Total Steel

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21 January 2015

Anti-Dumping Review Panel

By email
ADRP_Support@industry.gov.au

Dear Review Panel Member

Non-confidential Submission to the review of the Minister's decision to publish a dumping duty notice for Case 234

Total Steel of Australia Pty Ltd (***Total Steel***) notes the Review Panel is undertaking a review of the Minister's decision to publish a dumping duty notice in respect of Anti-Dumping Commission Case 234 - Quenched and Tempered Steel Plate Exported from Finland, Japan and Sweden (***Review***). Total Steel appreciates having the opportunity to make a submission to the Review Panel for the Review.

Please find attached for your consideration Total Steel's non-confidential submission (***Submission***).

If you have any questions in respect of the Submission or would like to discuss any aspect of the Submission, please do not hesitate to contact me on (03) 9369 8855.

Yours faithfully

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Attachment - Submission from Total Steel

1. Introduction to submission

1.1 Total Steel of Australia Pty Ltd (***Total Steel***) applied to the Anti-Dumping Review Panel (***Review Panel***) requesting a review of the decision for Case 234 made on 5 November 2014 by the Parliamentary Secretary to the Minister for Industry (***Total Steel's Review Application***). Annexure 1 to this Attachment contains the grounds and reasons for review from Total Steel's Review Application.

1.2 On 22 December 2014, the Review Panel published notice of its intention to conduct a review of that decision, identifying 13 non-exhaustive grounds for review.

1.3 Total Steel is an interested party in the review, and requests that the Review Panel consider its submission in conducting the review.

1.4 Total Steel addresses the grounds for review in its submission as follows:

Ground for review as identified in the Notice of review published by the Review Panel	**Section of Total Steel's submission in which the ground is addressed**
(a) The form of the anti-dumping measures applicable to exports from Finland and Japan that have been applied on the basis of the *ad valorem* method;	Section 1
(b) The effective rate of the measures applied to exports from Finland and Sweden;	Section 2
(c) Errors in the consideration of material injury;	Section 5
(d) Misapplication of s. 269TAE of the Customs Act 1901 (Cth) (***Customs Act***);	Section 5
(e) Failure to properly establish the requisite causal link between injury to the Australian industry and the presence of allegedly dumped goods in the Australian market;	Section 5
(f) Flawed description/classification of goods under consideration;	Section 6
(g) Failure to adequately address differences in products and markets;	Section 7
(h) Failure to calculate the normal value (JFE Steel) in accordance with the Customs Act;	Section 8
(i) Error in the calculation of the export price;	Section 9
(j) Errors in the finding of material injury to the Australian industry;	Section 5
(k) Failure to determine a non-injurious price;	Section 11

(l) Error in determining dumping duty on an ex-works basis; and	Section 12
(m) Error in identifying an Australian industry producing like goods.	Section 13

Submission

1. Anti-dumping measures for exports from Finland and Japan applied on the *ad valorem* method

1.1 The submissions in this section respond to Bisalloy's application requesting that the Review Panel review the Parliamentary Secretary's decision to apply *ad valorem* measures to exports of Q&T steel plate from Finland and Japan.[1]

1.2 For the reasons addressed elsewhere in this submission, Total Steel considers that the Parliamentary Secretary's decision to apply anti-dumping measures on exports of Q&T steel plate from Japan was not the correct or preferable decision. However, if anti-dumping measures are to be applied, Total Steel agrees with the Commission's assessment that, for JFE Steel Corporation (***JFE***) (a Japanese exporter), interim dumping duties should be calculated using the *ad valorem* method.[2]

1.3 As expanded upon below, Total Steel submits that, as far as it is aware the Commission's approach in applying the *ad valorem* method does not reflect:

(a) a miscalculation, misconstruction or misapplication of the law; and

(b) that it has:

(i) inappropriately relied on data in a selective manner; or

(ii) ignored relevant data.

1.4 Bisalloy's claims that inadequacies and shortcomings exist in the Parliamentary Secretary's decision to apply the *ad valorem* method are unsupported by relevant information.

Approach taken by Commission is valid

1.5 The approach taken by the Commission in applying the *ad valorem* method to Q&T steel plate from Japan is a valid approach that it was entitled to select applying section 8(5BB) of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (***Customs Tariff Act***) and Regulation 5 of the *Customs Tariff (Anti-Dumping) Regulation 2013* (Cth).

1.6 The Commission's approach is also consistent with the Commission's *Guidelines on the Application of Forms of Dumping Duty* (***Guidelines***). The *ad valorem* method is the appropriate method to apply given each of the following considerations have been identified in REP 234 as characteristic of the Australian market for Q&T steel plate:

(a) <u>the market is a falling market:</u> The Guidelines reflect that duty can become punitive applying a method other than the *ad valorem* method, which can have a flow-on negative effect on other industries (such as the end user customer);[3]

(b) <u>there is a broad range of Q&T steel plate produced by the Australian industry and overseas manufacturers:</u> Variable parameters include thickness, width, length, finishes,

[1] Section B.1 of Bisalloy's Review Application pages 5 - 6.
[2] REP 234 paragraph 11.3.1 sets out the Commission's assessment for Finland and Japan.
[3] Guidelines on the Application of Forms of Dumping Duty November 2013 page 6.

edge conditions, flatness, standards and grades.[4] The *ad valorem* method is seen as the preferable method where there are many models or types of the goods;[5] and

(c) there has been significant price variation in the Q&T steel plate market over time: The *ad valorem* method is seen as the preferable method where such price variations occur.[6]

1.7 The selection of the *ad valorem* method is also the most appropriate method given movement in the Australian dollar. Over the period of the investigation, the Australian dollar has depreciated significantly against the US dollar and other foreign currencies. This fluctuation has significantly affected the price in the market.

1.8 Looking forward, economists predict that the Australian dollar is expected to further depreciate.[7] This depreciation will impact price in the future for imported Q&T steel plate.

1.9 A dumping duty method that included a fixed component would not be reflective of the impact of the fluctuating currency. A fixed component determined on export prices for the investigation period would reflect the impact of a much stronger Australian dollar than exists for current market conditions (and is anticipated to exist for the foreseeable future). Accordingly, a method containing a fixed component would not be the most appropriate method to apply in the circumstances.

1.10 The risk of circumvention is very low as it would be commercially problematic in an open and competitive market with alternative sources of supply. In any case, the risk of circumvention activity under the *ad valorem* method can be adequately addressed through monitoring and, if necessary, commencing an anti-circumvention inquiry. It is also important to note that in REP 234,[8] the Commission did not accept Bisalloy's submission that the data relied on by Bisalloy pointed "to the appearance of circumvention being undertaken by exporters from the nominated countries".[9]

1.11 The Commission also rightly pointed out that it was open to Bisalloy to apply for a review of measures 12 months following publication of the Parliamentary Secretary's decision.[10] This time period would allow Bisalloy the opportunity to gather evidence covering a period impacted by the anti-dumping measure being in place.

1.12 The Commission's explanation in REP 234 as to why the Commission chose the *ad valorem* method for Japan Q&T steel plate does not support Bisalloy's submission that the Commission's rationale was primarily based on what is done in other jurisdictions or what is the simplest and easiest form of duty to administer. That said, and as noted in the Guidelines, these are relevant considerations to take into account (along with other factors).

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[4] Visit Report - Australian Industry Bisalloy Steel Pty Ltd Public Record document 037 pages 12 - 14 describes variable characteristics of Q&T steel plate identified as produced by Australian industry and an import comparison by Bisalloy between Bisalloy Q&T steel plate with imported Q&T steel plate.
[5] Guidelines on the Application of Forms of Dumping Duty November 2013 page 11.
[6] Guidelines on the Application of Forms of Dumping Duty November 2013 page 11.
[7] Examples of predictions by economists can be found at the following: http://www.abc.net.au/news/2014-09-19/australian-dollar-could-fall-to-73-us-cents/5756598
http://www.poundsterlinglive.com//466-aus-dollar-forecasted-to-decline-below-09-4543543
[8] REP 234 section 10.7 page 86.
[9] Bisalloy Submission Public Record document 085 pages 7 - 8.
[10] REP 234 section 10.7 page 86.

Bisalloy's claims are not made out

1.13 In REP 234, the Commission responded to[11] Bisalloy's earlier submissions on the *ad valorem* method.[12] The Commission's response adequately explained why Bisalloy's position was not accepted. For example:

(a) Bisalloy submitted that the *ad valorem* method as used for the interim measures published in PAD 234 on 15 May 2014 was insufficient to remove the injurious effects of the exports at dumped prices. It further claimed that Australian Bureau of Statistics (***ABS***) data for the period 1 January 2013 to 31 August 2014 on monthly import volumes based on FOB values of Q&T steel plate for Finland, Japan and Sweden supported its position. In REP 234, the Commission explained that the period covered by the ABS data was incapable of showing the impact of the interim measures. The Commission highlighted:

"that potentially all of the pricing negotiation for imports arriving between 19 May 2014 and 31 August 2014 are likely to have occurred prior to 19 May 2014 due to the significant lead time in the manufacture and export of goods from the countries under investigation".[13]

(b) The Commission gave credible reasons (unrelated to dumping) that could explain the FOB values from the ABS database. These reasons related to the effect of product mix, low monthly volumes and a contraction in demand and changed patterns of consumption for the Australian market during the investigation period.[14]

(c) The Commission noted in REP 234[15] that Bisalloy's application for the publication of a dumping notice identified that, in Bisalloy's opinion, the ABS FOB import price data was less reliable then selling prices in the market identified by Bisalloy.[16] Bisalloy's Review Application does not address the contradictory positions it took as to the reliability of the ABS database:

(i) treating the database as unreliable and not reflective of market intelligence of Q&T steel plate prices in its application for publication of a dumping notice. Total Steel further notes that Bisalloy in one of its submissions said:

"In the application, Bisalloy stated that it did not consider that the export prices published by the Australian Bureau of Statistics ("ABS") were reliable.";[17] and

(ii) treating the database as reliable in demonstrating the ineffectiveness of the *ad valorem* method, in its later submission responding to SEF 234.

1.14 Bisalloy's use of the ABS data to support its argument also seems to be based on a flawed understanding of how the data was constructed and what it represents.[18] Total Steel's understanding is that the ABS FOB price data can be characterised as a notional value established for customs duty valuation purposes. Customs have a basket of currencies they

[11] REP 234 Chapters 10 and 11.
[12] Bisalloy Submission Public Record document 085 pages 5 - 8.
[13] REP 234 section 10.7 page 83.
[14] REP 234 section 10.7 page 85.
[15] REP 234 section 10.7 page 85.
[16] Bisalloy Application for the publication of dumping and/or countervailing duty notices Quenched and Tempered Steel Plate From Japan, Sweden and Finland Public Record document 001 page 25.
[17] Bisalloy Submission Public Record document 026 page 1.
[18] http://www.adcommission.gov.au/reference-material/abs-data.asp

impose on the date of export which is used to calculate the FOB value. The ABS FOB price data does not reflect actual prices paid. Such prices are typically determined on order confirmation dates, which usually occur 3-6 months before the date of export.

1.15 The Commission's conclusions in REP 234 reflects that there is no evidence to support the claims in the Bisalloy Review Application that duty determined applying the *ad valorem* method will be incapable of remedying the alleged injury experienced from the dumping. There is no relevant information supporting that this conclusion was in error.

2. Effective rate of the measures applied to exports from Finland and Sweden

2.1 Total Steel makes no submission on the review in relation to the effective rate of the measures applied to exports from Finland and Sweden.

3. Errors in the consideration of material injury

3.1 Total Steel refers to its submissions in section 5.

4. Misapplication of s. 269TAE of the Customs Act

4.1 Total Steel refers to its submissions in section 5.

5. Failure to properly establish the requisite causal link between injury to the Australian industry and the presence of allegedly dumped goods in the Australian market

5.1 Total Steel refers to the reasons given for Ground 5 in Total Steel's Review Application which set out the basis for establishing the Commission's error in failing to establish a causal link between injury to the Australian industry and allegedly dumped goods (see paragraphs 5.1 to 5.27 of Total Steel's Review Application).

5.2 In addition to the points from Total Steel's Review Application, Total Steel makes the following submissions concerning the Commission's failure to establish the requisite causal connection between the Australian industry and allegedly dumped goods:

Cumulative effect

5.3 The Commission wrongly decided that a cumulative approach was appropriate. In conducting the task of analysing injury to the Australian industry, the Commission's policy as expressed in the Dumping and Subsidy Manual:

(a) requires specific matters to be assessed when electing to consider the cumulative effect of allegedly dumped imports, including a requirement to first consider the conditions of competition as between the goods imported from all countries and then consider the condition of competition between the exported goods and like goods that are locally produced by the Australian industry.[19] The Commission failed to assess these matters (or if the Commission undertook such an assessment, it did not explain this in REP 234); and

(b) allows for a more extensive market analysis and market sectoral analysis in certain circumstances where this is appropriate. Total Steel submits that the circumstances surrounding the Q&T steel plate in the present case called for analysis of such matters. In not undertaking that analysis, the Commission failed to take into account relevant information concerning the assessment of material injury to the Australian industry.

[19] Dumping and Subsidy Manual, page 126.

Cumulative Effect - failure to properly assess the evidence on cumulative effect

Section 269TAE(2C) of the Customs Act sets out the mandatory elements which must be taken into account for the Minister to be satisfied that considering the cumulative effect of exports is appropriate. Specifically, section 269TAE(2C)(e) requires that, in determining, for the required purpose, the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:

"it is appropriate to consider the cumulative effect of those exportations having regard to:

(i) the conditions of competition between those goods; and

(ii) the conditions of competition between those goods and like goods that are domestically produced."

5.4 The subsection adopts the required elements from Article 3.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (***Anti-Dumping Agreement***). In *EC—Tube or Pipe Fittings*,[20] the Appellate Body said the following about that Article:

> "*The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the Anti-Dumping Agreement to assess cumulatively the effects of imports from several countries. These conditions are:*
>
> *(a) the dumping margin from each individual country must be more than de minimis;*
>
> *(b) the volume of imports from each individual country must not be negligible; and*
>
> *(c) cumulation must be appropriate in the light of the conditions of competition*
>
> *(i) between the imported products; and*
>
> *(ii) between the imported products and the like domestic product.*
>
> *By the terms of Article 3.3, it is 'only if' the above conditions are established that an investigating authority 'may' make a cumulative assessment of the effects of dumped imports from several countries.*"[21]

5.5 Properly construed, section 269TAE(2C)(e) of the Customs Act required the Commission to undertake a two-step analysis. First, it was required to analyse the level of competition between foreign exporters/importers of the goods under consideration, so as to satisfy subsection 269TAE(2C)(e)(i) as between those persons. The Commission was then required to consider and analyse the conditions of competition between the imported goods and the domestically produced goods to satisfy subsection 269TAE(2C)(e)(ii). In the relevant discussion of the cumulative effect in REP 234, there is no analysis of the conditions of competition as between all importers (as the Commission was required to do) before the discussion on the Commission's consideration of the conditions of competition between imported goods and like domestic goods.[22] In addition to erring in not undertaking the full

[20] *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, Report of the Appellate Body, WT/DS219/AB/R (***EC—Tube or Pipe Fittings***).
[21] *EC—Tube or Pipe Fittings*, Report of the Appellate Body, WT/DS219/AB/R, at [109].
[22] See REP 234, pages 56-58.

analysis required, the Commission also failed to take into account relevant information concerning the elements to apply when considering the cumulative effect.

5.6 The Dumping and Subsidy Manual explains the relevant factors the Commission was required to assess when analysing the conditions of competition as follows:

"The conditions of competition are assessed between the goods imported from all countries and the conditions of competition between the exported goods and like goods that are locally produced by the Australian industry. Such assessment might be, but is not confined to:

- *Physical characteristics and uses of the domestic like product and imports from each of the countries whose imports may be cumulated, as well as the degree of interchangeability, fungibility, or substitutability. Considerations of customer perception and specific customer requirements; tariff classification may be relevant in this regard.*
- *For the purpose of analysing threat of material injury, the levels and trends in the volume of imports from each of the countries whose imports may otherwise be cumulated, either in absolute terms or relative to production or consumption in the importing country.*
- *The existence of sales of the domestic like product and imports from each of the countries whose imports may otherwise be cumulated. Examples of this are:*
    - *through common or similar channels of distribution;*
    - *during the period of investigation;*
    - *the trends of prices for the domestic like product and imports from each of the countries whose import may be cumulated;*
    - *the levels and trends of prices undercutting by imports from each of the countries whose imports may otherwise be cumulated during the period of the dumping investigation.*

The Commission will not have regard to data collected outside the injury period in assessing the conditions of competition."[23]

5.7 Had the Commission undertaken the appropriate analysis concerning the conditions of competition as between all importers as required, then it should have had regard to the evidence before it. By way of example, and in addition to the submissions in respect of competition provided by Total Steel (which we address elsewhere in this submission), the following relevant information was before the Commission:

(a) SSAB Australia stated that:

(i) *"because of the superior nature of its products, it can distinguish itself from the cheaper alternatives and does not compete in the same market as cheaper imports"*;[24] and

(ii) *"it does not conduct value added functions such as cutting, bending or welding."*[25]

[23] Dumping and Subsidy Manual, pages 126-7.
[24] Public Document 057, Verification Report SSAB Swedish Steels Pty Ltd, page 17.
[25] Public Document 057, Verification Report SSAB Swedish Steels Pty Ltd, page 17.

(b) Vulcan Steel stated that:

(i) it *"placed increased consideration on product quality and performance"*;[26]

(ii) *"all of the Q&T plate Vulcan imports is sold directly to PDC Steel for our own internal use and further downstream processing. PDC Steel sells small items of highly processed steel plate - not full plate"*; [27] and

(iii) *"the minimal volume of imports by Vulcan Steel, and the absence of evidence that those imports have caused any detriment to Bisalloy, provide grounds for the Minister to exclude from the goods description any dumping notice, plate steel that is imported for further processing before resale"*.[28]

(c) Commercial Metals Pty Ltd:

(i) stated *"that it provides distributors and resellers in the Australian market an alternative supply of steel products. In terms of placing orders, Commercial Metals bundles smaller orders into larger orders that are acceptable quantities for the overseas mills"*;[29] and

(ii) *"identified its customers in three categories: distributor, end user and processor. Of the three categories, [blank] per cent of sales by value during the investigation period were to distributors."*[30]

5.8 Instead of undertaking the required appropriate analysis, in section 8 of REP 234, the Commission made the following comments without any supporting analysis:

(a) "*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.*"[31]

(i) Total Steel refers to its earlier submissions at section 5.6 of Total Steel's Review Application concerning the value added processing which affects the majority of Total Steel's imported goods. This is further discussed in section 5.15 of this submission.

(ii) Total Steel also refers to section 5.15 of this submission concerning the different market sectors.

(b) *"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."*[32]

Again, this finding ignores the distinct market segments discussed in further detail below from section 5.15 of this submission. That is, the Australian industry supplies its distribution networks and original equipment manufacturers (**OEM**) market. Total Steel does not compete in these markets and specifically targets the majority of its

[26] Public Document 092, Vulcan Steel Submission, page 1.
[27] Public Document 092, Vulcan Steel Submission, page 2.
[28] Public Document 092, Vulcan Steel Submission, page 2.
[29] Public Document 054, Verification Report for Commercial Metals Pty Ltd, page 9.
[30] Public Document 054, Verification Report for Commercial Metals Pty Ltd, page 13.
[31] REP 234 section 8.3 page 56.
[32] REP 234 section 8.3 page 57.

imported Q&T Steel Plate, after having undertaken significant value adding processes, to the repair and maintenance (**R&M**) sector of mining and resource industry.

(c) *"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."*[33]

Total Steel again submits that this is contrary to specific information before the Commission, including the Commission's own observation in considering material injury. In this regard, Total Steel endorses the comments by JFE concerning products and markets at paragraphs [125]-[126] of JFE's Review Application in light of the Commission's crucial finding that there was no volume injury caused by dumping:

"125. The Commission's pricing conclusion is also inconsistent with its finding (page 69) that Q&T steel plate is a somewhat specialised product with purchasing decisions based on a variety of factors including dimension limitations, quality differences, access to and security of supply and global brand recognition with price being an important factor but not the only consideration.

126. If product and market differences are properly considered as they should be, TSA's particular business focus will be given the distinct consideration that it deserves. The natural conclusion would then be that if volume injury is not caused by dumped goods and is not more than could be expected in the downturn, and if the repair and maintenance work is not expected to reduce in a downturn, as breakdown of equipment is not impacted upon by general economic circumstances, TSA's general business model cannot cause injury to Bisalloy. As noted above and below, that is a further reason why cumulation was inappropriate."

(d) At sections 8.3.1 to 8.3.2 of REP 234, the Commission appeared to focus its analysis on one aspect of competition - price. This was to ignore the other specific elements to be considered when an assessment of cumulative effect is undertaken according to its own Dumping and Subsidy Manual (listed in section 5.6 of this submission above). The Commission did not take into consideration that Total Steel predominantly services the R&M market, whereas Bisalloy does not. The Commission's ignored the fact that the distribution channels of JFE imported Q&T steel plate differs significantly to Bisalloy's Q&T steel plate. Further, the Commission's analysis of price erroneously, concentrated only on looking at if weighted average prices were similar. The legal question was whether the conditions of competition make cumulation permissible. That would require a correlation analysis between prices to see if they are elastic. For example, a proper analysis would ask whether domestic prices fluctuate with changes in import prices. The Commission failed to use a reliable method when analysing price and also failed to consider other required factors in its analysis.

5.9 Total Steel endorses the comments made by JFE in JFE's Review Application concerning cumulation at [137]-[140]:[34]

[33] REP 234 section 8.3 page 57.
[34] See JFE Application dated 5 December 2014, page 22 under ground: "Ground 7: Cumulation".

> *"137. As noted above, a failure to appropriately distinguish the analysis based on the characteristics of goods and differing markets, impacts upon causation analysis and would particularly do so if cumulation is wrongly determined to apply.*
>
> *138. In that regard, the Commission should not have cumulated TSA imports with other imports under the provisions of section 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. The Commission's conclusion (page 56) that importers and Bisalloy are both selling goods into the same market, or alternatively, that domestically produced Q&T steel plate can be substituted for imported Q&T steel plate, simply looks at what it thinks is theoretically possible and not what is actually occurring in the relevant market where local miners must have urgent responses to their repair and maintenance needs.*
>
> *139. Based on the Commission's own investigation, that would not even be theoretically possible under a realistic assessment of the circumstances of the market as found by it. In any event, the Commission must formally present a view as to why cumulation is appropriate in the particular circumstances. It has failed to do so.*
>
> *140. As a result, the Commission should not have cumulated all imports given that the conditions of competition between R&M and OEM products are fundamentally different. It should also not cumulate imports by an entity such as TSA where Bisalloy will not offer product at competitive prices."*

5.10 The Commission therefore erred in:

(a) failing to undertake the mandatory analysis to determine if cumulation was appropriate in these circumstances; and

(b) failing to take into consideration all relevant information in that analysis.

As a result, the Commission failed to conclude (as it should have on the evidence before it), that cumulation was not permitted under the Customs Act or the Anti-Dumping Agreement.

5.11 The Commission ought to be directed to undertake further analysis in light of these factors, in particular as to the conditions of competition between the relevant importers as between themselves and then as between the importers and the Australian industry.

The Commission ought to have undertaken sectoral market analysis

5.12 In light of the information before the Commission, the Commission should have undertaken a sectoral market analysis and focussed its inquiry on the unprocessed market sector. The Commission had information before it from Total Steel, concerning the R&M market that Total Steel services with processed Q&T steel plate. This information was contrary to the conclusion the Commission reached which was:

> *"The Australian Q&T steel plate market is supplied by the Australian industry and imports from a number of countries. 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."*[35].

[35] REP 234 section 5.3 page 32.

5.13 The Commission has the discretion to undertake such a sectorial analysis in circumstances where "separate market sectors can be established by objective evidence".[36] The Dumping and Subsidy Manual acknowledges that separate market sectors objective data might indicate:

- "*production destined for one market does not enter the other market;*
- *there are no imports or other external supply to the market unaffected by dumping;*
- *prices, and price movements, between the markets are dissimilar;*
- *different market structures exist between the market sectors (for example by different intermediate manufacturing processes, production technology, handling, packaging, distribution and sales methods);*
- *the imported and closed market production have different end uses, (however an application based on different end use alone would be inadequate as different end use does not of itself differentiate a market. If an application were decided on end use, it is not possible to apply measures on that basis); or*
- *that after intermediate processing the imported product is not sold onto the same market as output from the sector unaffected by dumping (i.e. where there are also downstream market sectors).*"[37]

5.14 As illustrated below, there was information before the Commission that indicated the above. By way of example, Total Steel presented information which indicated that there were specific sectors in which Total Steel participated including:

- processed plate sales; and
- unprocessed full plate sales from TSA inventory."[38]

5.15 Total Steel explained to the Commission the differences between processed plate sales which have undergone a value added process and unprocessed plate sales. Unprocessed Q&T steel plate is the plate as imported without further change. Processed steel plate, however, is notably a different product which is destined for different end-users and services a distinct market sector. It requires labour intensive (and costly) value added processes including:

(a) <u>profiling the steel plate</u> – which involves cutting a different dimension (shape) from the full plate, and is the simplest of the value added process which Total Steel undertakes, and which is usually coupled with additional processing steps (as outlined immediately below); and

(b) <u>processing the steel plate</u> – which involves labour intensive work readying the steel plate so that it may be quickly and directly installed on an R&M site, and includes:

(i) bevel cutting – preparing the edge of the plate for direct welding, noting that most mining operations require welds to be "seven passed" (that is, seven welds, one over the top of the other);

(ii) stud welding – Total Steel welds studs directly onto the steel plate that have a tread. This ensures that when the processed steel plate arrives at the R&M site, the new plate can be installed directly in place of the old plate which has

[36] Dumping and Subsidy Manual, page 18.
[37] Dumping and Subsidy Manual, page 19.
[38] Total Steel Verification Report Public Record document 050, page 16.

the commercial advantage of significant reductions in downtime for the mining operation;

(iii) drilling, treading or countersinking – these are specific process steps undertaken by Total Steel which enable attaching the processed replacement steel plate into the existing structure for the R&M site, such that it is simple to remove and install, and again providing a significant commercial advantage in reduction of downtime for the mining operation and cost savings to the mine site;

(iv) rolling – as the name suggests, this processing involves rolling the cut steel plate to form a replacement steel plate for any damaged equipment, such as a mining bucket or slurry pipe. Again, Total Steel prepares the replacement processed steel plate so that it arrives at the R&M site ready to replace the damaged or worn out part; and

(v) etching – this is a form of lightly engraving the replacement parts, with specific customer requests such as site location, individual part numbers for replacement at site, and marking for further site welds.

5.16 Not only was this information about further Q&T steel plate processing before the Commission, it was explained in great detail when the Commission undertook its site visit with Total Steel before preparing Total Steel's verification report. This information should have indicated that cumulation was inappropriate as well as calling for a segmented analysis. It also shows that other factors would be the cause of any injury to the Australian industry.

Evidence concerning Total Steel's participation in the Australian Market

5.17 In Total Steel's verified visit report, it was noted that:

"*the majority of its Q&T plate sales are processed plate sales, where the plate is further worked and sold as part of a package or service, predominantly for repair and maintenance (**R&M**) in the mining industry.*"[39]

5.18 Specifically, the Commission verified:

"*the accuracy of the sales spreadsheet by reconciling the selected sales from the sales spreadsheet to source documents. Details for all selected sales were matched to source documents, including the proof of payment where relevant bank statements were provided.*"[40]

5.19 Having done so, the Commission said it was:

"*satisfied that the updated sales spreadsheet is an accurate, complete and relevant reflection of TSA's sales of unprocessed Q&T during the investigation period.*"[41]

5.20 These comments indicate that not only was Total Steel making available to the Commission data which reflected the different market sectoral information, it also had a reasonable expectation that the Commission's analysis would properly consider and assess the differences between processed and unprocessed plate sales. Having not done so, the Commission appears to have ignored and omitted relevant information in reaching its decision.

Production destined for one market does not enter the other market

[39] Total Steel Verification Report Public Record document 050, page 16.
[40] Total Steel Verification Report Public Record document 050, page 16-17.
[41] Total Steel Verification Report Public Record document 050, page 18.

5.21 Total Steel submits that the following information ought to have formed part of the Commission's investigation into the relevant sectoral analysis in accordance with the Dumping and Subsidy Manual:

(a) Total Steel's focus is:

"*predominately on value-add processing such as multi-torch oxy cutting, drilling, countersinking, stud welding, saw cutting and plasma cutting including bevel cutting*".[42]

(b) Total Steel "*does not actively pursue the sale of unprocessed Q&T steel plate and it only sells Q&T in the same condition as it is imported when it is required as part of a package, or at an ad hoc basis on request by its customers. The unprocessed plate sales included one "indent sale" of tonnes, being a sale direct from wharf in Fremantle (not entered into TSA warehouse) in August 2013.*"[43]

(c) The majority of Total Steel's imported steel plate was sold into the processed steel plate market after undergoing significant value adding processes (and thus no longer capable of being considered the goods under consideration), being approximately 85% of its total imported steel plate.[44]

(d) "*TSA aims to deliver quick processing turnaround which is labour intensive.*"[45]

(e) The Commission verified Total Steel's customers which were noted to be unrelated.[46]

(f) "*TSA explained that EH SP contains an additional alloy, Titanium Carbide. This plate wear hardens over time, creating a slippery surface. It further added that Bisalloy do not manufacture an equivalent product.*"[47]

(g) "*TSA stated that over the past 20 years, it has developed a market in Australia for abrasion resistant and high tensile strength wear plate manufactured by JFE in Japan. TSA outlined that it imports Q&T steel plate products under the 'Everhard' (EH 360, 400, 450, 500 and EH SP) and 'Hi-Ten' 780 brand.*"[48]

(h) Bisalloy did not identify that it served the R&M market segment. Instead, the information provided to the Commission showed that Bisalloy was focussed on the distributor and OEM market segments. This is illustrated by the following:

(i) *"Bisalloy advised that its domestic customers can be divided into national/state based distributors and fabricators/original equipment manufacturers (OEMs)".*[49]

(ii) In Bisalloy's Application, it identified that:

"Bisalloy sells approximately 80% of its Q&T steel plate domestically via a network of Distributor companies such as [company], [company], [company] and [company] and approximately 20% direct to larger end-user

[42] Total Steel Verification Report Public Record document 050, page 9.
[43] Total Steel Verification Report Public Record document 050, page 16.
[44] Total Steel Verification Report Public Record document 050, page 9.
[45] Total Steel Verification Report Public Record document 050, page 9.
[46] Total Steel Verification Report Public Record document 050, page 10.
[47] Total Steel Verification Report Public Record document 050, page 10.
[48] Total Steel Verification Report Public Record document 050, page 11.
[49] Visit Report - Australian Industry Bisalloy Steel Pty Ltd Public Record document 037 page 11.

OEMs/fabricators who service the mining sector on major project expansions and repairs and maintenance."[50]

(iii) *"Both Bisalloy and importers of the GUC compete in all states and territories in Australia and across each segment via similar distribution channels to sell product to the larger Distributors and OEMs/Fabricators companies in Australia."*[51]

(iv) *"[A]pproximately 80 per cent of Bisalloy's domestic Q&T steel plate sales are made to distributors and the remaining 20 per cent to larger fabricators/OEM's."*[52]

5.22 Bisalloy's submissions do not directly address the numerous submissions of other interested parties saying that Bisalloy does not compete in the R&M market segment. Accordingly, the Commission has received no proper response from Bisalloy on this issue.

5.23 Importantly, REP 234 does not reflect that the Commission investigated Bisalloy's inability to service the R&M market and the reasons for the situation that existed. Further, the Commission's duty of inquiry, together with the duty of the Australian industry to act honestly, means that the Commission would need to have been satisfied of Bisalloy's ability to service the R&M market through, for example, the Commission's own inspection of Bisalloy's machinery, sales, capacity and timeliness of service. The information identified above casts serious doubt on whether this was adequately investigated by the Commission. Indeed, it would have been important for the Commission to have inquired whether a lack of Bisalloy investment and marketing strategy was the real reason for Bisalloy not targeting R&M. The requirements of Bisalloy's identified distributor and OEM customer base allowed Bisalloy to have maximum production and Bisalloy's cost to operate was lower than to operate an R&M business (which responds to more bespoke requirements).

5.24 Accordingly, the Commission ought to be directed to make those specific investigations to the required level of satisfaction consistent with the WTO jurisprudence identified later in these submissions.

Prices, and price movements, between the markets are dissimilar

(a) As the sectoral analysis was not undertaken by the Commission, there is a serious question to be asked as to what such analysis would have shown. The Commission ought to be requested to undertake further inquiries into the differences between:

(i) the unprocessed Q&T market sector;

(ii) the R&M processed Q&T market sector;

(iii) the OEM market sector; and

(iv) the price differentiations, movements between these sectors.

5.25 The Commission undertook no such analysis. Even without a discrete sectoral analysis, the Commission (consistent with WTO jurisprudence) is required to undertake a comprehensive objective analysis of all relevant factors and so needed to consider these differences, either in a sector analysis or at least in considering whether injury was actually caused by dumping or by other factors.

[50] Public Record document 001, Application, page 16.
[51] Public Record document 001, Application, page 16.
[52] Bisalloy's Verification Report Public Record document 037, page 18.

The imported and closed market production have different end uses

5.26 There was clear objective data before the Commission concerning the different end-use and end-users which supports the existence of different market sectors. The submissions set out above (at sections 5.15 to 5.16) are also relevant to this question, including that:

(a) there are distinct end-uses of Q&T steel plate, including the different uses for producers, distributors, OEM and R&M;

(b) there are distinct end uses with different functional requirements, such as valued added processed plate for the R&M end-users compared with unprocessed steel plate for OEM end-users; and

(c) these end uses are driven by different commercial expectations and objectives concerning the delivery of the specific processed or unprocessed steel plate with the R&M end-users who frequently require processed plate delivered on-site within a matter of days (which is essential for mining operations to continue without major disruption) compared with an OEM end-user making new product (which have much longer lead times).

5.27 It is unclear whether or not the Commission has made the necessary enquiries of these end-users which is plainly relevant to a proper investigation of the market sectors for the purpose of the material injury analysis.

That after intermediate processing the imported product is not sold onto the same market as output from the sector unaffected by dumping

5.28 We refer to our earlier comments at sections 5.12 to 5.27 of this submission concerning the difference between processed and unprocessed Q&T steel and, in particular, the intermediate processing which is required to service the R&M market sector which is distinct from those selling to the OEM market sector. As detailed by Total Steel to the Commission, processing occurs to the majority of the product imported by Total Steel and as a result of that processing the product is not sold onto the same market as the market in which Bisalloy competes.

Unusual pricing involving Australian industry

5.29 Information provided to the Commission about pricing involving the Australian industry showed that there was no real competition because the pricing reflected the Australian industry could discriminate between the pricing it offered to distributors.

5.30 The Commission has failed to give sufficient consideration to the information provided to it on unusual pricing effects involving the Australian industry. The Commission received information showing that price representations for Q&T steel plate produced by the Australian industry reflected unusual differential pricing between different levels of the market sectors. This information showed pricing different to what would be normally expected.

5.31 For example, Total Steel advised the Commission that, with respect to pricing:

"*TSA shifted from Bisalloy to imported Q&T steel plate due to Bisalloy's uneven price structure. TSA explained that Bisalloy's pricing to distributors was much lower than end-users and fabricators. TSA provided an example of where Bisplate could be purchased from a*

*distributor at a lower price than what TSA could obtain from Bisalloy directly (**Confidential Attachment GEN 4**)."*[53]

5.32 The anomalous pricing ought to have been the subject of thorough investigation by the Commission. The Commission does not seem to have adequately addressed these issues when considering material injury to the Australian industry (or if it has, did not provide sufficient reasoning behind these unusual pricing effects). A proper analysis would have:

(a) taken into account that Bisalloy offered substantially higher pricing to Total Steel than Bisalloy offered to other distributors; and

(b) assessed whether this conduct (and not dumping) was a contributor to any material injury suffered by Bisalloy.

5.33 The Commission ought to be directed to take this relevant pricing information into account in addressing the material injury analysis. Bisalloy cannot be damaged by imports that it is unwilling to compete for at realistic prices.

5.34 Please refer to Total Steel's Confidential Submission about the numerical details as to unusual pricing involving Australian industry.

Supply constraints set by Australian industry

5.35 The Commission failed to give sufficient consideration to the information provided to it about difficulties experienced by end users in sourcing Q&T steel plate from Australian industry and distributors for Australian industry. An examination of the information provided on the history between Total Steel and Bisalloy shows that Total Steel has experienced difficulty buying Q&T steel plate from Bisalloy. This history shows that:

(a) as explained in sections 5.29 to 5.34 of this submission, Bisalloy has sought to set higher prices for Total Steel to pay than Bisalloy's distributors;

(b) Bisalloy cannot supply the quantity of Q&T steel plate required by Total Steel;

(c) Bisalloy cannot meet the delivery timeframes needed by Total Steel, particularly in order for Total Steel to service the R&M market; and

(d) Bisalloy's product is not up to the standard and quality required by Total Steel.

5.36 Given the unusual pricing circumstances explained in sections 5.29 to 5.34 of this submission, Total Steel might be able to obtain a more competitive price from a Bisalloy distributor than obtainable from Bisalloy. However, the other problems remain because those problems are due to the nature of the Bisalloy product and production of that product. The problem with sourcing Q&T steel plate from Bisalloy distributors is further exacerbated because the distributors do not tend to carry sufficient stock for Total Steel to place an order. Given these factors, distributors could not order and obtain stock from Bisalloy with sufficient speed to service the needs of R&M suppliers.

5.37 The difficulties described above in Total Steel sourcing product from Bisalloy has meant that Total Steel has been forced to seek viable offerings from importers.

5.38 For example, Total Steel advised the Commission that it was Total Steel's experience that:

[53] Total Steel Importer Visit Report, Public Record document 050 page 20.

"• during the boom in mining investment, Bisalloy didn't have the capacity to fully supply the market, which facilitated import competition.

• even with the current market experiencing reduced demand, Bisalloy still cannot fully service the underlying domestic demand, therefore import competition is necessary.

*• TSA shifted from Bisalloy to imported Q&T steel plate due to Bisalloy's uneven price structure. TSA explained that Bisalloy's pricing to distributors was much lower than end-users and fabricators. TSA provided an example of where Bisplate could be purchased from a distributor at a lower price than what TSA could obtain from Bisalloy directly (**Confidential Attachment GEN 4**)."*[54]

5.39 In light of the information provided, the Commission should have investigated whether Australian industry had discriminated between purchasers (or refused to supply) and whether such behaviour (rather than dumping) was a cause of material injury suffered by Australian industry. It is incorrect to conclude that dumping has prevented the Australian industry from supplying the market without first examining the impact of non-dumping factors such as Australian industry imposing large barriers to supplying certain customers such as Total Steel, lack of capacity and quality concerns.

5.40 Please refer to Total Steel's Confidential Submission about supply constraints set by Australian industry.

The Commission's price suppression and price suppression analysis

5.41 In REP 234 the Commission found price injury and as a result, revenue and profit injury, but importantly, concluded that there was no volume injury caused by dumped imports. It found instead that loss of volume was caused by the general downturn in the market. The Commission asserted that price injury was caused by dumping, simply from a methodology that asserted that as the dumping margins were high, as a result, imports had the ability to adversely affect prices. The Commission noted that price undercutting could not be consistently demonstrated but considered that:

"there is sufficient evidence from the price undercutting analysis to conclude that the dumping at levels outlined … (in the range of 21.7% to 34%) created a competitive benefit to importers, and demonstrates that the Australian industry faced price pressure from imported goods".[55]

5.42 That is an improper and illogical and methodology and, as explained below, contrary to WTO jurisprudence.

5.43 The Commission's findings are further flawed by reason of a failure to reconcile the valid finding of no volume injury with price injury, the two going hand-to-hand in most competitive markets and the failure to distinguish the conditions of competition between Bisalloy and Total Steel among others, leading to improper cumulation analysis.

5.44 The Commission's entire finding on injury was premised on an assertion that high margins allow for price impacts. That is both flawed and contrary to WTO provisions and jurisprudence. As noted in the JFE Application:

"105. *The most serious defect is the suggestion that the dumping margin itself shows that in an economic sense, the exporter was able to undercut prices. Para 8.5.1 suggests that the size of the margin provided exporters with the ability to offer Q&T steel plate at*

[54] Total Steel Importer Visit Report, Public Record document 050 page 20.
[55] REP 234 section 8.5.2 page 61.

significantly lower prices than would otherwise be the case. That has no commercial logic. The dumping margin in and of itself cannot show such market power or likely behaviour as the margin does not indicate actual domestic and export prices, but only some differential between them. Cost to make and minimum acceptable profitability is what allows for undercutting, not constructed dumping margins. One can still have a higher dumping margin where the export price is still well above the prices of the local industry. It is the pricing power in the Australian market that matters, not the mere presence of high prices overseas.

106. ADC should have used its assessment of actual prices at different levels of competition in conducting this analysis.

107. The Ministerial Direction on Material Injury of AP2012 indicated that the identification of material injury be based on facts and not on assertions unsupported by facts. DSM (page 15) indicates that when examining prices, the Commission may take into account export price, the difference between the price payable for goods produced in Australia and the price paid or payable for imported goods when sold in Australia where the landed duty paid in the store cost of the imported goods at the same level of trade and the effect that dumped goods are having or are likely to have upon the price of the goods produced in Australia. This calls for an examination of actual or hypothesised prices and not an examination of the dumping margin per se, particularly where the latter is based on some artificial construction. The Manual goes on to say that an examination of prices will show whether there has been undercutting or price suppression.

108. An example of the use of real prices would be the prices that Bluescope would have been offered by Bisalloy as compared to the prices it was offered by Ruukki and others."

5.45 The following WTO jurisprudence demonstrates clearly that Commission was in error when it concluded that there was price depression and suppression from imports, even though it correctly found on the facts that there was no consistent undercutting or volume injury. It supported its finding by relying on a wholly irrelevant and inadequate consideration, namely the size of the artificial dumping margin it purported to identify.

5.46 This calculation of a margin was flawed in a number of ways, among other reasons, because of inappropriate use of only some domestic data and inappropriate methodology of normal value calculation, inadequate adjustments and use of incorrect export price. Given these flaws, an incorrect figure was used.

5.47 More fundamentally, even if the margin calculations of the Commission were valid, a margin is not objective evidence of actual or potential price impacts. It can only be an Australian import price that hurts an Australian producer. The presence of high prices overseas has no relevance to price competition in Australia.

5.48 A proper and objective analysis of the effect of imports on prices is called for by Article 3.2 of the Anti Dumping Agreement. Article 3.1 also requires that this and other assessments be based on an objective examination of all relevant information.

5.49 In *China GOES*,[56] the Appellate Body concluded that a price suppression and depression analysis requires consideration of the *relationship* between imports and local prices. It is a causation analysis, although not as broad in ambit as the ultimate causation analysis that looks at all injury factors, not simply adverse price effects. The Appellate Body stated:

[56] *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, Report of the Appellate Body, WT/DS414/AB/R (***China—GOES***).

"The paragraphs of Articles 3 and 15 thus stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Together, these provisions provide an investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis. These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination. This inquiry entails a consideration of the volume of subject imports and their price effects, and requires an examination of the impact of such imports on the domestic industry as revealed by a number of economic factors. These various elements are then linked through a causation analysis between subject imports and the injury to the domestic industry, taking into account all factors that are being considered and evaluated. Specifically, pursuant to Articles 3.5 and 15.5, it must be demonstrated that dumped or subsidized imports are causing injury "through the effects of" dumping or subsidies"[a]s set forth in paragraphs 2 and 4". Thus, the inquiry set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5."[57]

5.50 At paragraph 136, the Appellate Body referred to the interaction analysis:

"By asking the question "whether the effect of" the subject imports is significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports. Moreover, the syntactic relation expressed by the terms "to depress prices" and "[to] prevent price increases" is of a subject (dumped or subsidized imports) doing something to an object (domestic prices). The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices."[58]

5.51 At paragraph 138, the Appellate Body states:

"Given that Articles 3.2 and 15.2 contemplate an inquiry into the relationship between subject imports and domestic prices, it is not sufficient for an investigating authority to confine its consideration to what is happening to domestic prices for purposes of considering significant price depression or suppression. Thus, for example, it would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices. Moreover, the reference to "the effect of such [dumped or subsidized] imports" in Articles 3.2 and 15.2 indicates that the effect stems from the relevant aspects of such imports, including the price and/or the volume of such imports."[59]

5.52 It should be noted that the Appellate Body refers in the last sentence to the *price* of the imports and not the dumping margin assessed against them.

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[57] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R at [128].
[58] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R, at [136].
[59] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R, at [138].

5.53 At paragraphs 141 and 142, the Appellate Body further states:

"Our interpretation is reinforced by the very concepts of price depression and price suppression. Price depression refers to a situation in which prices are pushed down, or reduced, by something. An examination of price depression, by definition, calls for more than a simple observation of a price decline, and also encompasses an analysis of what is pushing down the prices. With regard to price suppression, Articles 3.2 and 15.2 require the investigating authority to consider "whether the effect of" subject imports is "[to] prevent price increases, which otherwise would have occurred, to a significant degree". By the terms of these provisions, price suppression cannot be properly examined without a consideration of whether, in the absence of subject imports, prices "otherwise would have" increased. The concepts of price depression and price suppression thus both implicate an analysis concerning the question of what brings about such price phenomena.

Therefore, a consideration of significant price depression or suppression under Articles 3.2 and 15.2 encompasses by definition an analysis of whether the domestic prices are depressed or suppressed by subject imports. As a corollary of this understanding, Articles 3.2 and 15.2 would appear to make a unitary analysis of the effect of subject imports on domestic prices more appropriate, rather than a two-step analysis that first seeks to identify the market phenomena and then, as a second step, examines whether such phenomena are an effect of subject imports."[60]

5.54 At paragraph 200, the Appellate Body also made the point that such price comparison may need adjustments for different levels of trade or quality and the like:

"In response to questioning at the oral hearing, both participants agreed that an investigating authority must ensure comparability between prices that are being compared. Indeed, although there is no explicit requirement in Articles 3.2 and 15.2, we do not see how a failure to ensure price comparability could be consistent with the requirement under Articles 3.1 and 15.1 that a determination of injury be based on "positive evidence" and involve an "objective examination" of, inter alia, the effect of subject imports on the prices of domestic like products. Indeed, if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices. We therefore see no reason to disagree with the Panel when it stated that "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue."[61]

5.55 No such adjustments would have been made by the Commission because it concentrated on margins not prices.

5.56 Most importantly, the Appellate Body noted, and impliedly approved, the Panel's conclusion that dumping margins are not a substitute for a comparison of actual import prices with domestic prices, properly adjusted. The Panel in *China – GOES* stated the following:

"In particular, disclosures regarding the existence of dumping and subsidization are not on point as they do not relate to the prices of subject imports, relative to GOES produced by the domestic Chinese industry, which is the matter at issue. In our view, the existence of dumping or subsidization cannot be used to infer the relative prices of subject imports and the domestically produced product."[62]

[60] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R, at [141]-[142].
[61] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R at [200].
[62] *China—GOES*, Report of the Panel, WT/DS414/R at [7.572].

5.57 As noted in both Total Steel and JFE Applications, it is not clear whether the Commission found undercutting as it made contradictory statements on that issue. It did find suppression and depression, which was flawed for the above reasons. If it indeed found undercutting also by a margin logic, that would be even more flawed. Import prices either undercut (that is, are lower) or they do not. Prices in Japan that set margins of any dumping, have nothing to say on that question.

5.58 The above concerns are supported by WTO jurisprudence that demonstrate that the Commission's approach was in error.

Need to consider other factors that impact on pricing

5.59 A causal analysis also requires consideration of other factors that impact upon pricing. In that regard, the Commission also failed to draw proper conclusions as to prices from its finding of no volume injury from dumping. It found that negative volume impact was caused by the downturn in the market.

5.60 To that end, the Appellate Body in *EC–Tube or Pipe Fittings*,[63] stated:

> *"Article 3.1 and the succeeding paragraphs of Article 3 [of the Anti-Dumping Agreement] clearly indicate that volume and prices [of the dumped imports], and the consequent impact on the domestic industry, are closely interrelated for purposes of the injury determination."*[64]

5.61 The Commission also did not adequately consider the impact of the downturn on prices. In *China – GOES,* the Appellate Body noted that other factors must be distinguished:

> *"Articles 3.5 and 15.5 require an investigating authority to "examine any known factors other than the [dumped or subsidized] imports which at the same time are injuring the domestic industry", and to ensure that "the injuries caused by these other factors [are not] attributed to the [dumped or subsidized] imports". As the Appellate Body has found, the non-attribution language of Articles 3.5 and 15.5 requires that "an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports". In contrast, Articles 3.2 and 15.2 require an investigating authority to consider the relationship between subject imports and domestic prices, so as to understand whether the former may have explanatory force for the occurrence of significant depression or suppression of the latter. For this purpose, the authority is not required to conduct a fully-fledged and exhaustive analysis of all known factors that may cause injury to the domestic industry, or to separate and distinguish the injury caused by such factors.*
>
> *This does not mean that an investigating authority may disregard evidence that calls into question the explanatory force of subject imports for significant depression or suppression of domestic prices. Rather, where an authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, it must consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices. This understanding is also reinforced by the very concept of price suppression under Articles 3.2 and 15.2, which concerns prevention of price increases "which otherwise would have occurred". Moreover, by taking into account evidence pertaining to such elements, an authority also ensures that its consideration of significant price depression and suppression under Articles 3.2 and 15.2 is properly based on positive evidence and involves an objective examination, as required by Articles 3.1 and 15.1."*[65]

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[63] *EC—Tube or Pipe Fittings*, Report of the Appellate Body, WT/DS219/AB/R.
[64] *EC—Tube or Pipe Fittings*, Report of the Appellate Body, WT/DS219/AB/R, at [115].
[65] *China—GOES*, Report of the Appellate Body, WT/DS414/AB/R, at [151]-[152].

5.62 Panel decisions support the need for proper comparison. In *China – Broiler Products,*[66] after recognising that the "investigating authority is afforded a certain level of discretion in choosing a methodology"[67] the Panel stated:

> *"Nonetheless, Articles 3.2 and 15.2 require the investigating authority to consider 'whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member'. There can be no question that the prices being compared must correspond to products and transactions that are comparable if they are to provide any reliable indication of the existence and extent of price undercutting by the dumped or subsidized imports as compared with the price of the domestic like product, which may then be relied upon in assessing causality between subject imports and the injury to the domestic industry.*
>
> *The authority's discretion is also circumscribed by the overarching obligation under Articles 3.1 and 15.1 that the determinations of injury "be based on positive evidence and involve an objective examination". A comparison of prices that are not comparable would not, in our view, satisfy the requirement for the investigating authority to conduct an "objective examination" of "positive evidence".*"[68]

Shortcomings in weighing the effect of the market downturn

5.63 Total Steel supports the following grounds in JFE's Application:

> *"Ground 6.2: The Commission erroneously found price injury caused even though it rightly concluded that there was no volume injury caused*
>
> *109. ADC found that only price, revenue and profit injury was caused by dumped goods. It also concluded that volume injury was caused by normal downturn in economic circumstances and not by dumped goods. It is simple logic that if loss of volume was natural, revenue and profit injury can only be a result of dumped goods if prices were adversely affected by those goods. A further problem with the undercutting analysis is that if prices can so readily be undercut, why does this not cause a loss of volume?*
>
> *110. The Commission noted that price undercutting could not be consistently demonstrated but considered that "there is sufficient evidence from the price undercutting analysis to conclude that the dumping at levels outlined … (in the range of 21.7% to 34%) created a competitive benefit to importers, and demonstrates that the Australian industry faced price pressure from imported goods." (Page 61)*
>
> *111. The most significant concern is that the Commission's analysis showed no consistency in price undercutting and hence no correlation between dumping and prices offered by Bisalloy. If dumping is assumed to always be there at high margins based on the Commission's quarterly analysis, but often with no undercutting, a causal link simply is not there.*
>
> *112. There are other flaws with the price undercutting analysis. If imports can truly undercut domestic prices then volumes should decrease. Yet the Commission has*

[66] *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Report of the Panel, WT/DS427/R (***China—Broiler Products***).
[67] *China—Broiler Products*, Report of the Panel, WT/DS427/R, at [7.474].
[68] *China—Broiler Products*, Report of the Panel, WT/DS427/R, at [7.475]-[7.476].

emphatically concluded that there is no material injury caused through dumping by way of volume effects.

113. If there is price undercutting but Bisalloy still makes sales at acceptable volume, this would be illogical in a fully open market with truly identical products. The fact that there was some price undercutting with Bisalloy still keeping its volume can only raise the logical hypothesis that there are indeed differences in products as alleged by interested parties, differences in distribution chains, quality and timing of delivery, differences in customer specifications or the like to explain this phenomenon, all factors which would need to have been taken into account in the causation analysis and which would have undermined the positive conclusion of material injury caused by dumping.

114. The only alternative hypothetical commercial reason why the undercutting might not have been effective even where Bisalloy keeps selling at higher prices would be if there was an ill-informed market that did not know about other prices, which cannot be presumed to be the case with such specialty products and sophisticated and large scale customers.

115. A further concern is that ADC should be consistent in its methodological approach as between domestic and Australian price analysis. It found no consistency in Japan sector by sector, so why was there presumed consistency in undercutting power in material injury in Australia on the causal link analysis? The Commission concluded that differential pricing in Japan meant that no uniform conclusions could be drawn about Japanese market sectors, yet somehow concluded that vastly differentiated pricing in Australia shows sufficient presence of price undercutting as a dominant driver of behaviour. They both cannot be concurrently valid conclusions."

"Ground 6.6: The Commission wrongly concluded that the current economic downturn aided the causation analysis rather than undermining it

127. The Commission also referred to the Ministerial Direction on material injury inviting the Commission "to consider … the greater impact of injury during periods of economic downturn and reduced rates of growth as an element of injury." Given that the Commission has found that decreased volume was not caused by dumping, the only relevant factor is price impact. It accepted that some price impacts were caused by the downturn itself and not by dumping. Hence the Ministerial Direction can be of little aid in considering the extent of the price impact from dumped imports."

Guidance in determining "like product"

5.64 In support of Total Steel's submissions, commentary on the Anti Dumping Agreement also recognises that functions and end use of goods and channels of distribution and marketing of goods are relevant considerations to assessing like goods:

"The AD Agreement does not contain any further guidance, apart from the definition in Article 2.6, on the issue of determining the "like product." It is common practice for investigating authorities to have developed some criteria, which they apply on a case-by-case basis. Members have applied different criteria in determining like product, including the following:

- *The physical characteristics of the merchandise*
- *Degree of commercial interchangeability of the products*
- *Raw materials used in manufacturing*
- *Manufacturing methods and technologies used in production of the merchandise*
- *The functions and end uses of the merchandise*
- *Industry specifications*
- *Pricing*
- *Quality*
- *Tariff classification*
- *Channels of distribution and marketing of merchandise*
- *The presence of common manufacturing facilities or use of common employees in manufacturing the merchandise*
- *Customer and producer perception of the products*
- *Commercial brand/commercial prestige."*[69]

[our emphasis added]

Approach to market segmentation in related areas

5.65 Competition law also provides useful guidance on how an appropriate market segmentation analysis might be undertaken. The well known market definition in Australian competition law is as follows:

"We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close competition there is of course a monopolistic market). Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. … It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics, the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply?"[70]

5.66 The above logic has been applied in a European Commission case on market segmentation applied to spare parts. In *Hugin v Commission*,[71] Hugin was fined by the European Commission for refusing to sell spare parts for its cash registers to Liptons, an independent company that is separate to Hugin. Hugin applied for an annulment of the decision and challenged the European Commission's definition of the market.

[69] J. Czako, J. Human, & J. Miranda, *A Handbook on Anti-Dumping Investigations* (United Kingdom: CUP, 2003) at page 11.
[70] *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169 at 190 (per Woodward J, President and Members Shipton and Brunt) considered and not disapproved by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd Co* (1989) 167 CLR 177 and *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2003) 215 CLR 374.
[71] *Hugin Kassaregister AB & Hugin Cash Registers Ltd v European Communities Commission* (Case 22/78) [1979] ECR 1869 (***Hugin v Commission***). Note the favourable discussion of this decision in *Regents Pty Ltd v Subaru (Aust) Pty Ltd* (1998) 84 FCR 218 at 224-228.

5.67 The European Court of Justice considered whether the supply of spare parts constituted a specific market or whether it formed part of a wider market. The court held:

"… there exists a separate market for Hugin spare parts at another level, namely that of independent undertakings which specialize in the maintenance and repair of cash registers, in the reconditioning of used machines and in the sale of used machines and the renting out of machines. The role of those undertakings on the market is that of businesses which require spare parts for their various activities. They need such parts in order to provide services for cash register users in the form of maintenance and repairs and for the reconditioning of used machines intended for re-sale or renting out. Finally, they require spare parts for the maintenance and repair of new or used machines belonging to them which are rented out to their clients. It is, moreover, established that there is a specific demand for Hugin spare parts, since those parts are not interchangeable with spare parts for cash registers of other makes

…

Consequently the market thus constituted by Hugin spare parts required by independent undertakings must be regarded as the relevant market for the purposes of the application of Article 86 of the facts of the case. It is in fact the market on which the alleged abuse was committed."[72]

5.68 The Court identified there existed a separate market for Hugin spare parts at another level, namely that of independent undertakings which specialise in the maintenance and repair of cash registers, in the reconditioning of used machines and in the sale of used machines and the renting out of machines. Similarly, as explained in section 5.26 of Total Steel's submissions, there are separate market segments for customers seeking Q&T steel plate.

6. Flawed description/classification of goods under consideration

6.1 Total Steel refers to the reasons given for Ground 2 in Total Steel's Review Application which set out the basis for establishing the Commission's error in its description of the goods.

6.2 In addition to the points from Total Steel's Review Application, Total Steel makes the following submissions concerning the flawed description of goods identified for the investigation:

Further examples of confusion caused by description

6.3 Total Steel's Review Application gave examples of the inherent inconsistency and confusion caused by the description of the goods included in the application, particularly in identifying what was meant by "not further worked than hot rolled". As a further example, the description of goods also lists the surface conditions which may be included for consideration (on a non exhaustive basis). This includes "primed" and "lacquered" goods. Total Steel submits that these types of treatment would come within the plain meaning of "worked" which illustrates a further inconsistency with the goods description.

6.4 The flawed description of goods also raises the curious issue of whether the description is capable of applying to the applicant's goods. The applicant further works greenfeed material. At least one of the meanings capable of being given to the description of the goods in the application, is that goods which are further worked (other than hot rolled) are intended to be excluded from the scope of the goods.

Is the Customs Tariff or another meaning intended?

[72] *Hugin v Commission* at 1896-1897.

6.5 The description of the goods employs terminology that is used extensively in defining goods for tariff classifications as incorporated into the Customs Tariff Act. A reasonable inference from that use is that the references to such terms in the goods description is intended to pick up the same meaning given to those terms in interpreting the tariff classifications. REP 234 in fact noted that the reference in the goods description to plate "not in coil" follows the wording of tariff sub-heading 7225.40.00.[73] However, such an approach still leads to an illogical and contradictory interpretation of the goods description.

6.6 Where ambiguous phrases in the tariff are concerned, it is permissible to resort to the Brussels Notes. The Brussels Notes indicate when subsequent manufacture and finishing can properly be said to convert goods into other articles for classification purposes. The relevant provision refers to

"surface treatment, or other operations … to improve the properties of the metal …."[74]

The Brussels Notes indicate that, except as otherwise provided in the text of certain headings, such treatment will not affect the heading in which the goods are classified. Reference is made to hardening, tempering and similar heat treatments to improve the properties of the metal, which are indeed key processes applied to the imported goods under consideration in this case.

6.7 The typical way that the Customs Tariff Act "otherwise provides" is by the inclusion of the phrase "not further worked". This general phrase is used to signify an intent to override the presumption in the Brussels Notes. Given this, it would be proper to conclude that the use of "not further worked" signifies the intent to send further worked goods into another classification. That means as a result, that such heat treatments are properly seen as further working and hence goods so treated do not come within the relevant description or original tariff heading.

6.8 While the Brussels Notes are not intended for dumping administration, given the fact that the same words as used in the tariff classifications have been used in the description of the goods in the application and were also relied upon by the then Parliamentary Secretary in publishing notice of his decision, they should be taken to intend the same meaning. It would be problematic if the same words were interpreted differently by trade remedies and by classification officers. The Ministerial delegate would hardly be expected to have intended this.

6.9 In any event, the description is flawed whether it is approached under plain meaning or by way of accepted principles of tariff interpretation.

6.10 There are two related conclusions:

(a) The better view is that either on plain meaning of "not further worked" or on the meaning intended under the relevant customs tariff wording that has been adopted in the application, the goods imported by Total Steel do not fit within the ambit of the application by reason of actually being further worked.

(b) More significantly and for the reasons outlined above, there is such internal illogicality in the description that it should be seen as fatally flawed from the outset in relation to most, if not all other importers.

[73] REP 234 section 3.6.3 page 20.

[74] Explanatory Notes to the Harmonised Commodity Description & Coding System - General Notes to Chapter 72 - Pages XV-72-5 to XV-72-12. In particular page XV-72 – 10 para C referring to " Subsequent Manufacture & Finishing".

Commission did not show how it identified the goods as against the description

6.11 Total Steel refers to the comments in section 13 of this submission in relation to the Commission's treatment of thermo mechanically controlled process steel plate (***TMCP***) and its failure, in REP 234, to clearly identify what it considered to be TMCP and apply consistent treatment between exporters.

6.12 It is also unclear from REP 234 whether the Commission's treatment of TMCP is consistent with the description of the goods.

Commission had no right to amend the application

6.13 In adding tariff subheading 7225.99.00 to the details identifying the goods under consideration, the Commission effectively amended Bisalloy's application for the investigation in a material respect after the investigation had commenced. Please see Total Steel's Confidential Submission about the treatment of the tariff heading.

6.14 The Commission has not sought to identify the legal basis on which it was entitled to amend the application in this way. Total Steel submits that a discretion for the Commission to amend the application is not permitted by Part XVB of the Customs Act:

(a) Section 269SMD of the Customs Act identifies the Commission's role as:

"The Anti-Dumping Commission's function is to assist the Commissioner in the performance of his or her functions or the exercise of his or her powers."

(b) Section 269MF(2) of the Customs Act identifies the scope of the Commissioner's powers and functions as:

"The Commissioner has the powers and functions conferred or imposed on him or her by this Act or any other law."

(c) Part XVB of the Customs Act creates a detailed regime addressing each stage of a dumping investigation and sets out the associated rights and powers imposed on the Commission, the Commissioner and the Minister for conducting a dumping investigation. Express provision is made for where there is a discretion to act. Section 269TAG makes it clear, for example, that the Minister has discretion to commence his or her own investigation independently of the conduct of any applicant. No one is given discretion to change an applicant's application.

(d) Part XVB also goes into some detail as to the process by which an application is to be made and considered before it is accepted and an investigation may commence. No provision is made for the Commission to update details identifying goods in an application once the investigation has commenced. The power given to the Commission with respect to the application is to apply the process in section 269TC and decide to reject or not to reject the application. If the Commission was not satisfied with the application, the process in s. 269TC required it to reject the application. Part XVB does not contemplate that the Commission might update or reinterpret the application after the investigation has commenced.

6.15 The application and investigation process as contained in the Customs Act and in practice statements from the Commission simply do not contemplate that the Commission mid-way through an investigation might add an additional tariff classification to the subject-matter of the investigation. If the application was flawed or contained irregularities, the only option available to the Commission under the Customs Act was to reject the application. Rejecting

the application has to be the only option available to the Commission as the application comes from the applicant.

6.16 As noted at section 2.11 of Total Steel's Review Application, the applicant's subjective intention communicated privately to the Commission (but not expressed in the application) should not be treated as relevant to the scope of the goods covered by the application. The intention of the Commission about what goods it intended to be within the scope of the investigation is also irrelevant.

6.17 From a due process perspective, it must be improper for the Commission to announce after all foreign visits, exporter questionnaires, importer visits and primary analysis that a new classification is being incorporated into the scope of the investigation.

Applying 7225.99.00 to the goods is flawed

6.18 Even if a power existed that enabled the Commission to amend the details of the goods after the investigations had commenced, simply including category 7225.99.00 as the Commission has purported to do cannot be justified, as by definition, the category 7225.99.00 cannot cover the goods as expressly described in the application. The goods as described are limited to goods "not further worked", while category 7225.99.00 (being for "other" goods) impliedly only covers goods that are actually further worked. Given this, the Commission incorporated a tariff number that is inherently inconsistent with the wording provided by the applicant.

7. Failure to adequately address differences in products and markets

7.1 Total Steel agrees with and adopts the grounds in the review Application made by JFE about the Commission's failure to adequately address differences in products and markets. Total Steel also refers the Review Panel to other sections of this submission where these issues are discussed. JFE's Application provided:

> *"48. The Commission has made erroneous decisions about the nature of the goods, the ambit of like goods to the goods under consideration, the essential nature of the Australian industry, the ambit of exclusions and the consequential desirability or otherwise of cumulation on consideration of injury.*
>
> *49. As indicated in the previous section, the first difficulty is to understand what kind of further working is in fact properly included in the application and what is not.*
>
> *50. Given that the Commission included consideration of a whole range of goods and was provided with evidence in the submissions about differences between the processes, product characteristics and distribution and market circumstances of all interested parties, the Commission erred in largely rejecting all arguments to distinguish the goods, distinguish the markets and identify different products for calculation purposes. Either the Commission should have identified differing products, should have made full and appropriate allowances or should at least have ensured that there is no cumulation analysis that would undermine effective comparability.*
>
> *51. On the issue of product specification and quality differences, the Commission in REP 234 acknowledged that based on the evidence "there may be some degree of technical and quality differences in locally produced and imported Q&T steel plate and that certain customers may have different requirements".[2] This assessment of the evidence conflicts with the Commission's finding that "Bisalloy's Q&T steel plate has characteristics which, although not identical, closely resemble those of imported Q&T steel plate".[3] There are no reasons given for the Commission's finding on*

this point (and so no explanation of why the Commission made its findings given the Commission's recognition that the evidence demonstrated several differences).

52. *A proper analysis of the different properties of imported goods and the distribution chains and customer needs in the Australian market, should have led ADC to conclude that JFE product should not be cumulated. On that basis, attention would have then been properly given to the impact of those imports on injury.*

Ground 2.1: There is no proper finding in REP 234 on whether thermo mechanically controlled process steel plate (TMCP) produced by JFE falls within the scope of goods identified for the investigation

53. *As noted above, it was only in respect of one matter that the Commission did in fact exclude certain goods from the analysis. This related to certain thermo mechanically controlled processed steel plate (**TMCP**). Where this was concerned, however, the Commission wrongly concluded that the TMCP plate produced by JFE should not be excluded. That was doubly problematic given that the Commission chose to exclude similar plate from other suppliers the subject of this investigation. The Report shows no justifiable grounds for having done so.*

54. *The Commission noted properly that the Australian industry does not manufacture TMCP steel plate products. Para 1.8.1 of the Report notes the Commission's view that TMCP steel plate is not the goods. It concluded that such plate did not constitute the goods and are not like goods and asserted that it did not include them in its dumping margin calculations. (Report p 21) That is the only proper conclusion given the clear differences in product attributes using TMCP processes and the separate market for such attributes.*

55. *It is hard to reconcile these emphatic conclusions with other comments and in particular, the treatment of JFE. Previously, the Commission noted that TMCP may have different meanings within the industry, with direct quenching sometimes referred to as a form of TMCP. (Report p 18) Page 17 states that "co- operating manufacturers claim that the direct quenching (and tempering) process alters the final characteristics of the plate, reducing manufacturing time and cost." At page 18, the Commission concludes that while Bisalloy does not use direct quenching, its steel plate closely resembles the goods manufactured by exporters. On this basis it is not clear why it excluded some TMCP products, although it is also unclear what the Commission meant by reference to "resembles" which is not the test of "like goods." It is also unclear why the Commission concluded that TMCP processes of any or all manufacturers were simply "quenching." That is not the case where JFE is concerned.*

56. *The Commission was provided with information about end-attributes as well as information about TMCP itself. For example, JFE advised that certain of its grades contain titanium carbide alloy and certain grades have an additional minus 40° Celsius Charpy impact test guarantee. The Commission noted the differences but concluded without reasons that Bisalloy's Q&T steel plate has characteristics which closely resemble those of imported Q&T steel plate. (Report p 24) The Commission provides no logical reason why Bisalloy's product closely resembles each and every one of the imported grades in light of the evidence as to attributes. Simple logic dictates that you cannot be harmed by things you cannot make and which are required by customers. It is again not clear how*

this conclusion is consistent with the conclusion that at least some TMCP processed product should be excluded.

57. *At page 25, the Commission concludes that Bisalloy's production processes are similar to production processes employed by overseas manufacturers. It is again not clear how this conclusion is consistent with the conclusion that at least some TMCP processed product should be excluded.*

58. *The Commission concluded that in the context of its investigation, its reference to TMCP plate was to plate "manufactured by heating an alloyed slab to a high temperature and controlling the temperature of the plate during the rolling process. This form of TMCP steel plate is not technically quenched as it does not involve rapid cooling." (Report p 18)*

59. *Once again it is simply unclear why the Commission concluded that JFE plate does not comply with that test or indeed, why such a test is determinative.*

60. *The confusion may be understood in the context of the investigation process itself. The Commission was advised that JFE's TMCP was produced at the Fukiyama works and was invited to make a site visit to that facility. It did not do so and have taken an erroneously limited view of JFE's TMCP process.*

Ground 2.2: The Commission erred in excluding TMCP of other exporters it found to have similar processes

61. *It would appear on the face of the Report that JFE has been treated adversely as compared to Ruukki at least. This is because footnote 10 on page 18 of the Report refers to Ruukki's submission at No. 9 of the public record referring to direct quenching as a special case of TMCP. The footnote goes on to imply that JFE's form of direct quenching was not excluded for that reason. It does not purport to indicate that Ruukki direct quenching was similarly seen as sufficiently like the goods under consideration.*

62. *On the material that was before the Commission, there is no justification for differentiating between TMCP processes and certainly no justification for treating exporters who utilise what it describes as direct quenching differently. That differential treatment impacts upon the normal values and in turn dumping margins applied to each and in turn their competitive relationship after application of a dumping duty.*

63. *Furthermore, that differential treatment alters the relevant imported goods upon which an analysis of causation of material injury is to be undertaken once the decision was made to cumulate. Because the differential treatment of exclusion was unreasonable, dumping margins and causation analysis are similarly unreasonable. The decision to cumulate was itself flawed by reason of a failure to give sufficient consideration to the differing attributes of all TMCP product.*

Ground 2.3: REP 234 reflects that the Commission may have incorrectly applied tests for an Australian industry producing like goods and exemptions that are different to the required test in the Customs Act

64. *It is not clear from the Report whether the reference to goods being "generally reflective" is a reference to a test of "like goods" or a criterion by which to determine entitlement to exemptions. Regardless of which view was intended, the*

use of such expression must be improper. The proper meaning of the phrase "like goods" as defined in the Australian legislation and as elaborated upon in WTO jurisprudence, does not purport to apply a "generally reflective" test and hence to the extent that it was applied in substitution for the proper criteria underlying a like goods analysis, such analysis must have been flawed.

65. Alternatively, if the phrase "generally reflective" was only intended to be applied in the context of exemption applications, this is again not the statutory test underlying exemptions.

66. For the foregoing reasons, the Commission should have come to different conclusions as to like goods, the ambit of the Australian industry, the distinctions in the market and in turn the basis for proper consideration of whether cumulation is appropriate or not. The failure to do so unfairly disadvantages JFE where it was well-known to the Commission that goods produced by JFE are imported by TSA primarily for made to order repair and maintenance equipment needed on an urgent basis by major entities in the mining and resources sector. Such entities depend upon long-standing relationships as to quality and timeliness of performance. It would have been abundantly clear to the Commission that if goods produced by JFE were considered separately in terms of their impact upon Bisalloy, no material injury could have been found. JFE endorses the comments in the application by TSA to the Review Panel where more detail is provided as to the business model of TSA and understands this to be true and submits that this should have been persuasive to the Commission."

8. Failed to calculate the normal value (JFE Steel) in accordance with the Customs Act

8.1 Total Steel refers to the reasons given for Ground 4 in Total Steel's Review Application, which set out the basis for establishing the Commission's error in calculating normal value for JFE goods. Total Steel also refers to its submissions in section 9 of this submission.

8.2 Total Steel makes the following further submissions concerning the calculation of normal value for JFE exports:

8.3 All domestic sales must be "in the ordinary course of business" and, as demonstrated by following the WTO case, inordinately high or low prices may at times be seen as outside the ordinary course of business. In *US—Hot-Rolled Steel* the Appellate Body said:

"We note that determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price."[75]

8.4 The Appellate Body then said:

"In our view, the duties of investigating authorities, under Article 2.1 of the Anti-Dumping Agreement, are precisely the same, whether the sales price is higher or lower than the

[75] *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R at [142] (***US—Hot Rolled Steel***).

'ordinary course' price, and irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities must exclude, from the calculation of normal value, all sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation, whether the price is high or low, would distort what is defined as 'normal value'."[76]

8.5 It is arguable that categories above 5% might be excluded on this basis. As the footnote to Article 2.2 of the Anti-Dumping Agreement states:

"Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."

8.6 Once again, the reference is to "normally," and it should be read in the context of the above jurisprudence as to inordinately high or low prices, which may arise with market share above or below 5%.

8.7 Total Steel submits that in calculating normal value, the Commission failed to act consistently with its obligation to take account of all necessary costs and factors impacting on export value and, as such, did not undertake a fair comparison consistent with WTO requirements.

9. The decision erred in the calculation of the export price

9.1 Total Steel agrees with and adopts the grounds identified by JFE in the JFE Application. Total Steel also makes the following submissions on the Commission's errors in the calculation of the export price:

9.2 The export price used to calculate dumping duty payable by Total Steel is unfair and artificially inflates the dumping margin. If JFE is indeed the exporter, its ex works price is not the price in the transaction that brings the goods to Australia and so needs to be adjusted for the extra amount paid by Total Steel that bring the goods to the FOB point. It is equally not the valid price if someone else (eg, MISI) would be seen as the exporter under a proper interpretation of the Customs Act. That would likely substantially lessen the margin and would further undermine the Commission's analysis of price impacts that relied on the level of the margin.

9.3 Total Steel notes that the Commission ought to have acted consistently with the following WTO jurisprudence which is relevant for the determination of export price and the proper comparison with normal values. The approach of ADC makes no allowance for the extra price truly paid by Total Steel to bring the goods to Australia.

9.4 Article 2.4 of the Anti-Dumping Agreement states:

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties

[76] *US—Hot Rolled Steel*, Report of the Appellate Body, WT/DS184/AB/R at [146].

and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties".

9.5 The presumption in the above quote to use the ex-factory basis as the level "normally" referred to, implies that in appropriate circumstances, this should not apply. This is one such case. A comparison should not be made at the factory level where the goods are not sold by the factory to Australia. Even if that is to be the starting point, allowances are to be made for profits accruing, which in this case should include MISI profits at either the export price determination or adjustment stage. If there is a middle-man between JFE and TSA, namely MISI and no middle-man between JFE and domestic customers or a middleman with differing profit margins and costs, this is clearly a factor that affects comparability.

9.6 Where adjustments are concerned, the following jurisprudence is relevant and shows that ADC did not adequately perform its obligations to make appropriate adjustments. In *Egypt — Steel Rebar*,[77] the Panel stated:

"[W]e read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirement in Article 2.4 that '[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability' (emphasis added). We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for 'any other differences which are also demonstrated to affect price comparability' (emphasis added). Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it 'shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties' (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case by-case basis, grounded in factual evidence."[78]

9.7 In *US—Hot-Rolled Steel*,[79] the Appellate Body said:

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

[77] *Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, Report of the Panel, WT/DS211/R (***Egypt—Steel Rebar***).
[78] *Egypt—Steel Rebar*, Report of the Panel, WT/DS211/R. at [7.352].
[79] *US—Hot Rolled Steel*, Report of the Appellate Body, WT/DS184/AB/R.

There are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[80]

The Appellate Body then said that it considered:

"the obligation to ensure a "fair comparison" under Article 2.4 "lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."[81]

9.8 In REP 234, the Commission noted JFE's concern that:

"In relation to models with low domestic sales volumes in Japan, JFE submits:

• that the Commission's methodology of calculating normal values based on the domestic sales price of alternate models, uplifted by an 'arbitrary price adjustment' based on internal price guidance has no evidential basis. JFE state that their internal price guidelines have no application and that the Commission's adjustments do not reflect the differences in cost to make the relevant models. JFE used an example of one particular model with low domestic sales volumes, which it described as the most critical) to show that an uplift for specification differences was unjustified because the cost to manufacture that model was lower than the alternate model"[82].

9.9 This illustrates the Commission wrongly included in its calculation of normal export value prices low volumes of domestic goods with pricing that was not appropriately comparable to the exports.

10. Errors in the finding of material injury to the Australian industry

10.1 Total Steel refers to its submissions in section 5 above.

11. Failure to determine a non-injurious price - flawed methodology

11.1 Total Steel makes the following submission on flaws with the Commission's determination of the non-injurious price (***NIP***).

11.2 The NIP for goods exported to Australia must be determined pursuant section 269TACA of the Customs Act. The Commission's policy for determining NIP is:

"The Commission will generally derive the NIP from an unsuppressed selling price (USP). The USP is a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports."[83]

11.3 On the issue of the appropriate methodology to use for the USP, the Commission pointed to limitations with determining the price of undumped imports by reference to the declared FOB values from the ACBPS import database (eg, the Commission identified reliability concerns and filtering limitations with the database) and concluded that:

"the average weighted selling price of the Australian industry from 2010 to 2012 is the most reliable methodology to calculate an USP."[84]

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[80] *US—Hot Rolled Steel*, Report of the Appellate Body, WT/DS184/AB/R at [177].
[81] *US—Hot Rolled Steel*, Report of the Appellate Body, WT/DS184/AB/R at [178].
[82] REP 234 section 6.5.1 page 40.
[83] *Dumping and Subsidy Manual* page 128.
[84] REP 234 section 10.6.1 page 82.

11.4 As expanded upon below, Total Steel submits that:

(a) in its application of the average weighted selling price methodology, the Commission took into account to inappropriate historical data that did not realistically reflect current circumstances; and

(b) the Commission failed to properly assess the most appropriate methodology to use to determine USP. As a result, the Commission erred in selecting the average weighted selling price as the most reliable methodology.

Errors in applying average weighted selling price

11.5 The Commission used weighted average selling prices in calendar years 2010 to 2012, clearly including periods which are wholly unrealistic in current circumstances (eg, the period chosen covers a boom period for the mining industry whereas the current situations reflects a strong downturn in the mining industry). The Commission's approach is contrary to the guidance set out in the Dumping and Subsidy Manual which reflects that the approach applied must be reasonable and properly account for unsuitable data or data that is not relevant.[85] A consideration of the weighted average selling price during the period unaffected by dumping must be a period that is properly comparable to the investigation period. Because of the downturn in the mining industry, any earlier period would inflate the USP.

11.6 The Commission noted in REP 234 that:

"a downturn in the mining sector led to a rapid decline in demand for Q&T steel plate during the investigation period".[86]

Given that the Commission concluded that reduced demand is likely to have contributed to the lowering of prices, the Commission was also required to indicate how much of such lowering of prices was caused other than by dumping and ensure that this was not attributed to the dumping itself. A calculation of an NIP could only have been validly done under a hypothetical scenario where reduced demand from such a downturn was hypothesised to exist. It would have been wholly inappropriate to look at an earlier point in time before that reduced demand was prevalent.

11.7 The Commission concluded in REP 234 that the injury in terms of price and profit effects due to dumped steel plate is greater than that likely to have occurred in the normal ebb and flow of business in the contracting market.[87] The Commission was required to quantify the difference to ensure that price and profit effects not caused by dumping were not attributed to dumping. REP 234 does not reflect that the Commission undertook this quantification.

11.8 The judge at first instance in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs*[88] quoted with approval from *SPP Nemo SA Comercial Exportadora v Minister of State for Small Business and Consumer Affairs*[89] to the effect that a non-injurious price had to be calculated by reference to the question of material injury and an assessment of its extent and the establishment of the causal link between dumping and the injury must be identified. This is because the Minister under section 269TACA is required to identify as the NIP the minimum price necessary to prevent the injury or the recurrence of the injury. REP 234 does not reflect that the Commission took this approach in determining NIP.

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[85] *Dumping and Subsidy Manual* pages 128 to 130.
[86] REP 234 section 5.4 page 32.
[87] REP 234 section 8.6 page 63.
[88] *Siam Polyethylene Co Ltd v Minister of State for Home Affairs* [2009] FCA 837.
[89] *SPP Nemo SA Comercial Exportadora v Minister of State for Small Business and Consumer Affairs* [1998] FCA 1627

Better methodologies were open to the Commission to use

11.9 There were far better methodologies available for the Commission to use to determine NIP than the approach described by the Commission in REP 234. While the Commission noted that the price of un-dumped imports may at times be a suitable methodology in certain instances, the Commission asserted that the database did not allow comparison based on thickness, width or length. The Commission was inconsistent in aggregating all models and specifications in doing the dumping margin analysis, but not employing the same methodology for USP.

11.10 Even rejecting un-dumped imports as the methodology does not mean that average weighted selling price during boom years is the most reliable methodology. The Commission should have identified a period with similar total demand and other commercial constraints to that which pertained in the investigation period.

11.11 Further, the Commission could have used Bisalloy's own imports from its China joint venture to set a USP. The Commission would have known the prices charged by Bisalloy's joint venture, although of course they would be prices to a related party. The Commission could easily have identified the cost to make of the Chinese joint venture and added a profit that is reasonable in the current steel climate, not the expectations of former boom years.

11.12 Such an NIP would also ensure that Bisalloy could not utilise unfair market power were an anti-dumping duty to remain. If Bisalloy could bar other imports effectively via excessive duty rates and have duty free access to its own goods where those goods can be sold far below the identified NIP, there will simply be no meaningful competition in the Australian domestic market. This is an important issue of public interest.

11.13 Alternatively, an approach that looks at other products produced by the applicant might look at the armoured plate produced by Bisalloy for the Australian Defence Forces and consider the cost, profit and pricing in 2013, being similar market conditions. Even that would be unduly favourable to the applicant given that there is not a similar downturn in defence as there is in the mining sector. For example, total defence funding for 2014–15 will be $29.3 billion. This is a rise of 8.1 per cent (or 5.7 per cent in real terms) and is 12.6 per cent higher than the 2013–14 budget forecast for defence expenditure for that year.[90]

11.14 The Commission's NIP assessment also did not purport to identify a domestic premium that a local producer could charge to account for the closer proximity to customers, the lesser need for transport costs and the lesser risk of international transport.

11.15 The Commission should be asked to review which is the most appropriate methodology to apply to determine the NIP and identify the data that is relevant to use in order to apply the test required by section 269TACA.

12. The decision erred in determining dumping duty on an ex-works basis

12.1 Total Steel refers to the reasons given for Ground 1 in Total Steel's Review Application, which set out the basis for establishing the Commission's error in calculating the dumping duty on an ex works basis (EXW basis).

12.2 In addition to the points from Total Steel's Review Application, Total Steel makes the following submissions concerning the EXW basis:

[90] Budget overview for the Department of Defence http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201415/DefenceBudget

Difficulties in determining the EXW price remain

12.3 Total Steel notes that the Commission has published the details for the Dumping Commodity Register for Quenched and Tempered Steel Plate exported from Finland, Japan and Sweden.[91] The published details fail to resolve the problems identified in Total Steel's Review Application in determining the EXW price. Instead, it is assumed in the document that relevant confidential information from the exporter, which is needed for an importer to show how the imported goods should be treated will be held by the Commission and made available to an importer who provides the required bona fides. The assumption that the Commission will hold those details needs to be properly tested before applying the EXW price.

12.4 If the Commission holds the relevant details now, then for an importer whose bona fides have already been identified (such as Total Steel as an import of relevant goods from JFE), it seems logical that a margin determined on an FOB basis for those importers would be the most appropriate, administratively efficient and least onerous decision.

Change from FOB to EXW remains unexplained

12.5 In Total Steel's Site Visit report,[92] those representing the Commission recommended as follows:

"Subject to further enquiries, it is recommended that the export price for Q&T steel plate imported by TSA from MISI is established under s. 269TAB(1)(c) of the Act, having regard to all the circumstances of the exportation. Specifically, the Commission recommends that the export price be calculated using the invoiced price between TSA and MISI, less deductions to the FOB level as required."

12.6 At no time before the publication of REP 234 did the Commission indicate:

(a) that the recommendation for calculation on an FOB basis would not be adopted;

(b) the reasons as to why that recommendation would not be adopted; and

(c) what (if any) further enquiries were made leading to the decision to adopt the EXW approach.

12.7 Total Steel was not:

(a) made aware that the recommendation would not be accepted;

(b) provided with an opportunity to make submissions on that decision; and

(c) made aware of any of the circumstances leading to that decision.

Had Total Steel been made aware of the Commission's intended approach, Total Steel would have been able to make submissions addressing why the Commission's original recommendation to calculate the export price on an FOB basis was the better approach than on an EXW basis.

13. The decision erred in identifying an Australian industry producing like goods

13.1 Total Steel refers to the reasons given for Ground 3 in Total Steel's Review Application, about the Commission's error in:

[91] http://www.adcommission.gov.au/system/documents/D72254000-150113.pdf
[92] Total Steel Verification Report Public Record document 050.

(a) its findings on an Australian industry producing like goods; and

(b) including JFE TMCP steel plate as goods under consideration.

13.2 In addition to the points from Total Steel's Review Application, Total Steel makes the following submissions about those matters:

Relevant differences overlooked for EH SP and TMCP

13.3 Total Steel wishes to note further examples of relevant differences between goods. The following matters were identified to the Commission but the Commission did not give them sufficient weight:

(a) The Site Verification Report for Bisalloy identifies that across several product grades Bisalloy had identified a comparable JFE product to product produced by Bisalloy.[93] One of those comparisons was to the EH SP (or "Everhard Super") product imported by Total Steel which is sourced from JFE. The Importer Visit Report for Total Steel recognises that Total Steel took exception to EH SP being identified as like goods:

"TSA explained that EH SP contains an additional alloy, Titanium Carbide. This plate wear hardens over time, creating a slippery surface. It further added that Bisalloy do not manufacture an equivalent product."[94]

(b) Total Steel provided further materials to the Commission on the characteristics of EH SP and the significance of this product distinction. For example, the slippery surface meant that equipment with this surface (eg, an earth moving machine) would be more efficient as materials carried using the equipment were less likely to be retained when it was operated to release the material being carried. The EH SP of its nature was different in its physical, commercial, functional and production characteristics to the goods produced by the Australian industry.

13.4 Total Steel acknowledges that the description of the goods includes goods presented in "any surface condition". However, Total Steel notes the substantial interpretation problems already identified with the description of the goods (please see section 6 of this submission). Total Steel submits that the Commission failed to recognise this significant difference between goods produced by the Australian industry and goods exported by JFE.

13.5 Total Steel also refers to its discussion of differences in sections 5 and 7 of this submission, to the extent the differences identified in that section are relevant to applying the test of like goods.

13.6 With respect to TMCP, the Commission was provided with information about end-attributes as well as information about TMCP itself. For example, JFE advised that certain of its grades contain titanium carbide alloy and certain grades have an additional minus 40° Celsius Charpy impact test guarantee. The Commission noted the differences, but concluded without reasons that Bisalloy's Q&T steel plate has characteristics which closely resemble those of imported Q&T steel plate.[95] The Commission provided no logical reason why Bisalloy's product closely resembles each and every one of the imported grades in light of the evidence as to attributes. Simple logic dictates that you cannot be harmed by things you cannot make and which are required by customers. It is again not clear how this conclusion is consistent

[93] Bisalloy Site Verification Report, Public Record document 037 page 14.
[94] Total Steel Importer Visit Report, Public Record document 050 page 10.
[95] REP 234 section 3.7.2 page 23.

with the Commission's conclusion that at least some TMCP processed product should be excluded.

Concluding remarks

The Commission noted various arguments about the public interest in various submissions for the investigation into Case 234, but did not indicate whether the arguments were valid and made no recommendation. The Commission should have assisted the Parliamentary Secretary with such an analysis. The then Parliamentary Secretary could only have meaningfully employed his discretion in that regard with appropriate assistance from the Commission Report and recommendations.

For example, a key public interest issue on the effect of a dumping decision on competition in the Australian market is outlined in section 11.12 of this submission. A further key public interest issue is the effect downstream on the Australian mining industry of imposing dumping margins.