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LAWYERS

22 March 2013

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Director Operations 3
International Trade Remedies Branch
Australian Customs & Border Protection Service
Customs House
5 Constitution Avenue
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Dear Sir/Madam

Hot Rolled Plate Steel – Investigation into Alleged Dumping and Subsidisation: Request for Redefinition of the Goods under Consideration

We represent Bisalloy Steels Pty Ltd (**Bisalloy**) in relation to the above matter and request that Customs immediately redefine the goods under consideration (**GUC**) to reflect the separate markets that exist for the applicant's sales of the products identified in its application.

Bisalloy is Australia's only manufacturer of high-tensile, abrasion-resistant and armour grade quenched and tempered steel plate, marketed under the brand name "Bisplate®". The feedstock for the manufacture of Bisplate is non-heat treated alloyed steel plate, commonly known as Q&T Greenfeed, that Bisalloy Steels purchases primarily from Bluescope Steel Limited (**BSL**) and to a more limited extent from mills in China and Korea. For further details we refer you to – www.bisalloy.com.au.

Bisalloy is the sole Australian user of alloyed Q&T Greenfeed which is purely an intermediate alloyed product used in the manufacture of quenched and tempered alloy steel plate and is unsaleable for any other purpose, as without heat treatment it has no application. Production costs and selling prices are at substantial premium to non-alloyed steel plate and in the case of the finished product – Q&T alloy steel plate – there is a significant increment to this premium resulting from the cost of the substantial manufacturing process of heat treatment involving shot blasting, hardening, quenching, tempering and levelling.

Alloyed Q&T steel plate in both its intermediate and finished form is a very different product to non-alloyed steel plate. The combination of additive amounts of alloys and the subsequent heat treating process together with precise specification of chemical profiles and grain structures are designed to achieve high strength, impact and abrasion resistance mechanical properties that non-alloyed steels cannot provide. These factors, together with the different cost and price profiles referred to above and the separate and distinct markets for alloyed Q&T Greenfeed and non-alloyed steel plate, result in a situation where, within the GUC nominated by the applicant pursuant to s.269TB(1) of the *Customs Act 1901* (Cth) (**the Act**), there are two categories of product that are not 'like' in that they are neither identical nor do they have 'closely resembling' characteristics.

This situation has occurred previously in dumping investigations conducted by Customs. For example, in 2001 Customs had already commenced an investigation in which the applicant had nominated the goods collectively as pineapple juice concentrate, canned consumer pineapple and canned pineapple for the food services industry (**FSI**)[1]. At an early stage of the investigation process Customs concluded, correctly, that these categories constituted different 'goods' and that three separate, parallel investigations must be conducted. Each category was the subject of separate analyses and conclusions relating to normal values, export prices, non-injurious prices, material injury and causation and separate dumping notices for each category were published by the Minister. In successive reviews and investigations over the past decade Customs has maintained this approach, again correctly, in relation to two of the categories – canned consumer and FSI pineapple.

In 2012 we understand that Customs received, or became aware that it was about to receive, a single dumping application covering Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel[2]. Before acceptance and presumably prompted by the obvious existence of two separate categories of goods, the intended single application was replaced with two separate applications which nevertheless are the subject of joint investigations to be covered in a single report. In substance the approach taken by Customs is no different to that taken in the pineapple investigation.

In contrast to the legally correct and administratively sound approaches taken in those examples Customs adopted a different position in the recent original investigation into Hot Rolled Coil Steel[3], another case involving categories of goods within the GUC that were not 'like'. In

[1] REP.41
[2] CON. 193
[3] REP. 188

rejecting submissions from interested parties that the categories of goods should not have been amalgamated in the investigation Customs stated:

> *...that the product description set for an investigation, which defines the goods under consideration, is determined by the party that is applying. Neither the Customs Act nor the Anti-Dumping Agreement imposes an obligation concerning the scope of the product that is subject to an investigation. That said the goods that are ultimately covered by the dumping investigation will affect the injury analysis in relation to the goods, as covered in chapter 7.*[4]

However, none of the three propositions set out in that statement supports the approach taken by Customs. The first, relying on a Pontius Pilate defence, is both disingenuous and a denial of the role and responsibilities of an administering authority. Prior to lodgement of a formal dumping or countervailing application there is protracted dialogue between Customs and potential applicants during which there is ample opportunity for the resolution of such matters as product definitions and the scope of the application and subsequent to lodgement the CEO has the power to reject the application if the proposed product definitions are incompatible with fulfilment of the purposes of the Act and the WTO Anti-Dumping Agreement.(**ADA**). Furthermore a redefinition of the GUC by the administering authority after the commencement of the investigation is not prohibited by the Act and, as we shall see below, is an option sanctioned by the Appellate Body of WTO.

Contrary to the implication in the second proposition, the WTO Panel in the authority cited by Customs clearly rejects the notion that the identification of a domestic industry is not an obligation of an investigating authority, stating that:

> *In our view, merely that Article 4.1 sets out a definition does not preclude a panel finding that the decision of the investigating authority concerning the appropriate domestic industry is inconsistent with the AD Agreement. The question whether the EC defined the domestic industry in a proper manner may well be decisive in the consideration of other claims in dispute, i.e. subsidiary claims regarding initiation, as well as claims regarding injury and causation.*[5]

The Panel's observations point to the fundamental obstacle, partly acknowledged in Customs' third proposition, to an objective examination of material injury and causation that may be

[4] Ibid: s.4.5.1
[5] DS 337: EC - Salmon (Norway): para 7.118

created by a broad goods description. Such observations are reconcilable with comments by WTO Panels in other matters to the effect that the ADA does not require all products falling within the GUC to be like goods[6] or to be homogeneous[7]. The issue is essentially one of degree. The fact that a particular GUC description may include some examples of individual products that are not 'like' is unremarkable and not, in itself, a threat to the cogency, objectivity and legality of a single macro-analysis of material injury and causation. That threat is realised, however, in circumstances where the GUC contains two or more substantial categories of goods which are not 'like', which do not exhibit any significant degree of substitutability and which are both of a particular kind and cannot be classified as goods of the same kind[8]. At the heart of any robust causation analysis is an examination of the impact of the export of alleged dumped goods of a particular kind on the economic performance of an industry producing goods of the same kind. In cases where there is more than one significant product or group of products of a particular kind, the fundamental principle of causation is traduced by any attempt to attribute material injury to the production of goods of one kind to the alleged dumping of exports of another kind that are neither 'like', nor substitutable for, the goods of the first kind.

In the present matter the magnitude of the differences between alloyed Q&T Greenfeed and non-alloyed steel plate is at least as great as that applying in the examples cited above of Customs providing a constructive response to the appropriate scope of particular inquiries. The differences include physical characteristics, tariff classifications, product performance, end uses, separate markets, costs and prices and the absence of substitutability and are of a kind and significance that precludes the lawful continuation of the present inquiry on any basis other than separate assessments for alloyed Q&T Greenfeed and non-alloyed steel plate of all injury and causation factors.

Any repeat of the assertion in the HRC Steel case that separate assessments are beyond the authority of the administering body must be dismissed on a range of grounds. Such an assertion implies that unlike all other key elements of an investigation the scope and character of the description of the GUC is unalterable from the moment of initiation. The claim is obviously at odds with the approach taken by Customs in the examples cited above and also contrasts with other recent cases such as Certain Aluminium Extrusions where during the course of the investigation the scope of the GUC was the subject of an Issues Paper and ongoing investigation. These approaches recognise that the essential purpose of an investigation is to gather and assess evidence in relation to the key determinative factors and formulate objective reasoned

[6] Ibid: para 7.68
[7] DS 397: EC - Fasteners (China): para 7.265
[8] *Customs Act 1901 (Cth)* – s.269TG(1),(2) &(3) and s.269TAE(1).

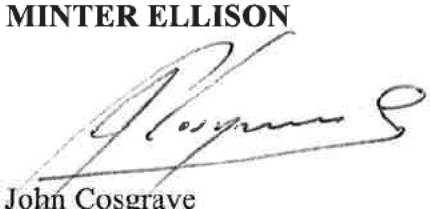
conclusions based on that evidence. Inevitably in the course of an investigation process there will be occasions when the tentative conclusions reached at the time of consideration of an application will have to be modified, altered or overturned. That this situation can occur in relation to the definition of the goods under consideration is clearly recognised by the Appellate Body of the WTO in *EC-Bed Linen*:

> *...we are bound to add that, if the European Commission wanted to address, in particular, certain types of bed linen, it could have defined, or redefined, the product under investigation in a narrower way.*[9]

As the applicant has not provided any evidence of dumping, material injury or causation in respect of alloyed Q&T Greenfeed steel plate, the conclusion by the CEO in Consideration Report 198 that there appear to be reasonable grounds for the publication of a dumping duty notice in respect of goods of that particular kind cannot be sustained. In these circumstances the most appropriate course of action for Customs would be to invite BSL to act pursuant to s.269TB(3) of the Act and withdraw its application so far as it extends to exporters of goods of that particular kind from China and Korea. Alternatively we submit that Customs should immediately publish a notice redefining the goods under consideration as alloyed Q&T Greenfeed on the one hand and non-alloyed steel plate on the other and providing for the investigation to be conducted as two separate, parallel investigations with separate assessments of variable factors, material injury and causation.

We would appreciate an early response to these representations.

Yours sincerely
MINTER ELLISON



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[9] DS 141/AB/R: para 62