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For Public Record

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Ms Joanne Reid
Director Operations 2
Anti-Dumping Commission
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Ms Reid

Hot Rolled Plate Steel – Investigation into Alleged Dumping and Subsidisation: Statement of Essential Facts (SEF) 198.

INTRODUCTION

1. We represent Bisalloy Steels Pty Ltd (**Bisalloy**), the sole Australian customer for alloyed Q&T Greenfeed exported from the People's Republic of China (**PRC**) during the dumping investigation period. We refer to the Commission's preliminary findings in the SEF in relation to alleged dumping by, and subsidisation of, our supplier, JIGANG, and take this opportunity to support some of the preliminary findings and analyse and identify errors of concern to our client in other findings.

2. Bisalloy welcomes and supports the Commission's proposal to terminate the dumping investigation into Hot Rolled Plate Steel Exports by JIGANG but contends that the preliminary finding of a subsidy margin of 2.6% applying to exports by JIGANG is compromised by a range of errors relating to the Commission's assertions concerning the alleged subsidisation of coking coal by the GOC. In addition Bisalloy submits that even if such a subsidy exists it understands from its supplier JIGANG that a proper calculation of the alleged benefit to JIGANG utilising the amount of coking coal consumed over the IP rather than the amount purchased would yield a negligible countervailing margin. Such a proper calculation would address the critical issue of the tonnes of coking coal used by JIGANG during the investigation period, and the resulting factor of coking coal used for

every tonne of hot rolled steel plate produced by JIGANG during the period. The latter should be applied instead of the factor put forward by the applicant (i.e. 0.88).

3. Furthermore, the ADC itself acknowledges in the SEF[1] that the use of the GOC export coking coal benchmark is also compromised by the absence of any evidence that the coking coal purchased by JIGANG is comparable in terms of quality and price with the exported coking coal. The seriousness of this evidentiary deficiency is magnified by the fact that we understand JIGANG used nine different types of coking coal in 2012. The deficiency could only be overcome if the Commission had access to export prices for each of those types of coking coal, assuming that each type is in fact exported. A benchmark is defined by the Oxford English Dictionary as *...a standard or point of reference against which things may be compared* and implies a reference point that is transparent, reliable, authoritative and productive of fair comparisons. With respect, the export price series adopted by the Commission is totally lacking in any of those characteristics. Furthermore, the price volatility (>30% over the IP) of the GOC export coking coal benchmark adds another level of uncertainty in calculating any countervailing subsidy, particularly when imported coking coal prices into China used by WestPac/BREE (Appendix 1; p.20) may be significantly lower on a quarterly basis depending on the coking coal quality level used by JIGANG compared with the export coking coal benchmark adopted by the Commission. Bisalloy Steels submits that the lack of integrity and comparability in the export price series relied on by the Commission relative to other relevant and verifiable data sources admits of only one conclusion – the use of the series by the Minister in calculating and imposing a countervailing duty would be both inappropriate and unlawful.

4. In addition our client submits that the Commission has failed to identify any basis for a final finding that exports of Q&T Greenfeed to Australia by JIGANG have caused material injury to the Australian industry.

5. In the event that the preliminary finding in relation to the alleged subsidisation of JIGANG's production at more than negligible levels is affirmed in the final report, Bisalloy also requests that in that report the Commissioner brings to the attention of the Minister the anomalous outcomes and national interest implications of any imposition of a countervailing duty on imports of alloyed Q&T Greenfeed.

[1] SEF 198: p.160

ALLEGED SUBSIDISATION

6. The only alleged subsidy of any significance claimed by the Commission to benefit JIGANG relates to the company's purchases of coking coal. The claim is based on assertions by the Commission that some of those purchases have been from state invested enterprises (SIEs), that those enterprises are 'public bodies' that they provide coking coal to JIGANG for less than adequate remuneration and that the benchmark for adequate remuneration is the Chinese export price for coking coal. While it is not contested that JIGANG purchases some of its coking coal requirements from SIEs, the remaining assertions are unsubstantiated and incorrect.

The Commission has failed to establish that the SIE's supplying coking coal to JIGANG are public bodies.

7. The Commission has not even bothered to investigate whether the SIEs supplying coking coal to JIGANG are public bodies for the purposes of the Act. While referring in passing to the decision of the WTO Appellate Body in DS379 the SEF contains no analysis of the application of the three alternative tests set out in that decision. Similarly, while there is a passing reference to a report on Hollow Structural Sections by the Trade Measures Review Officer (Review Officer) dealing with these issues, there is no consideration of the extremely well qualified Review Officer's detailed and careful analysis of the errors made by the Commission or his cogent conclusions[2]. Instead the Commission relies solely on the assertions of a reinvestigation officer contained in a subsequent report[3] relating to the same product. The officer, in an excess of hubris, rejected the considered opinions of the Review Officer without any substantive analysis or persuasive reasoning.

8. In addition to the lack of any authority attaching to the reinvestigation officer's views, the assertion in the SEF in relation to public bodies must also be set aside on the ground that the Commission cannot simply assume that evidence (if any) and assessments relating to SIE's supplying hot rolled coil steel to producers of coated steels applies to other specifically identified SIE's selling coking coal to a producer of plate steel. If the Commission wished to pursue the issue of subsidisation in this matter it had a duty to investigate, assemble evidence and formulate conclusions specific to the market for coking coal sold to plate steel producers in China. It has failed to do so.

[2] TMRO Report, 14 December 2012: paragraphs 219 - 250

[3] REP 203.

9. Although the Commission's failure invalidates a preliminary finding that actionable subsidisation has occurred, we take this opportunity to address the three alternative public body tests posited by the Appellate Body.

Is there a legal instrument expressly vesting government functions and authority in any Chinese producer of coking coal?

10. If there was such an instrument the Commission would undoubtedly have highlighted it in the SEF. In addition we note that in all previous inquiries concerning allegations of subsidisation of exports from China, the Commission has never identified any such instrument.

Do the SIE's that supply JIGANG with coking coal have the power to control, compel, direct or command JIGANG?

11. As the Commission has not even addressed this question, there is obviously no relevant evidence on the issue and on this ground alone the second test established by the Appellate Body has not been satisfied. Even if regard is had, unlawfully, to other findings by officers of the Commission in relation to different raw materials supplied by different SIEs, those findings are limited to observations that some SIE's were complying with policies of the GOC. As the Review Officer observed[4]:

> ...active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons .
>
> Accordingly I consider that Customs had no basis to conclude that the second limb of the Appellate Body test was met.

Does the conduct of the SIEs that supply JIGANG with coking coal serve as evidence that they possess governmental authority and exercise that authority?

12. As there is no evidence about the conduct of the SIEs in the present matter, obviously the Commission has failed to satisfy this test. Again what it has attempted to do, unlawfully, is rely on the other findings referred to above. In claiming that findings in other matters are 'equally' relevant to the present case the Commission completely ignores the caution enjoined by the Appellate Body[5] in any consideration of the public body issue:

[4] TMRO Report, 14 December 2012: paragraphs 246 - 247
[5] DS 379: paragraph 317

> Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.

13. There is no evidence of the 'core features' of any of the SIEs supplying coking coal to JIGANG. Instead the Commission purports to rely on one of its earlier conclusions, dismissed by the Review Officer, that certain *...notices and laws demonstrate that the GOC exercises meaningful control over iron and steel producing SIEs*[6]. Even if this incorrect conclusion was transferable to the present matter it still does not establish that the third test has been met. That test, enunciated by the Appellate Body also requires that the Commission produce *...evidence that such control has been exercised in a meaningful way*[7]. The Commission has produced no such evidence.

14. As there is no evidence of the provision of goods to JIGANG by a public body we submit that the Commissioner must forthwith terminate the investigation under s.269TDA(2)(b)(i) of the Act.

There is no evidence of inadequate remuneration or of any benefit to JIGANG flowing from its purchases of coking coal from SIEs

15. It is not disputed that there is evidence that SIEs sell coking coal to JIGANG. But even assuming that those sales are by a public body and fall within subparagraph (ii) of paragraph (a) of the definition of subsidy in Section 269T of the *Customs Act 1901 (Cth)* (**Act**), there is absolutely no evidence that a benefit flows to JIGANG as a result of its purchases from SOEs.

16. Section 269TACC of the Act provides certain guidelines for the Minister in ascertaining whether any financial contribution found to exist confers a benefit. The relevant guideline in relation to provision of goods by a government is paragraph 269TACC(4)(d), which establishes a negative standard by providing that *...the provision of goods ...does not confer a benefit unless ...the goods are provided for less than adequate remuneration*. Thus there is a presumption that the provision of goods does not confer any benefit and to overturn that presumption the first requirement is to establish whether selling prices of coking coal to JIGANG by SIEs result in adequate remuneration to the seller. As the Review Officer

[6] REP 203: p.56
[7] DS 379: paragraph 318

has pointed out, this requires an assessment of the return on investment of the SIE. If it is found that the remuneration to the SIE has been adequate that is an end to the matter. The legislative standard is unequivocal; there is no benefit to the purchaser in those circumstances (and no countervailable subsidy) even if, for example, SIE prices are lower than private prices (which is not the situation in the present matter.)

17. Accordingly, the obligation on the Commission is to determine whether SIEs recover their costs, plus a reasonable return on capital, from their sales of coking coal. In the present matter neither the applicant nor Customs has presented any direct evidence concerning the financial performance of SOEs.

18. On the other hand if the remuneration received by SIEs is judged to be less than adequate, then the second requirement of the legal standard must be assessed, namely the amount of the benefit enjoyed by the purchaser.

19. The Commission's approach is to ignore the terms of the legislation and the views of the Appellate Body and the Review Officer by conflating the issues of adequate remuneration, market situation and competitive market cost in its search for a 'benchmark'. Assessment of a benchmark, however, is only relevant to the secondary matter of the measurement of a benefit, not the primary issue of whether one exists. That primary issue depends on an assessment of evidence relevant to the determination of the adequacy of remuneration received by SIE's. As the Commission has not even acknowledged this requirement let alone assembled relevant evidence, we submit again that the countervailing investigation must be terminated.

What is the correct benchmark for assessing the existence and amount of any alleged benefit to JIGANG?

20. Even if the Commission's failure to engage with the adequate remuneration issue is put to one side, its approach to assessing if, and to what extent, JIGANG receives any benefit from purchasing from SIEs is clearly contrary to the relevant provisions of the Act.

21. The Appellate Body has stressed that in most circumstances private domestic prices for manufacturing inputs must be used as the benchmark for calculating the amount of any benefit accruing to a producer of a finished good:

> Although Article 14(d) does not dictate that private prices are to be used as the *exclusive* benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.[8]

22. The Appellate Body added:

> We emphasize once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited. We agree with the United States that "[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted". Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.[9]

23. Thus the potential ground allowed by the Appellate Body for the use of a benchmark other than private domestic prices is where the Government's predominant role in the market has distorted those prices. However without even addressing the issue of the degree of SIE involvement in the coking coal market, the Commission has rejected private domestic prices in China as a benchmark for assessing benefit with the following three statements[10]:

> *The Commission found that private prices of coking coal were affected by government influence and therefore not suitable.*
>
> *The Commission's assessment of data submitted by JIGANG shows that there is no significant difference between coking coal and coke prices from SIE and private suppliers.*
>
> *The Commission considers that private domestic prices of coking coal in China are not suitable for determining a competitive market price free from government influences.*

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[8] DS 257: Paragraphs 100 -103
[9] Ibid, paragraph 118
[10] SEF 198: p.158

24. The first statement relates to the normal value issue of 'market situation' in a dumping inquiry, not to a proper assessment of benefit in a countervailing investigation. A finding of 'government influence' is unremarkable as most governments influence the price of key raw materials in a variety of ways. Such influence cannot be assumed to result in price 'distortion' due to a predominant government role in the market but the Commission has made both those assumptions in clear defiance of the ruling of the Appellate Body.

25. While the second statement is accurate it does not provide any basis for a conclusion that private domestic prices are not an appropriate benchmark. Average prices paid by JIGANG to private producers for coking coal during the investigation period are slightly lower than prices charged by SIEs. Clearly this supports the view that there is a competitive market, that it is just as likely those private prices are influencing SIE prices as the obverse assumption and that these price levels provide a reasonable rate of return to the shareholders of the private companies. Again the statement by the Commission simply does not support a conclusion that prices are distorted.

26. The third statement again conflates dumping and subsidy issues. Whether domestic prices of coking coal reflect a competitive market price free from government influences is totally irrelevant to the question of whether private domestic prices are distorted because of a predominant role of government.

27. A further consideration arises out of the application of the ordinary meaning of the word 'benefit' which must be understood in the present context as denoting an advantage to the recipient of the financial contribution.[11] A 'benefit' only exists if the recipient is left better off. The finding in the SEF that sales by SIE's confer a benefit is unsustainable in the light of clear evidence that during the investigation period a significant proportion of JIGANG's purchases were from private producers and the equally clear evidence that average prices paid to SIEs were slightly higher than average prices paid to private producers.

28. In this matter, it is clear that JIGANG is not left any better off through purchasing from SIEs than through purchasing from other suppliers. In the absence of any advantage to JIGANG, there is simply no 'benefit' in terms of the relevant provisions of the Act.

[11] As the WTO Appellate Body explained in *Canada – Aircraft*, 'there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been.': WT/DS70/AB/R, para 157.

29. In conclusion the Commission has failed to establish that the SIEs supplying coking coal to JIGANG are public bodies, that they are selling at less than adequate remuneration and that JIGANG has received a benefit by purchasing coking coal from SIEs. We submit that these failures require the Commissioner to terminate the countervailing inquiry forthwith.

MATERIAL INJURY

30. We submit, on two grounds, that there is no evidence to support a finding by the Minister that allegedly subsidised consignments of Q&T Greenfeed exported to Australia during the investigation period have caused material injury to the applicant and consequently there are no lawful grounds for the Minister to publish a countervailing notice under s.269TJ(1) & (2) of the Act.

31. Firstly, the Commission acknowledges in the SEF that the market for Q&T Greenfeed is separate from the market for non-alloyed steel plate[12] and consequently that …*imported Q&T Greenfeed competes only with Bluescope's domestically produced Q&T Greenfeed.*[13] There are further admissions that Q&T Greenfeed was excluded from the Commission's analysis of volume, price and profitability effects[14]. As a result, despite a bland assertion to the contrary in section 5.4 of the SEF, the Commission's injury analysis in the report is clearly limited to consideration of the impact of dumped imported non-alloyed steel on BlueScope's production of that product only. There is no consideration or analysis of the question of whether the almost negligible margin of alleged subsidisation of Q&T Greenfeed could have possibly caused any material injury to the applicant and consequently there are no grounds for the publication of a countervailing notice.

32. Secondly, any injury to the applicant caused by exports of Q&T Greenfeed from China that allegedly benefit from a 2.6% subsidy cannot be regarded as material. Those exports amount to less than 5% of the applicant's annual plate steel production and we estimate that the impact, if any, of those exports on the volume and value of that production would be miniscule. Again, in the absence of any injury that could possibly be described as material there is no ground for the publication of a countervailing notice.

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[12] SEF 198: p.22
[13] Ibid p.46
[14] Ibid

NATIONAL INTEREST

33. While we appreciate that the Commissioner has no statutory role in relation to the Minister's discretion not to publish a countervailing notice on the ground of public interest, we request that the following points be brought to the Minister's attention in the final report.

34. The purpose of dumping and countervailing is to provide Australian industry with relief against import competition in certain prescribed circumstances. Paradoxically, the only beneficiaries of a countervailing notice in the present matter would be exporters and importers of finished Q&T steel plate who already enjoy a market share of more than 55%. All Australian manufacturers, including BlueScope, with an interest in the production and supply of Q&T Steel Plate would be worse off as a result of the imposition of a countervailing duty on Q&T Greenfeed.

35. As the sole Australian manufacturer of finished Q&T plate steel, Bisalloy has to compete with imports of that finished product. As the proposed countervailing duty will only apply to imports of Q&T Greenfeed and not to the finished product there will be an immediate erosion of our client's competitive position as a result of the increase in raw material costs. The inevitable loss of business to importers of the finished product will result in significant reductions in revenue and profitability, a second phase increase in costs, a reduction in the investment so essential to Bisalloy's performance as a technological innovator and the very real possibility of a reduction in the labour force.

36. We note that dumping and countervailing duties are trade <u>remedies</u> designed to deliver to affected Australian industries a degree of relief from import competition. Far from realising that objective, the imposition of a countervailing duty in the present case will, in fact, result in a deterioration in the applicant's competitive position. BlueScope's major competitors are the importers of Q&T Steel plate who already supply over 55% of the Australian market. If a countervailing duty is imposed on Q&T Greenfeed it is those importers who, perversely, will increase their market share for the finished product at the expense of the applicant's production of Q&T Greenfeed.

37. In summary, the result of any imposition of a countervailing duty on Q&T Greenfeed would directly undermine the objectives of Australia's trade remedies legislation and by increasing significantly the cost base of steel production in Australia it would be directly contrary to the national interest.

Yours sincerely
MINTER ELLISON

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