the Act

101. JFE again gave a number of grounds upon which it based its attack on the finding by the ADC with respect to the normal value of JFE's goods. I address these grounds below separately, with the exception of four grounds which are all related to the way in which the ADC approached making adjustments to certain models which had low volumes of sales domestically compared to the export sales of those models.

An improper hybrid approach

102. This argument by JFE appears to be that if the ADC adopted a model by model approach then this should have been the approach that was consistently applied at the normal value, export price and causation stages of the analysis. In particular, JFE complains that if its domestic sales figures had been considered as a whole, and not on a model by model basis then they would have met the threshold of 5% of export sales.

[48] Letter from Moulislegal dated 21 January, 2015
[49] Paragraph 209.
[50] Definition of "like goods" in s.269T

103. The ADC did in its assessment of the normal value for JFE analyse domestic sales at an individual model level.[51] As is noted in the ADC Report, this is standard practice and I do not consider that the ADC erred in doing so. With regard to the sufficiency of sales issue, I note that only three of JFE's models were found to have low domestic sales.

104. JFE criticises the ADC for being inconsistent in analysing export price and normal value at a model level but not identifying individual dumping margins on a model level and that these should have been identified on the public record. The approach taken by the ADC to determine a single dumping margin is however required by s.269TACB and the decision in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth*.[52] It has also been clearly stated by the Appellate Body of the World Trade Organisation (WTO) that it is not permissible to determine dumping margins on a model by model basis. A margin of dumping can only be found for the product under investigation as a whole.[53]

Misapplication of s.269TAC(14)

105. JFE's contention appears to be that s269TAC(14) does not direct that individual models are considered for the 5% test. This is correct. S269TAC(14) focuses on the volume of domestic sales of "like goods" to those goods which have been exported to Australia and which are the subject of the investigation.

106. However, s.269TAC(14) does not appear to have been relevant to the ascertainment of the normal value of JFE's exports. The normal value of JFE's exports was calculated under s.269TAC(1) and there was no exercise of the discretion under s.269TAC(14) to allow the use of a low volume of sales. [54] The ADC found that the domestic sales of like goods was greater than 5% of the sales of the exported goods. A review of the confidential appendix 2 to the ADC Report confirms that this was the case.

Failure to narrow analysis to construction sector

107. In its submission JFE contends that the ADC erred in failing to concentrate on prices in the construction sector in Japan, which it claims was the most reasonable for comparison purposes as Japan did not have a mining sector.

108. JFE points to an inconsistency with the comment made by the ADC in response to the claim that it should focus on the construction industry. The following is the relevant extract from the ADC Report:

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[51] Section 6.5.2, page 41 of Report 234
[52] [2013] FCA 870 paragraphs 136 to 140
[53] *EC-Bed Linen* WT/DS141/AB/R: *US -Softwood Lumber V* WT/DS264/AB/R
[54] Section 6.5.2, pages 41 to 42 of Report 234

> "As outlined in JFE's verification visit report, the visit team examined the selling prices of Q&T steel plate to each level of trade identified by JFE in the Japanese domestic market. Whilst it was found that the price to the construction sector was the lowest, there were significant differences in selling prices on a customer by customer basis in that sector. No consistent or distinct price differences between the different levels of trade were identifiable to warrant a comparison of export prices to normal values in the Japanese construction sector alone."[55]

109. The criticism JFE makes of this analysis would seem justified. As JFE points out it confuses two distinct concepts, namely differences in customer bases or industry sectors with level of trade, the latter being concerned with differences between sales at the wholesale, retail or distributor level. The above extract on its face does not appear to make sense. However, if regard is had to the JFE Verification Report, to which the ADC report makes reference, the source of the confusion becomes apparent.

110. In the Verification Report, which is the report by the ADC on its visit to JFE in May, 2014, the ADC discusses JFE's domestic market. Most of this discussion is redacted in the public version of the Verification Report and accordingly, I am not able to provide the full extract. However there appears the following:

> "Sales to these different sectors were all made via…"
>
> "The total tonnes sold during the investigation period for each level of trade were: "
>
> "Both Everhard and HiTen was sold across all market sectors with the exception of…."
>
> "It [JFE] explained that [confidential] were generally in relation to customers in the [confidential] levels of trade." [56]

111. When regard is had to the confidential version of the Verification Report it is clear that the ADC representatives are referring to "level of trade" and "market sectors" interchangeably. The reason why this occurred seems to stem from an initial submission made by JFE as to differences in level of trade which was referring to different market sectors. With this background, the following reference in the ADC Report makes sense if the reference to levels of trade is changed to a reference to market sectors:

> "No consistent or distinct price differences between the different levels of trade were identifiable to warrant a comparison of export prices to normal values in the Japanese construction sector alone."

[55] Section 6.5.2, page 45 of Report 234
[56] Section 6.1 of Visit Report to JFE May,2014

112. While the reader of the ADC Report would not be aware of how the confusion arose and could be confused as to what was in fact intended by the above, JFE did have access to the confidential version of the Verification Report and would, with the benefit of this, have been able to understand the reference being made by the ADC to levels of trade in this context.

113. What I think the ADC Report meant to say is that the ADC did not find consistent or distinct price differences across the different market sectors such as to warrant using only those prices in the construction sector for the purpose of calculating the normal value for JFE's exports. This seems to be a reasonable response made to the claim by JFE and, while the reasoning behind the recommendation to the Parliamentary Secretary with regard to JFE's normal value calculation could have appeared confusing, it does not affect the ultimate decision by the Parliamentary Secretary to accept the recommendation.

Adjustments to low volume models

114. A number of arguments put forward by JFE relate to the way in which the ADC dealt with certain models which had low domestic sales compared with the export sales for those models. While the arguments are put under four different grounds[57], I consider it more efficient to deal with them together.

115. The ADC found that there was a sufficiently high volume of like goods to those exported to Australia sold domestically in Japan to calculate the normal value of the exports using the domestic price paid for those like goods[58]. Consequently, it calculated the normal value for such exports under s.269TAC(1). It made adjustments to the domestic prices under s.269TAC(8) to make those prices properly comparable with the export prices.

116. Given that the volume of domestic sales for like goods was a substantial percentage of the export sales and well in excess of the 5% threshold, the approach taken by the ADC was appropriate. JFE argues however that for certain models which were below the 5% threshold, the ADC should have used a constructed normal value under s.269TAC(2). As noted above[59], the test for a low volume of sales is based on the volume of sales of "like goods" in the country of export and not on a model by model basis.

117. JFE also argues that internal price guidelines should not have been used to make adjustments under s.269TAC(8) to the domestic prices of the models which had low volumes of domestic sales. The price guidelines should have been rejected as unreliable. The ADC did not agree with the submission by JFE regarding the unreliability of the price guidelines. It found that the

[57] Grounds 3.5, 3.6, 3.7and 3.8, pages 12 to 14 of the JFE submission
[58] Section 6.5.3, page 44 of Report 234
[59] Paragraph 106

guidelines "more accurately reflect JFE's actual selling prices of export sales to Australia, third countries and domestic sales in Japan"[60].

118. I do not consider that there was anything unreasonable in the approach taken by the ADC to making adjustments using the price guidelines to the prices of the replacement models to find an adjusted price for the models with low domestic sales. JFE complains that this methodology effectively "gets back to the same point". That is, it takes the calculation back to the domestic price of the models for which there were low sales and which the ADC found to be therefore unreliable. However, there does not seem to me that there is such a circularity with this approach. The price guidelines were used to determine any adjustments that needed to be made to the prices to reflect the differences in the models. The ADC used the price guidelines rather than the cost of production because it found that the costs of production did not reflect the differences in the price guidelines or in the actual selling prices. In this respect I note that the ADC had regard to the actual selling prices to third countries as well as domestic selling prices and sales to Australia. This seems to me a valid reason for not using the cost of production.

119. Finally, JFE in its submission on this issue, raised the adjustment made by the ADC for the difference in the credit terms between the domestic sales and the export sales. It is not clear to me how this is specifically related to the adjustments to the prices of the models with low sales. The adjustment for the difference in credit terms was not limited to those models with low sales. In any event, the explanation given by the ADC for using the prime rate rather than the higher rate for which JFE argued was that the ADC was not satisfied that the higher rate reflected the actual cost incurred by JFE.

Approach to determining normal value involved due process error

120. JFE submits that the incorrect reference in the SEF to the use by the ADC of s.269TAC(2) to calculate the normal value for the models with low sales mislead JFE and denied it the opportunity to make informed submissions in response to the SEF. In this respect, JFE does have a legitimate complaint. The misinformation in the SEF did mean that JFE was, with respect to the calculation of the normal value of its exports, not in a position to fully understand the approach which the ADC had taken and respond to it.

121. It is clear that the legislative intention behind the procedural aspects of Part XVB is that interested parties be informed of the conclusions made by the ADC and the material upon which those conclusions are made so that they have full opportunity to make informed submissions to protect their interests.[61]

122. This argument by JFE raises the issue of whether or not the Panel should as part of a review consider a denial of procedural fairness as a ground in of itself

[60] Section 6.5.2, page 42
[61] *Pilkington (Australia) Ltd v Minister of State for Justice and Customs* [2002] FCAFC 423 [22]-[23]; 127 FCR 92

to find a reviewable decision was not the correct or preferable decision. In *GM Holden Limited v Commissioner of the Anti-Dumping Commission*,[62] Mortimer J considered that it was not part of the function of the Trade Measures Review Officer (TMRO). After considering the function of the TMRO, her Honour stated:

> "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 articulated by the party said to have been denied procedural fairness in relation to a particular "finding" in the CEO report."[63]

123. It is true that there are differences with a review by the Panel to that which was conducted by the TMRO. However, I do not consider that the differences are such that they would lead to a different conclusion to the one her Honour reached. The Panel still only makes a recommendation to the Minister. In any event, I am not convinced that the misinformation in the SEF has resulted in a denial of procedural fairness such as to make the reviewable decision in this case not the correct or preferable decision.

124. The crux of the complaint by JFE is that because it believed that the ADC was using s.269TAC(2) to construct the normal value, it representations were to show that the ADC was making erroneous calculations under s.269TAC(2) and "it did not begin to address the fundamental question as to why that section should apply".[64]

125. As noted above, there was no basis for using s.269TAC(2) to construct a normal value for JFE's exports. There were more than the required volume of arms-length sales of like goods in the ordinary course of trade in the country of export to use as the basis for the construction of normal value. There was no basis for going outside these sales (with any necessary adjustments under s.269TAC(8)) to calculate a normal value for JFE's exports. So, no submissions by JFE on why s.269TAC(2) should apply on the basis of low sales could have been successful.

Inappropriate conclusions as to volume effects

126. JFE takes issue with the finding by the ADC that there were no identifiable trends in price differences based on volumes. JFE's response to this is that the low volumes of sales in Japan meant that they did not engender a volume based discount for any domestic customers and this should not have been a basis for rejecting resort to the most important sector. It considers that volume effects would have been discernible from third country figures. This argument

[62] [2014] FCA 708
[63] Para [175]
[64] Para 93, page 15 of JFE Submission

is another basis upon which JFE contends that the normal value calculations should have been based on the construction sector alone.

127. The conclusions by the ADC with respect to the claim for volume adjustments were based on findings outlined in the Verification Report. When considering the claim for an adjustment for volume, the ADC notes the claim by JFE regarding sales to the construction sector being the most comparable to Australian sales in terms of volume. However, it also noted sales in a different sector, with that sector having a certain number of customers compared to the construction sector. On this basis the ADC did not consider that the construction sector alone should be used for normal value on the basis of volume.[65]

128. I cannot find any error in the approach by the ADC. The reasoning in the ADC Report could be clearer but there are restraints imposed by the need to maintain confidentiality. I am similarly constrained in fully explaining the reasoning of the ADC. However, JFE would have had access to the confidential version of the Verification Report and would have been able to see the reasons given by the ADC. Those reasons seem valid to me.

Export Price

129. JFE contends that the export price ascertained for its exports during the investigation period should not have been calculated on an ex works basis but instead the export price should have been based on the sale price of the sales from an entity it described as “MISI” to the importer, Total Steel. I take this to be a reference to the sales from Marubeni Itochu Steel Inc. (MISI) to Total Steel. According to JFE, MISI was the exporter and not it and, accordingly, the export price is that based on the contract between MISI and Total Steel. JFE also argues that the way it was treated was different to the way another exporter, SSAB[66], was treated in this respect.

130. The emphasis in the submission by JFE on the contract of sale between MISI and Total Steel and the purchase price paid by Total Steel as the importer does not accord with the test set out in s.269TAB for the determination of the export price. In *Companhia Votorantum de Celulose e Papel v Anti-Dumping Authority* [1996] FCA 1048 it was stated:

> “The use of the concept of purchase does not mean that the identity of the exporter is to be determined by identifying the vendor under the contract of purchase with the importer. The question is the other way around; it is necessary to identify the "exporter" and then to examine whether that is the party from whom the importer has purchased. It is not the passing of property which identifies the exporter (although it may be critical to identification of the importer) but rather the identification of which party satisfies the requirements of truly being the exporter. This view is reinforced

[65] Section 8.5.3 of the Verification Report to JFE in May, 2014.
[66] I took this to be a reference to SSAB EMEA AB, an exporter from Sweden

by the presence of par 269TAB(1)(c) which contains no description referable to purchase."[67]

131. The approach taken by the ADC to the identification of the exporter would appear to be consistent with Australian case law. Once JFE is taken to be the exporter, then the export price cannot be determined under s.269TAB(1)(a) as that requires the importer to have purchased the goods from the exporter. Consequently, JFE's submission that the export price for its goods should be based on the sales price between MISI and Total Steel cannot be accepted. In such circumstances, the export price falls to be determined under s.269TAB(1)(c) which is the basis upon which the ADC calculated the export price for JFE's exports.

132. With respect to JFE's complaint that it was treated differently to SSAB, the circumstances of the export arrangements were different and it is not surprising that a different approach was taken. It also notes that the export price ascertained for it at the time of the PAD was lower than the final determination. It would not be unusual for the values used to determine export price and normal value to change as a result of the ADC completing its investigation.

133. Finally, JFE raised an issue with the calculation of the export price on an ex works basis. It contends that erroneous calculations were made in that the ADC failed to account for credit terms on certain grades. It was difficult to reconcile the figures provided by JFE with the calculations done by the ADC as set out in the confidential attachments to the ADC Report. It is possible that JFE was using the preliminary and not the final calculation of the dumping margin. In any event, a review of the ADC's calculations of the dumping margin for JFE showed that the adjustment for credit terms was made across all grades.

134. I note that in its s.269ZZJ submission, Total Steel contends, in support of the JFE application, that an adjustment was not made to the JFE export price to account for the "middle man", MISI, and this affected comparability with the domestic prices. However, the ADC did have regard to the need to ensure comparability in the comparison of prices and adjustments were made under s.269TAC(8) to compare domestic selling prices with an ex works export price[68]. JFE does not appear to have claimed a level of trade adjustment.

[67] Page 15 per Wilcox and R D Nicholson JJ
[68] Section 6.5.3, pages 44 to 45 of Report 234

Erroneous calculation of dumping margin

135. This ground, in JFE's submission, is to the effect that the ADC should have calculated and published a model by model dumping margin. As noted above[69] this would be inconsistent with Australian case law.

Errors in findings on material injury and causation

136. The submission by JFE puts forward seven reasons why the ADC erred in its findings in relation to material injury and causation. I deal with these each of these below with the exception of one based on the use of Ministerial Direction No. 2012/24. The use of that Ministerial Direction by the ADC is dealt with above in response to the Japanese Mills application.[70]

Wrongly determining price undercutting based on dumping margin

137. JFE contends that there was a serious defect in the use by the ADC of the size of the dumping margin. It argues that the dumping margin cannot of itself show that exporters were able to offer Q&T steel plate at significantly lower prices as it alleges was found by the ADC at section 8.5.1 of the ADC Report. JFE notes that there could be a higher dumping margin where the export price was still well above the prices of the local industry.

138. The latter point made by JFE is true in theory. However, when high dumping margins are combined with price undercutting by the imported product, it is permissible to have regard to the size of the dumping margin in the causation analysis. I do not consider that the point being made by the ADC in the ADC Report regarding the size of the dumping margins to be other than a simple statement of the obvious. The lower the export price (compared to the normal value of the exports), the higher the dumping margin will be. The size of the dumping margins (i.e. the low export prices) gave importers the ability to price undercut.

139. In this respect I note that Article 3.4 of the Anti-Dumping Agreement[71] and WTO jurisprudence accept that the size of the dumping margin can be relevant to the issue of causation. In *US-Measures Relating to Zeroing and Sunset Reviews*[72] it was stated by the Appellate Body:

> "The margin of dumping reflects the magnitude of dumping. It is also one of the factors to be taken into account to determine whether dumping causes or threatens material injury."[73]

[69] Para 104
[70] Paragraphs 59 to 63
[71] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
[72] WT/DS322/AB/R
[73] Above at para 110

140. JFE argues that the ADC should have used actual prices at different levels of competition in conducting the causation analysis. However, the ADC did use actual prices in the Australian market in assessing possible injury caused by the price of dumped imports. It conducted the price undercutting analysis at an aggregated level, grade level and customer level. Where possible it analysed sales at a comparable level of trade.[74]

ADC erroneously found price injury even though no volume injury

141. This argument by JFE is that there cannot be price injury caused by dumped imports if there is no volume injury. This is based on a premise that if imports can undercut domestic prices then volumes should decrease. JFE points to the finding by the ADC that the volume injury suffered by the Australian industry was not from dumped goods but the downturn in the market.

142. The finding by the ADC was that a contraction in demand and changed pattern of consumption had occurred in the Australian market for Q&T steel plate and that this had caused material injury to Bisalloy's domestic sales volumes. It further concluded that while Bisalloy may have suffered some injury in terms of lost sales volumes to dumped imports, there was insufficient evidence to establish such injury as material.[75]

143. The difficulty with the argument put forward by JFE is that it is possible to have an industry suffer price injury from dumped goods but not volume injury. An industry faced with increased price competition could respond by lowering prices, or not increasing prices, so as to maintain its market share. It is also possible that an industry could at the same time be selling less because of market conditions such as a contraction in demand.

144. As I have some difficulty with the premise upon which JFE's argument is based, I cannot agree that there was an error in this respect with the finding of the ADC on material injury and causation.

The ADC erroneously presumed price suppression to be evident

145. JFE makes two points. First, that as there was no correlation between dumping and prices with wild fluctuations between negative and positive undercutting it was not reasonable for the ADC to conclude that the Australian industry was forced to lower prices. Secondly, that the ADC could not conclude that without dumping the Australian industry would have been able to maintain prices at a level necessary to cover its CTMS.

146. It is true that the price undercutting analysis by the ADC showed that prices of imported goods were both above and below the Australian industry's prices. So to that extent there was not uniform price undercutting. However, as I noted

[74] Section 8.5.2, page 59 of Report 234
[75] Section 8.8.2, page 70 of Report 234

above[76], with respect to the submission by the Japanese Mills, a review of the confidential material showed that there was substantial price undercutting by dumped imports and it was not unreasonable in all the circumstances to find that the dumped imports were causing material injury through price depression and price suppression.

147. The basis for the second point made by JFE is that, as a result of the Q&T steel plate market being depressed, buyers had significant power to obtain reduced prices and that the ADC knew that traders had to sell at a loss for cash flow purposes. JFE does not reference any material before the ADC to support this assertion. There was some evidence before the ADC that stockists/importers were holding a significant amount of excess stock leading into the investigation period[77]. However, the ADC was satisfied that given the size of the Australian market for Q&T steel plate, in the absence of dumping, the Australian industry could have operated profitably during the investigation period.[78]

ADC concentrated on inappropriate Australian sales figures

148. This argument by JFE is, in my view, speculative. JFE contends that it was highly likely that the ADC relied upon pricing by traders and similar distributors who acquired inappropriately excessive stock and for liquidity reasons had to sell at low prices. The only evidence upon which JFE relies for this assertion is the excerpt which I noted above, that some stockists/importers were holding a significant amount of excess stock leading into the investigation period.

149. I have been unable to discern any basis for an argument that the ADC used inappropriate Australian sales figures. The price undercutting analysis conducted by the ADC was based on the verified sales data sourced from visited importers and Bisalloy. I reviewed one of the reports of one those visited importers. The sales data upon which the ADC relied shows that the sales were all profitable.

150. In the absence of any evidence to support the assertion that the sales figures used by the ADC were inappropriate I am unable to accept this argument by JFE.

ADC failed to take adequate notice of differences in product

151. JFE contends that the ADC pricing conclusion was inconsistent with its finding that Q&T steel plate is a somewhat specialised product with purchasing decisions based on a variety of factors. If these differences are properly considered then, Total Steel's business would be given distinct consideration. This would it seems lead to the conclusion that Total Steel's general business model could not cause injury to Bisalloy.

[76] Para 50
[77] Section 8.8.2, page 68 of Report 234
[78] Section 8.9, page 74 of Report 234

152. The ADC's pricing analysis did take into account the differences in the Q&T steel plate market in Australia. It compared certain grades and specifications (strength, hardness and thickness) of the Q&T steel plate sold by importers against equivalent grades sold by Bisalloy at the distributor and end-user level of trade. It also considered the context of customers purchasing comparable grades of goods from both Bisalloy and importers. Price undercutting was found on the basis of grades, customers and level of trade during the investigation period.[79]

The ADC failed to take steps required under WTO jurisprudence

153. This argument, while referring to WTO jurisprudence for support, is essentially the same as that put forward above with regard to the alleged inconsistency between the findings that price injury was being caused by dumping whereas volume injury was not. For the reasons given above[80] I do not consider that JFE has established that the approach taken by the ADC was not acceptable or not in accordance with WTO jurisprudence.

Cumulation

154. JFE contends that the imports by Total Steel should not have been cumulated with other imports under the provisions of s.269TAC(2C) given the differences and conditions of competition between imported goods targeted for the repair and maintenance sector and imported goods targeted at other sectors. In its submission, JFE appears to accept that it was theoretically possible for the domestically produced Q&T steel plate to be substituted for the imported product. It argues that this was not what was actually occurring in the market. JFE also argues that the ADC did not formally present a view as to why cumulation was appropriate in the particular circumstances.

155. S.269TAE(2C) provides that the Minister should consider the cumulative effect of the exportation of goods to Australia from different countries of export, if the Minister is satisfied as to certain matters. Relevantly for the submission by JFE, the Minister must be satisfied that it is appropriate to consider the cumulative effect of those exportations having regard to:

- the conditions of competition between those goods; and
- the conditions of competition between those goods and like goods that are domestically produced.

156. The ADC dealt with the issue of assessing the cumulative material injury effects of the exports to Australia from different countries at section 8.3 of the ADC Report. When specifically considering whether a cumulative assessment was appropriate given the conditions of competition between imports and

[79] Section 8.5.2, pages 59 and 60 of Report 234
[80] Paragraphs 125 to 128

between imported goods and like goods produced domestically it stated the following:

> "The conditions of competition between imported products and between imported and domestically produced Q&T steel plate are similar. The Commission has established that importers and Bisalloy are both selling goods into the same markets, or alternatively that domestically produced Q&T steel plate can be substituted with imported Q&T steel plate.
>
> Evidence indicates that the imported goods and domestically produced goods are used by the same or similar customers and that the importers' customers are competing with Bisalloy's distribution network.
>
> The Commission also considers that domestic and imported goods are like, have similar specifications, are manufactured to similar recognised industry standards (such as Brinell hardness or tensile strength) and have similar end-uses. The above finding has been verified during importer, exporter and Australian industry visits."

157. Given the findings by the ADC as set out above, it was reasonable that the ADC considered it appropriate to cumulatively assess the material injury effects of imports.

Other factors that would have been likely to cause injury

158. As with the submission from the Japanese Mills, JFE argues in its submission that the ADC did not take appropriate note of the other factors that would have been likely to have caused injury and provided seven reasons for this. I deal with six of these reasons below. The first, dealing with reduced demand, is dealt with when responding to the ground based on the non-injurious price.

Bisalloy's Business model and differential pricing

159. JFE's first complaint is that, without any reasoning, the ADC simply concluded that it did not consider that Bisalloy's business model contributed materially to the ADC's assessment of material injury, in contrast to the impact from dumping. The reference to Bisalloy's business model is taken to be a reference to the allegations put forward by interested parties during the investigation regarding:

- the distribution strategy whereby Bisalloy sold 80% of its product via distributors and 20% to end users, its uneven pricing structure and stockholding;
- the lack of competition between Bisalloy's product and the imported product, with some imported product being supplied to different markets;
- inefficiencies with Bisalloy's production, inferior product and an unwillingness or inability by Bisalloy to supply the market;

- increased costs incurred by Bisalloy in servicing its debts.[81]

160. In further support of the claim that the ADC did not appropriately account for the effect of Bisalloy's business model, JFE points to information supplied by Total Steel that it could not buy at competitive rates from Bisalloy. This is also a contention made by Total Steel in its submission under s.269ZZJ.[82]

161. It is true that there is a paucity of detail in the explanation by the ADC of why it concluded that Bisalloy's business model did not contribute materially to the ADC's assessment of injury, in contrast to dumping. The conclusion however needs to be read in the context of the wider investigation of material injury and causation. The ADC is comparing what it considered to be the immaterial contribution which Bisalloy's business model may have had upon the price injury which it found Bisalloy suffered compared to that caused by the dumping.

162. In its assessment of the other factors causing material injury to the Australian industry, the ADC only found that weakened demand for Q&T steel plate from a downturn in the mining sector, and to a lesser extent the decline in volume of export sales, had impacted upon Bisalloy's economic performance. It then sought to isolate the injury caused by dumping from other factors through its price undercutting analysis. It was the injury identified by the price undercutting that the ADC identified as being caused by dumping through the effect such undercutting had on Bisalloy's price and profitability.

163. It is not clear from JFE's submission how the ADC could find that Bisalloy's business model was contributing materially to the price injury which was identified by the ADC as a result of the price undercutting analysis. It could possibly have caused an impact on JFE's economic performance, and in particular lost sales, but it is not clear how it would have contributed to the injury caused by the price undercutting.

164. To ensure I understood the arguments that were made by interested parties regarding Bisalloy's business model being the cause of the injury suffered by Bisalloy, rather than the dumping, I reviewed the submissions which were referenced by the ADC when dealing with this issue.[83] These submissions did not however add anything further to the summary of the arguments made by the ADC. I am unable to find anything wrong with the approach taken by the ADC on this issue or with the finding made by it.

Currency Effects

165. JFE argues that it was erroneous for the ADC to simply consider actual movements in the currency and not to consider price suppression as a result of currency movements. In making this argument, JFE does not provide any

[81] Section 8.8.3, pages 71 and 72 of Report 234
[82] Page 17 of Submission attached to letter from Total Steel dated 21 January, 2015
[83] Documents 9, 66, 45 and 28 on the Electronic Public Record maintained by the ADC

reference to material before the ADC to support the existence of price suppression caused by currency movements.

166. In dealing with the effect of a high Australian dollar, the ADC was satisfied that the Australian dollar had had a limited effect on Bisalloy, compared to the impact from dumping. In the absence of anything to show that this conclusion was wrong, I must reject JFE's argument.

Bisalloy's decreased export success

167. This argument focuses on the finding by the ADC that there had been a general decline in Bisalloy's export volumes over the injury analysis period which had been a contributing factor to its increased inventory levels and decreased capacity utilisation. JFE complains that having found this to be the case, the ADC concluded that export performance and productivity was not a significant contributing factor to other injury factors such as the decline in the industry's domestic profit and profitability. According to JFE, this conclusion could only be reached if the changes in the export performance were not significant and the ADC could not have concluded this to be the case.

168. The argument by JFE does not however take into account what was actually stated by the ADC. The ADC was not in its conclusion referring to JFE's general profit and profitability. The ADC Report actually states:

> "The Commission is satisfied that the export performance and productivity of the Australian industry is not a significant contributing factor to other injury factors such as the decline in the industry's domestic profit and profitability which is depicted at Figure 7."[84]

169. Figure 7 illustrates the total domestic profit and unit profitability for Bisalloy, showing it declined significantly in 2013. This is to be contrasted with Bisalloy's overall economic performance.

170. While the ADC did further conclude that lower export sales had contributed to Bisalloy's economic performance (although to a lesser extent than weakened demand from the mining sector), it differentiated the injury caused by dumping from these other effects through its examination of the effect dumping had on price and profit. This was done through the price undercutting analysis from which the ADC found that Bisalloy had been forced to lower its prices to be competitive with dumped imports.

Anti-competitive aspects of Australian market not given due weight

171. JFE contends that there was monopolistic price pressure from Bluescope which increased the CTMS for Bisalloy and that this price pressure should not have been attributable to imports. JFE does not reference any material which was before the ADC to support its argument on this point.

[84] Section 8.8.6, page 73 of Report 234

172. Even if there was such price pressure as claimed by JFE, it is not clear from JFE's submission how any such increase in the CTMS would be responsible for the price undercutting by importers which the ADC found to be the source of the injury to the Australian industry.

173. There does not seem to be any basis for the allegation that injury from increased price pressure from Bluescope was attributed to imports.

Impact of un-dumped imports

174. This argument, by JFE, is based on alleged undercutting by non-dumped imports. JFE alleges relies specifically on imports from China. It again does not reference any material which was before the ADC to support its claim.

175. The ADC examined whether or not injury was being caused to the Australian industry by un-dumped imports. It examined the volume and declared export prices from the database of the Australian Customs and Border Protection Service (ACBPS) for imports from other countries. It found that export volumes from other countries were negligible. It also found that the export prices were comparable, in some cases above, but not materially below, the exports from those countries under investigation.[85]

176. There is nothing in the submission by JFE which provides any reason why the analysis by the ADC of this material was not appropriate.

Allocation analysis was flawed

177. JFE contends that there was no logical basis for the conclusion by the ADC that "the minimum amount of injury suffered by Bisalloy that can directly be attributed to dumped exports is reflective of the individual dumping margins"[86]. It alleges that if this was the case then there would be consistent price undercutting proportional to those margins but the findings by the ADC were to the contrary. JFE also refers to WTO case law regarding the need to distinguish the injurious effects of other factors from the injurious effects of dumped imports. It also refers to a comment in a Federal Court decision that a decision-maker cannot give cursory consideration to a matter prescribed by law[87].

178. The findings by the ADC as a result of its price undercutting analysis do show that the degree of undercutting varied. However, it was significant. There is obviously a limit on the amount of detail which can be provided to illustrate the undercutting which was found to have taken place. As I note above[88] my review of the price undercutting analysis showed there was substantial undercutting by imports from the countries under investigation.

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[85] Section 8.8.1, pages 64 and 65 of Report 234
[86] Section 8.9, page 74 of Report 234
[87] *Siam Polyethylene Co Ltd v Minister of State for Home Affairs* [2009] FCA 837 at para 99
[88] Para 50

179. JFE also argues that the conclusion that prices are lower than what they would otherwise have been does not indicate the extent that they would be lower. I do not however consider it unreasonable to take the lowest dumping margin as an indication of the minimum extent. If, as the ADC concluded[89], that dumping at the levels found to have occurred (in the range of 21.7 to 34%) was giving importers a competitive benefit it is not unreasonable to expect that if that dumping was removed prices would move up in line with the margin of dumping.

180. I consider that the ADC had complied with both domestic and WTO jurisprudence in distinguishing the effects of other factors from those of the dumped imports and did not just give them cursory consideration.

The ADC failed to appropriately determine a NIP

181. In its submission JFE makes a number of complaints regarding the basis upon which the ADC calculated the NIP for imposition of measures. As noted above there is an argument that the consideration of the lesser duty rule is not covered by the ambit of the decision being reviewed by the Panel. On balance however and, for the reasons given above[90,] I am of the view that the decision of the Parliamentary Secretary to accept the recommendation of the ADC with respect to the NIP to be included in the Dumping Duty Notice is part of the reviewable decision.

182. The first argument by JFE is that in using the weighted average selling prices in the calendar years 2010 to 2012 to determine the USP the ADC was using prices which were wholly unrealistic and not comparable to those in the investigation period and which would inflate the USP given the downturn in the mining industry.

183. In support of its argument that with the downturn in the mining sector, prices have declined, JFE quotes a finding from the ADC report that "a downturn in the mining sector led to a rapid decline in demand for Q&T steel plate during the investigation period"[91.] However JFE does not reference any finding in the ADC Report to the effect that the reduced demand meant lower prices. What the ADC did find was that the downturn in mining investment in Australia lowered Bisalloy's capacity utilisation and contributed to a higher unit CTMS[92]. It was for this reason it decided not to proceed with establishing a USP based on a constructed industry price.

184. In concluding that the USP should be based on the Australian industry's prices for the calendar years 2010 to 2012, the ADC recognised that there was market volatility in the years immediately before the investigation period. For

[89] Section 8.5.2, page 61 of Report 234
[90] Paragraphs 18 to 20
[91] Section 5.4, page 32 of Report 234
[92] Section 10.5, page 80 of Report 234

this reason it used a three year period rather than a shorter period. This seems to me a reasonable approach for the ADC to take.

185. JFE refers to the decision in *Siam Polyethylene Co Ltd v Minister for Home Affairs*[93]in support of its attack on the NIP determination. I take the reference to be to the following statement by Justice Rares:

> "The non-injurious price had to be calculated by reference to the question of material injury, an assessment of its extent and the establishment of the causal link between dumping and the injury: cp *SPP Nemo SA Comercial Exportadora v Minister of State for Small Business and Consumer Affairs [1998] FCA 1627* per Drummond, North and Mansfield JJ (15 December 1998 unreported) at pp 23-24."[94]

186. This is the approach taken by the ADC. The use of the prices pertaining in Australia in a period when there was no dumping to establish a USP reflects the ADC's assessment of the material injury in the form of price depression and price suppression found to have been caused to the Australian industry by the exportation of goods at dumped prices during the investigation period.

187. Whatever might be the arguments against using the weighted average prices in the three years before the investigation period, the alternative methodologies proposed by JFE are far more problematic.

188. The first methodology to which JFE refers in that of using the prices pf un-dumped goods. The ADC did consider this methodology but rejected it as the data it would have to use, namely that from the ACBPS database was unreliable. This was because the data could not be filtered to exclude goods not covered by the investigation (as the imports could not be filtered for variations in thickness, width or length). The ADC also found that the volume of un-dumped goods was relatively minor and unlikely to have influenced overall market prices[95].

189. I accept as appropriate the reasons given by the ADC to reject the use of the selling price of un-dumped goods to set the USP. I note that JFE complains that this was inconsistent with the aggregation of all models and specifications in doing the dumping margin analysis. There is no such inconsistency. The dumping margin analysis is based on verified data and as I note above, the aggregation of the models and specifications to ascertain a dumping margin is required by law.

190. Another methodology suggested by JFE is that the ADC should have identified a period with similar demand to that which pertained in the investigation period. No such period is identified by JFE. JFE also suggested that the sales from Bisalloy's China joint venture be used or a CTMS and profit from those sales.

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93 [2009] FCA 837
94 Above at para 113
95 Section 10.6.1, pages 81 and 82

Those sales would appear to be too small to provide a basis to calculate a USP, Bisalloy having only made one purchase during the investigation period[96]. There would also be the issue of reliability given the commercial relationship.

191. JFE also puts forward the sales to the Australian Defence Force. There was nothing before me to indicate that these sales were properly comparable so as to constitute an appropriate basis for the establishment of a USP. I note that Bisalloy describes its armour plate sales as a niche market and that the military sector is only about 10% of the Q&T steel plate industry[97].

Public Interest not assessed

192. JFE contends that the ADC should have analysed the various submissions made on public interest and made a recommendation to the Parliamentary Secretary in that regard.

193. There is no legislative requirement for the ADC to provide such an analysis or recommendation. S.269TE requires the ADC in making a report to the Minister to have regard to the considerations to which the Minister would be required to have regard. A proposal for a legislated requirement for consideration of the public interest by the Minister was expressly rejected at the time of the introduction of reforms to the anti-dumping legislation in 2011[98].

Total Steel

194. The reasons put forward by Total Steel in support of its application for review are set out in a submission by Baker & McKenzie. In many respects the grounds for review and supporting reasons are the same as those put forward by JFE. For that reason, I have only separately dealt with any additional or different arguments made by Total Steel. For the reasons given below, I do not consider that Total Steel has established that the decision of the Parliamentary Secretary was not the correct or preferable decision.

Dumping Duty for Finland and Japan exports calculated on an ex works basis

195. As with the submission by JFE, Total Steel takes issue with the use of an ex works basis for the calculation of the export price for JFE. It also complains that this basis was used for the export price for Finland although it is not clear what interest Total Steel has in the ascertained export price of Q&T steel plate from Finland as it imports such product from JFE.

196. Total Steel points out in its submission that there will be practical difficulties for it as it may initially pay more duty for its imports than is levied given the export

[96] Bisalloy Visit Report Document 37 EPR, page 18
[97] Bisalloy Steel Group Annual Report 2013 Attachment GEN 3 to Bisalloy Visit Report Document 37 EPR
[98] Explanatory Memorandum to the Customs Amendment (Anti-dumping Improvements) Bill (No.2) 2011, page 64

price has been determined on an ex works basis. This may be so although the duty assessment process is meant to enable the importer to have the correct duty assessed and any excess refunded. Such difficulties for importers do not necessarily mean a different export price should have been used. It should also be noted that it is the NIP which is the operative measure as the lesser duty rule was applied.

197. In addition to the administrative difficulties, Total Steel makes two further points. It argues that the ADC's approach is flawed because during the duty assessment process the ADC cannot control the information required to establish the export price on an ex works basis and hence the duty to be applied. This is, presumably, a reference again to the duty assessment process but it appears to misunderstand that process. The ADC does not need to control information. The duty assessment process requires the importer to provide the necessary information with the co-operation of the exporter. This information will be verified by the ADC with a verification visit if necessary.

198. The second point is that the use of an ex works basis is a departure from the standard practice and, if Total Steel had known of the ADC's intention to depart from standard practice, it would have pointed out why this was problematic. This is a procedural fairness point which raises, as noted above[99], the scope of the review by the Panel. In any event, the use of an ex works basis for the export price for JFE was notified to interested parties in the SEF[100]. Total Steel could have made submissions in response to the SEF on that issue.

199. The issue is really whether or not the ADC had a proper basis for departing from the standard practice of using an FOB price. As noted above in response to the JFE submission, because the goods under investigation had not been purchased from the exporter by the importer, the export price fell to be determined under s.269TAB(1)(c). This means that the export price is to be "the price that the Minister determines having regard to all the circumstances of the exportation".

200. The ADC Report gives the reason for the ex works basis for the export price as being "to ensure comparability with Japanese domestic sales".[101] There must be some doubt that this is a proper reason for the calculation of the export price under s.269TAB(1)(c) on an ex works basis, given that that is not a matter that goes to the "circumstances of the exportation". It seems however, that the ADC was being somewhat cryptic in its reasons, given possibly the need to preserve confidentiality. There were circumstances regarding the exportation which provided the reason for the use of the ex works basis. These circumstances are given in the Verification Report for JFE[102] but are not available in the public record. I am satisfied that there were circumstances of

[99] Paragraphs 122 to 123
[100] Section 6.5.1, page 33 of SEF 234
[101] Section 6.5.3, page 44 of Report 234
[102] Section 8.1 of Verification Report for JFE, Document 78 of EPR

the exportation which justified the use of an ex works basis to establish the export price.

201. I note that the approach by the ADC in this case was not inconsistent with the practice where the exporter sells to an intermediary. The Dumping and Subsidy Manual states:

> "Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter i.e. the manufacturer, and where an intermediary is involved the export price will be the price received by that exporter when selling to the intermediary. In working out the dumping margin the export price received by the exporter for the goods will typically be the free on board price but an export price at another point may have to be used depending on the circumstances, for example a free alongside price, or an export price expressed in some other terms."

202. To ensure there was comparability with the normal value of the exports and the export price on an ex works basis, the inland freight expenses were deducted in the calculation of the normal value.

203. In its s.269ZZJ submission, Total Steel expanded on its reasons on this issue. One of its points referred to the Dumping Commodity Register for Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden. This does not appear to be relevant information as defined by s.269ZZK(6) and I have not had regard to the submission on this point.

204. The s.269ZZJ submission also argues that Total Steel was not, before the publication of the ADC Report, made aware that the export price for JFE would be calculated on an ex works basis. This is not correct. It was made aware of this by the publication of the SEF.

Description of the goods is flawed

205. This argument is essentially the same as that put forward by JFE and for the reasons given above in reviewing that application, I do not agree that there was a flawed description of the goods.

206. In summary, the description of the Q&T steel plate was capable of being understood and the evidence before me showed overwhelmingly that the exporters, importers and other interested parties knew what was covered by the description. It is clear that Total Steel understood what was meant by the term Q&T steel plate and what was covered by the goods under description, although it argued that one grade it imported was not like goods to the Bisalloy product. Total Steel provided the ADC with a table comparing the Q&T steel plate it imported with the products produced by Bisalloy.[103]

[103] Verification Report for Total Steel, Section 3.4 and Confidential Attachment GEN 3

207. There was also no alteration to the description of the goods under investigation. The addition of a further tariff classification did not alter the description. Whether or not certain imported product falls within one tariff classification or another is not a matter for the Panel to determine.

Errors in findings on Australian industry producing like goods

208. This is a similar argument to one made by JFE in its application for review, which is dealt with above[104]. Total Steel has however provided further and more detailed arguments on this issue.

209. The first argument is that the ADC applied the wrong statutory test. Like JFE, Total Steel refers to the use of the term "generally reflective" by the ADC when referring to the differences in dimension of the goods. Unlike JFE, Total Steel provides a reference for this.[105] The term is used by the ADC in considering a claim by a number of interested parties that Bisalloy did not supply the entire range of dimensions of Q&T steel plate covered by the goods description and specifically a claim for exemption under s.8(7) of the Dumping Duty Act for Q&T steel plate more than 9.5 metres in length. It is only part of its reasoning in considering the issue of like goods.

210. Total Steel also refers to the use by the ADC of the term "similar" in its conclusion that Bisalloy's production processes were similar to those employed by overseas manufacturers in the manufacture of Q&T steel plate.[106] Again, this is part of the ADC's reasoning process in coming to the conclusion that the goods produced by Bisalloy were like goods to those under consideration. The ADC is not applying "similar" as the test for like goods. It lists the evidence upon which it comes to the conclusion that the goods produced by Bisalloy closely resemble those goods the subject of the investigation. Part of this evidence is that the production processes are similar.

211. In addition to the wrong test being applied, Total Steel argues that the finding of like goods was contrary to the evidence. In particular, it is put that there should have been a finding that there was no Australian industry producing Q&T steel plate greater than 9.5 metres in length. This argument appears to be more one for a claim for exemption under s.8(7) of the Dumping Duty Act and indeed this claim was made. In any event, there was evidence before the ADC regarding the ability of the Australian industry to produce Q&T steel plate in excess of 9.5 metres in length.[107]

212. Total Steel also points to a finding by the ADC that there was some degree of technical and quality differences in the locally produced and imported Q&T steel plate and certain customers may have different requirements.[108] This,

[104] Para 89
[105] Section 3.7.2, page 23 of Report 234
[106] Section 3.7.2, page 25 of Report 234
[107] Confidential Attachment 5 to the Response by the ADC to the ADRP
[108] Section 3.7.2, page 24 of the Report 234

Total Steel contends, conflicts with the finding that Bisalloy's Q&T steel plate has characteristics which, although not identical, closely resembled those of imported Q&T steel plate.[109] Total Steel also claims that no reasons are given for the ADC's finding on this point.

213. While it could be better explained in the ADC Report, the reason for this finding can be seen when the whole of its findings on the issue of like goods is considered. In response to the claims made by certain interested parties that there are technical differences in the Q&T steel plate made by Bisalloy and that which is imported, the ADC accepts that there are some differences. Clearly though it considers that these differences are not such that they prevent a finding that the products have characteristics closely resembling each other. This finding has to be considered in the broader context of the analysis made by the ADC of the various characteristics of the domestically produced goods which led to its determination that the goods had characteristics closely resembling the goods the subject of the application.[110]

214. As a further example of the conflict between the evidence and the ADC's finding on like goods, Total Steel points to the conclusion by the ADC that Bisalloy's production processes were similar to those employed by overseas manufacturers.[111] Total Steel considers that this conflicts with the ADC's reference to there being substantial evidence submitted on differences in production processes. However, there was no such finding by the ADC in the ADC Report.

215. The ADC pointed to assertions by certain exporters that their production processes were substantially different to Bisalloy's production process. However, the ADC did not agree with this assertion.

216. Finally, I note that in its s.269ZZJ submission, Total Steel put forward further detail in support of this ground. In particular, it pointed to differences between the Everhard Super product it imported from JFE and the locally produced product. I note that the ADC examined the claim by JFE that its products were technically different from the product made by Bisalloy[112.] The ADC still concluded that the Australian made products were like goods.

Errors in calculating normal value for JFE goods

217. The arguments made by Total Steel with respect to the normal value calculated for JFE's exports are similar to those made by JFE in its application for review.

218. Total Steel contends that the ADC has adopted a hybrid approach which should not be seen as the preferred methodology. I take this to be a reference to the analysis of JFE's domestic sales and export prices which was done on a

[109] As above
[110] Section 3.8, pages 26 and 27 of Report 234
[111] Section 3.7.2, page 25 of Report 234
[112] Section 3.7.2, pages 23 to 24 of Report 234

model by model basis with the ultimate determination of one normal value and one export price for JFE exports.

219. Where there are differences in models and types of the goods under consideration, it can be preferable that the analysis be done on a model by model basis as was the case with JFE's exports. However, the legislation requires that there be one normal value and one export price established for JFE's exports.[113]This was done on a weighted average basis.

220. Total Steel, as with JFE, complains that the ADC did not use the prices in the construction sector. The ADC did not confine its analysis to that sector because of its finding that while the price to that sector was the lowest "there were significant differences in selling prices. No consistent or distinct price differences between the different levels of trade were identifiable to warrant a comparison of export prices to normal values in the Japanese construction sector alone." [114]

221. As I explain above[115], the reference to level of trade should be read as a reference to the different market sectors and when so read it seems a reasonable response to the claim made by JFE in this respect. However, the ADC went further in its investigation and examined whether physical characteristics raised by JFE such as dimension, additional customer requirements or volume affected price. The result was that the ADC found:

- a range of different dimensions were sold in each market sector. There was no one market sector that closely aligned to Australian sales in terms of dimensions including thickness, length and width. The visit team was unable to quantify JFE's claims that the overall mix of product dimensions affected price to particular customers;
- there were no identifiable trends in selling prices for product manufactured to additional customer requirements. In addition, JFE did not demonstrate that these requirements incurred additional costs; and
- there were no identifiable trends in price differences for different customers based on volume.[116]

222. The above gives an adequate explanation for the decision by the ADC not to restrict the examination of JFE's domestic prices to the construction sector.

223. Total Steel contends that where there were low sales identified for certain models, a normal value should have been identified under s.269TAC(2). That sub-section however refers to low volumes of sales of like goods in the country

[113] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870
[114] Section 6.5.2, page 43 of Report 234
[115] Paragraphs 110 to 113
[116] Section 6.5.2, page 43 of Report 234

of export. There was not however a low volume of sales of like goods by JFE domestically and so s.269TAC(2) did not apply.

224. As with JFE, Total Steel criticises the use of the price guidelines to make adjustments under s.269TAC(8) to the alternative models used to account for differences in specification for those models with low domestic sales. For the reasons given above[117], I consider that the approach taken by the ADC in using the price guidelines was reasonable in the circumstances. As the ADC found:

- the price guidelines more accurately reflected JFE's actual selling prices of export sales to Australia, third countries and domestic sales in Japan; and
- differences in JFE's selling prices of export sales to Australia, third countries and domestic sales in Japan do not support JFE's claims that its internal price guidelines play no part in the determination of its selling prices.[118]

225. With respect to the remaining arguments by Total Steel on this issue, I believe that they have been addressed above in response to JFE's submission on normal value.

Errors in findings on material injury-no or immaterial causal connection

226. The first argument made by Total Steel is that JFE's exports should not have been cumulated with other exports under s.269TAE(2C) given the differences and conditions of competition between imported goods targeted for the repair and maintenance sector and imported goods targeted for other sectors. This is a similar argument made by JFE in its application.

227. In its submission under s.269ZZJ, Total Steel expanded on the arguments made in its application. It contended that the ADC did not comply with s.269TAE(2C) because there was no analysis of the conditions of competition as between all importers before the discussion on the ADC's consideration of the conditions of competition between imported goods and like domestic goods.

228. The ADC did consider the conditions of competition both between the imported goods as well as the conditions of competition between the imported goods and those produced domestically, as required by s.269TAE(2C). It found that the conditions of competition between imported goods were similar.[119] While it then expands on its reasoning when dealing with both the imported goods and domestically produced goods, it seems clear to me that those reasons are

[117] Para 117 to 118
[118] Section 6.5.2, page 42 of Report 234
[119] Section 8.3, page 56

intended to apply to both the competition between imported goods and those between those goods and domestically produced goods.

229. Total Steel's submission under s.269ZZJ also contends that in its cumulation consideration, the ADC focused its analysis on one aspect of competition, namely price and ignored other elements that had to be considered. This was not the case. The comments on its assessment on price competition were made in response to the submission by SSAB that a major condition of competition was price.

230. Total Steel also contends in its application that the ADC Report fails to show that the ADC's analysis of material injury was supported by facts. The complaint appears to be that there should have been an examination of actual or hypothesised prices and not an examination of the dumping margin per se. I do not agree with this. While the ADC did have regard to the dumping margin, as permitted by s269TAE(1)(aa), the ADC did examine prices and did rely on the result in its analysis of material injury and causation.

231. A further argument by Total Steel is that there was evidence before the ADC as to the differences in the JFE Q&T steel plate and the Bisalloy product and the conditions of competition between them. This is however another argument based on the submissions made regarding the repair and maintenance market which JFE's products supplied and the market which Bisalloy products supplied. The ADC found however that based on verified data from the Australian industry and visited importers that there was significant competition between imported goods and like domestic goods.

232. In its s.269ZZJ submission, Total Steel argued that the ADC should have undertaken a sectoral market analysis and focused its inquiry on the unprocessed market sector. Given the finding by the ADC, that "Bisalloy competes with importers of Q&T steel plate in all states and territories and across each segment via similar distribution channels to sell product to the larger distributors and original equipment manufacturers/fabricators"[120], I consider that it was appropriate that the ADC did not undertake a sectoral market analysis.

233. With respect to the criticism made by Total Steel with respect to the price undertaking analysis conducted by the ADC and the conclusions it reached based on that analysis, I believe that these are very similar to those made by the Japanese Mills and JFE and for the reasons given in the review of those applications, I do not consider the criticisms are valid. I do though make a couple of additional comments.

234. Total Steel refers to the finding from the price undercutting analysis that dumping at the levels found, had given importers a competitive advantage and demonstrated that the Australian industry had faced price pressure from imported goods. It then asserts that confusingly, at section 1.8.6, the ADC

[120] Section 5.3, page 32 of Report 234

Report does not list price undercutting as causing the Australian industry to suffer material injury as a result of dumped imports. There is however no confusion. At section 1.8.6 of the ADC Report, the ADC is listing the material injury which it found the Australian suffered, not the cause of that injury.

235. Total Steel also argues that the ADC's price undercutting showed no consistency and hence no correlation between dumping and prices offered by Bisalloy. As I note above,[121] my own review of the price undercutting material showed that there was significant undercutting of Bisalloy's price by dumped imports. The fact that price undercutting did not always occur does not logically mean that what price undercutting is occurring cannot be causing injury and, where the undercutting is significant, causing material injury.

236. On this issue, I note the comment of the WTO Panel in *EC-Tube or Pipe Fittings*[122]:

> "Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that were made at underselling prices. Thus, a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with 'overcutting' prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry."

237. In its S.269ZZJ submission, Total Steels refers to a number of WTO decisions which it contends establish that dumping margins are not a substitute for a comparison of actual import prices with domestic prices, properly adjusted. The ADC did not however simply use the size of the dumping margins as the basis for its causation analysis. Nor did it fail to take into account the need for comparability between prices, as Total Steel contends.[123] This was taken into account in the price undertaking analysis.[124]

Errors in Assessing whether JFE TMCP steel is goods under consideration

238. This is a similar argument as that put by JFE in its application for review and for the reasons given above[125] when dealing with JFE's submissions on this issue, I do not consider that the argument has merit.

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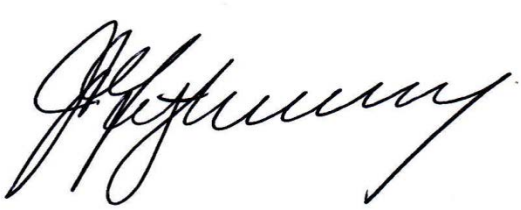
121 Para 50
122 WT/DS219/AB/R at 7.276-7.277
123 Page 21 of submission attached to letter from Total Steel dated 21 January, 2015
124 Section 8.5.2, page 59 of Report 234 and confidential appendix 6
125 Paragraphs 91 to 98

Recommendations/Conclusion

239. While some valid criticisms were made of the investigation process and the reasoning in the ADC Report, I do not consider that any of these criticisms mean that the decision of the Parliamentary Secretary is not the correct or preferable decision.

240. Pursuant to s.269ZZK(1), I recommend to the Parliamentary Secretary that she affirm the decision that a dumping duty notice be published in respect of Q&T steel plate exported to Australia from Finland, Japan and Sweden.



Joan Fitzhenry
ADRP Member
20 February, 2015