11 May 2016

Mr Reuben McGovern  
Case Manager  
Anti-Dumping Commission  
Level 35  
55 Collins Street  
MELBOURNE VIC 3000

By email: operations3@adcommission.gov.au

Dear Mr McGovern,

Response to Statement of Essential Facts  
Dumping and Subsidy Investigation No. 316: Grinding Balls exported from China

The Australian industry co-applicant Moly-Cop makes this submission in response to Statement of Essential Facts No. 316 (SEF) placed on the public record of the Australian Anti-dumping Commission (Commission) on 21 April 2016.

In summary, the Moly-Cop is generally supportive of the Commission’s assessments, save for the following matters of ongoing contention:

1. The Commission has previously relied on benchmark market costs reflective of domestic market conditions. The use of export prices as benchmark competitive market costs is unsound;

2. Preliminary securities have been imposed using the *ad valorem* form of measures. The combination method of interim dumping duty calculation should be recommended, as it ensures that the measures are fully effective at addressing the punitive effects of dumping against the Australian industry;

3. A dumping duty notice should be issued retrospectively for goods entered for home consumption up to 90 days prior to the taking of securities under section 42 of the *Customs Act 1901*¹ in accordance with subsection 269TN(3); and

4. The subsidy investigation should be extended to assess the pass-through of benefits to the exporters/producers of benefits conferred to upstream inputs, specifically steel billet (Program 1) and electricity (Program 2). In relation to Program 2, the Commission has failed to recognise the regional specificity of that program as alleged by Moly-Cop.

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¹ References to legislative provisions shall be references to provisions of the *Customs Act 1901*, unless otherwise specifically stated.
1. The Commission has erred in selecting prices based on export market conditions as an appropriate benchmark for competitive domestic market costs.

Moly-Cop is unable to reconcile the Commission’s selection in SEF 316 of the *Platts Latin American Billet FOB export price* as a suitable benchmark for domestic Chinese costs.

WTO jurisprudence currently supports the view that when comparing domestic prices to a price benchmark (in the context of the related matter of alternative benchmark selection to test adequacy of remuneration claims under Article 14(d) of the *Subsidies and Countervailing Measures Agreement*), then competitive price benchmark should be based on domestic market conditions.

Therefore in *US–Softwood Lumber IV*[^2], the United States’ approach in constructing an alternative benchmark based on prices of stumpage in bordering states of the northern United States was not overturned. Again in *US – Anti-Dumping and Countervailing Duties (China)*[^3], the United States’ reference to published domestic price information for hot rolled structural steel inputs was not overturned. Similarly, the Commission’s approach in recent matters concerning the selection of suitable competitive external benchmark prices for steel inputs has been to base these benchmarks on domestic values.

- **Hot rolled plate steel exported from China et Ors (REP 198):** The Commission determined that an appropriate benchmark for HRC [hot rolled coil] costs in China is the weighted average domestic HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea and Taiwan, at comparable terms of trade and conditions of purchase to those observed in China.[^4]

- **Hollow structural sections exported from China et Ors (REP 177):**
  - the weighted average of verified domestic black HRC costs incurred by exporters cooperating with the investigation into HSS from Korea, Malaysia and Taiwan to arrive at a black HRC price; and
  - the weighted average of verified data of domestic pre-galvanised HRC costs incurred by cooperating exporters from Korea and Taiwan to arrive at a pre-galvanised HRC price.[^5]

- **Zinc coated (Galvanised) steel and aluminium zinc coated steel exported from China et Ors (REP 190):**
  The benchmark for hot rolled coil was established by reference to domestic production costs of exporters from Korea and Taiwan.[^6]

[^4]: EPR Folio No. 198/179 at p. 67.
[^5]: EPR Folio No. 177/410 at p. 258.
[^6]: EPR Folio No. 190/142 at p. 55.
Therefore, the Australian industry applicant submits that it is not consistent with WTO-compliant practice or even the Commission’s policy and practice to base an external competitive benchmark for market costs on an export price index. Instead, the use of other country domestic price information as a suitable external benchmark is consistent with the principle of trying to achieve parity between the market conditions for the supply of goods to the producer in the country of export, with the other, benchmark country. This is not so easily achieved through an export price benchmark which reflects market conditions that cannot be accounted for through adjustments if required.

In the absence of verified, reliable domestic price information available concerning other countries, Moly-Cop referred the Commission to the published monthly domestic EXW billet price information available from MEPS (International) Ltd (“MEPS”). In the submission dated 1 April 2016, Moly-Cop provided endorsements for MEPS as a reliable, reputable and internationally regarded supplier of objective steel price data, regularly used by leading, WTO-compliant anti-dumping administrations including, but not limited to the Commission.

Moly-Cop provided the Commission with a reproduction of a subscription to MEPS Semi-Finished Steel Review containing domestic ex-works billet pricing for the period August 2014 to October 2015. The express written permission from the publisher for the information to be used was also included as a confidential attachment to the submission.

In the Commission’s consideration of a benchmark for Chinese grinding bar costs, SEF 316 states:

“The Commission considers that the Latin American steel billet export prices at FOB level published by McGraw Hill Financial Services (Platts), forms an independent and reliable basis for the steel billet input component”; and

“The Latin America region includes two of the top 13 countries, Brazil and Mexico [emphasis added], based on crude steel production volumes. Consequently, the Commission considers that the Latin America region has sufficient volume to reflect competitive market conditions.”

In relation to the exports of billet from Brazil, Moly-Cop provides further information for the Commission’s consideration. CONFIDENTIAL ATTACHMENT A contains a response from [global research unit] on a Moly-Cop query as to the Latin American billet export origins and destinations. It is noted that billet exports from Brazil form the overwhelming majority of the total billet exports from Latin America in 2014 and 2015,

and that

7 EPR Folio No. 316/029 at p. 4.
8 EPR Folio No. 316/033 at p. 24.
Since the Latin American billet export price appears to be heavily influenced and potentially tainted by transactions between [related party nature of export sales] and given the reservations expressed above to use of an export price benchmark, Moly-Cop urges the Commission to reconsider its selection of billet benchmark. It would be an anomalous outcome for the Commission to accept sales values between related parties as reflective of competitive market conditions. Clearly, the Latin American billet export price is not suitable as a benchmark for the purposes of this investigation.

Moly-Cop submits that the most appropriate alternative may be for the Commission to use the MEPS monthly US$/t domestic ex-works billet price for Mexico. As already pointed out by the Commission, Mexico is one of the top 13 countries in terms of crude steel production volumes and forms part of the Latin America region which “has sufficient volume to reflect competitive market conditions”.

2. The most appropriate form of measures should be based on the combination form of duty method rather than the ad valorem form of duty method

Moly-Cop fully supports the Commissioner’s recommendation to publish a dumping duty notice in relation to grinding balls exported from China, but disagrees that the ad valorem method is the most preferable form of measure. Moly-Cop submits that the ad valorem form of duty calculation is most likely to fail in its primary purpose of “removing the injurious effects” of dumping as it does not prevent the most basic form of avoidance, ie. duty absorption by an exporter.

The Commission’s main reasons for recommending the ad valorem form of measure are fundamentally flawed for several reasons.

Firstly in the SEF the Commission notes: ⁹

“the high combined dumping and subsidy margins calculated (ranging from 12.6 to 58.9 per cent for cooperating exporters and 113 per cent for uncooperative exporters, with a weighted average margin of 22.7 per cent), reduces the likelihood for significant reduction in export prices to avoid the intended effect of the duties…”

Any assessment based upon a weighted average dumping margin is irrelevant and erroneous, as it only takes one exporter to cause significant injury. What is relevant in assessing the likelihood of a reduction in export prices designed to avoid the intended effect of duties, is the level of the lowest dumping margins. Longte, understood to be the largest exporter, has the lowest interim dumping margin of only 12.6%.

⁹ EPR Folio No. 316/033 p. 63 refers
The graph below shows that Longte has already demonstrated the ability to fully absorb this level of dumping margin. Following the initiation of the investigation in November 2015, Longte have reduced their export price by approximately 18% exceeding the ad valorem rate of 12.6%.

![Graph 1: Longte grinding ball export price](image)

Refer Confidential Attachment B.

In addition to Longte being the largest exporter with the lowest dumping margin, the Commission has identified that there is such:

> “[a] close structural and commercial relationship between Longte, Longteng and ME Longteng the verification team considered it was appropriate to treat these companies as a single entity for the purpose of calculating a dumping margin.”

The Commission’s own Guidelines on the Forms of Duties states that when these conditions occur the combination method is the preferred form of duty:

> “[Combination method] is suited to circumstances where there are complex company structures with related parties; and where circumvention of measures is likely.”

In relation to the higher dumping margins of the other exporters, Goldpro, Xingcheng and Yute, Moly-Cop acknowledges that it is likely that ad valorem duties in the range of 38% to 104.8% will be effective, but only for 12 months. The Commission is aware that after the first 12 months exporters are able to reduce their dumping margins via the Review of Measures process. Once exporters have obtained a significantly lower dumping margin, they have the capacity to absorb the duty and continue to cause

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11 Anti-Dumping Commission “Guidelines on the Application of Forms of Dumping Duty – November 2013” p. 4 refers
injury to the Australian Industry. There is also no guarantee that their relatively high PAD margins will in fact be their final margins.

Another reason given by the Commission\textsuperscript{12} for imposing the \textit{ad valorem} method is:

\begin{quote}
\textit{the measures will better reflect changes in the market, because raw material prices can fluctuate dramatically, reducing the effectiveness of floor prices.}
\end{quote}

Whilst it is true that raw material prices will fluctuate, Moly-Cop disagrees that this reduces the effectiveness of the floor prices as it ignores the fact that the combination method (as the name suggests) has both a (fixed) \textit{ad valorem} component and a (variable) floor price component. If international prices increase to the extent that the floor price component no longer becomes operative, the \textit{ad valorem} component (when applied as a percentage) operates exactly the same as for the \textit{ad valorem} as a single measure. If raw material prices reduce to the extent that international prices fall, the floor price actually becomes more effective as it captures a higher interim dumping duty. This should not be regarded as punitive as in the Australian anti-dumping system if excess interim dumping duty is collected, the duty assessment procedures operate to refund that excess in the course of determining the final duty liability. It is noted that there is no capacity to collect any short-fall in duty liability.

A further reason given by the Commission\textsuperscript{13} for imposing the \textit{ad valorem} method is:

\begin{quote}
grinding balls imported from China can have various price points for different models…. The combination duty method, like the floor price duty method and fixed duty method, may not suit those situations where there are many models or types of the good with significantly different prices.
\end{quote}

Moly-Cop submits that whilst there may different models of grinding balls exported to Australia, the price differences between those models is likely to be relatively minor. For Moly-Cop the variation between models is typically less than x\%. However, even if the Commission considered that the price difference between the grades and/or models is such that a single AEP cannot be applied, then it is submitted that the lowest AEP determined for the goods under consideration be taken to form the variable component of the combination form of measures.

3. **The Dumping Duty Notice** should be issued retrospectively for goods entered for home consumption up to 90 days prior to the taking of securities under section 42 of the *Customs Act* in accordance with subsection 269TN(3) of the *Customs Act*

Moly-Cop welcomes the Commission alerting exporters in \textit{ADN 2016/45} that the Minister has the ability under section 269TN to apply retrospective measures. Moly-Cop calls on the Commission to recommend that the retrospective measures apply to exporters attempting to export large volumes of grinding balls to Australia following

\begin{footnotesize}
\textsuperscript{12} EPR Folio No. 316/033 at p. 63.
\textsuperscript{13} EPR Folio No. 316/033 at p. 63, refers
\end{footnotesize}
initiation of the investigation on 17 November 2015 and prior to dumping securities being imposed on 21 April 2016.

For retrospective measures under section 269TN to be applied the Minister must be satisfied that:

“(3) (a) within 90 days after the entry of the goods for home consumption, security has been taken under section 42 in respect of any interim duty that might be payable on goods of the same kind under section 8 of the Dumping Duty Act or, within that period, the Commonwealth had the right to require and take such security: and

“(b) the Minister considers that material injury has been caused to an Australian industry by the export to Australia during a short period of large quantities of goods of the same kind, being injury arising by reason of the amount of the export price of the goods exported being less than the amount of the normal value of the goods exported, and the Minister considers that the publication of the notice is necessary to prevent the serious undermining of the remedial effect of the dumping duty that will become payable upon publication of the notice.

“(4) Subsection (3) applies to goods:

“(a) that have been imported into Australia by an importer who the Minister considers knew, or ought to have known, that the amount of the export price of the goods was less than the normal value of the goods and that by reason thereof material injury would be caused to an Australian industry…”

Moly-Cop asserts that the conditions by which the Minister can apply retrospective measures have been met, specifically:

Paragraph (3)(a): The goods entered for home consumption after the initiation of the investigation fall within the 90 day time limit that the Commonwealth had the right to take securities as this right occurs after day 60 of an investigation.

Paragraph (3)(b): The Commission has determined in the SEF and PAD that material injury has occurred during the investigation and notes that the volumes have surged by 50% (annualized projection) following the end of the investigation period:

“The Commission notes that the total import volume of grinding balls from China was approximately 40,000 tonnes during the investigation period but the total imports of grinding balls from China is approximately 31,600 tonnes in the six months following the end of the investigation period. If these volumes of imports from China are sustained over the next six months this will...
result in a 50 per cent increase over the 12 month period following the investigation period."  

Paragraph (4)(a): The simple fact that the Commission initiated an investigation and outlined the claims in Consideration Report 316, demonstrates that the importers ought to have known that the exported goods were less than the normal value of the goods and that material injury would have been caused to the Australian industry.

It is for these reasons that Moly-Cop requests that the Minister inform the importers found to be importing surging volumes of grinding balls post initiation of Investigation No. 316, of the decision to impose retrospective measures as the necessary pre-cursor to imposing them in the final decision.

4. The subsidy investigation should be extended to assess the pass-through of benefits to the exporters/producers of benefits conferred to upstream inputs, specifically steel billet (Program 1) and electricity (Program 2). In relation to Program 2, the Commission has failed to recognise the regional specificity of that program as alleged by Moly-Cop.

Program 1: Steel billet at less than adequate remuneration

Moly-Cop observes that the Commission has reached the preliminary conclusion that Program 1 (Steel billet at less than adequate remuneration) was not a countervailable subsidy. The basis for this conclusion appears to be on a narrow reading of the “pass-through” of benefits from subsidised inputs.

In SEF 316, the Commission held out the following reasons in support of this preliminary finding:

- the cooperating exporters do not purchase steel billet for the production of grinding balls; and
- the Commission has not been presented with evidence that suggests the grinding balls industry receives preferential pricing for steel billet.

Firstly, the Commission is wrong for concluding that Program 1 does not constitute a countervailable subsidy because “cooperative exporters do not purchase steel billet for the production of grinding balls”. By the Commission’s own admission, the “cooperative exporter”, Xingcheng, does in fact purchase steel billet and convert it to grinding bar:

“Xingcheng’s actual verified costs to convert billet to grinding bar… Xingcheng’s actual verified costs to convert grinding bar to grinding balls”

However, even if we accept that the remaining “cooperative exporters” namely, Longte, Goldpro and Yute, did not purchase steel billet, the evidence before the Commission was that they all purchased grinding bar (the key material to grinding balls). The Commission’s Exporter Questionnaire required “cooperative exporters” to identify their suppliers of grinding bar. Assuming that this question was answered, and verified, it is now incumbent

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14 EPR Folio No. 316/033 at p. 55.
15 EPR Folio No. 316/033 at p. 28 [5.10.3]
upon the Commission to analyse the suppliers of grinding bar to the “cooperative exporters”, to determine who, in turn, their suppliers, are of steel billet. This extended analysis is relevant and necessary to the current investigation as it goes to the question of determining (a) the conferral of benefit under Program 1, and (b) whether or not there has been a pass-through of the benefit to the exporters of the goods under consideration (GUC), namely the grinding balls.

The identity of the suppliers of grinding bar, and in turn their suppliers of steel billet is critical to the question of conferral and pass-through of benefit, as is analysis of the relationship between vendor and purchaser of each respective input product as it passes-through to the producer/exporter of grinding balls. Therefore, if the supplier of grinding bar is related to the exporter/producer of grinding balls, then the pass-through of the benefit conferred to the supplier of grinding bar may be said to have occurred (with limited controversy) under Article 10 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Australian industry notes that although it is appropriate to treat multiple related entities as a single entity for the purpose of calculating dumping margins,16 in the case of considering the pass-through of benefit within the context of the SCM Agreement, the transfer of upstream input product between related parties must still be distinguished. Therefore, if the “cooperative exporter” has identified the sale of steel billet to a related grinding bar producer, who then in turn transfers grinding bar to the grinding ball producer, then the issue of conferral and pass-through remains relevant, and cannot be collapsed into the treatment of a single transaction. What is not clear to Moly-Cop is whether the Commission has separately verified the sale of steel billet to the grinding bar producer, which is in turn transferred to the related grinding ball producer. In fact, the Commission is silent on this issue, which suggests that it has made the error of collapsing the related transactions into one.

However, even if it is assumed that the grinding bar supplier is not related to the exporter/producer of the GUC, then that does not preclude the Commission from assessing any pass-through of benefit. This is permissible under the SCM Agreement as a “subsidy bestowed directly or indirectly upon the manufacture”17 [emphasis added]. Thus in US — Softwood Lumber IV,18 the Appellate Body found:

“That financial contributions by the government to the production of inputs used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed product.”19

However, the amount of benefit said to pass-through to the allegedly subsidised goods must be tested:

“In our view, it would not be possible to determine whether countervailing duties levied on the processed product are in excess of the amount of the total subsidy accruing to that product, without establishing whether, and in what amount, subsidies bestowed on the producer of the input flowed through,

16 Panel Report, Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia, WT/DS312/R, cited at EPR No. 316/033 at 25 [5.9.2]
17 Footnote 36 [Article 10] of the SCM Agreement
19 US — Softwood Lumber IV at [140].
downstream, to the producer of the product processed from that input. Because Article VI:3 permits off setting through countervailing duties no more than the subsidy determined to have been granted … directly or indirectly, on the manufacture [or] production … of such products, it follows that Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products. Rather, ‘[i]t is only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties.’

Although no pass-through test is required when all parties are related as in the case of a vertically integrated company, where the upstream inputs are sold in arm’s-length transaction to unrelated downstream parties, then the pass-through analysis is required in such circumstances. For example, the Appellate Body in US — Softwood Lumber IV concluded:

‘in cases where logs are sold by a harvester/ sawmill in arm’s-length transactions to unrelated sawmills, it may not be assumed that benefits attaching to the logs (non-subject products) automatically pass through to the lumber (the subject product) produced by the harvester/sawmill.’

It is not clear to Moly-Cop whether or not the Commission assessed the pass-through of benefit.

In relation to the suppliers of steel billet, it is not clear to Moly-Cop whether they have been identified to the Commission. In assessing their identity, the Commission will need to determine their status as State Invested Enterprises (SIEs). Again, even if the grinding bar producers are found to be vertically integrated, if there is evidence that the steel billet is produced by a subsidiary entity within the consolidated group, and the steel billet producing entity is found to be an SIE, then the Commission must not collapse the group of companies into a single entity, but consider the transfer of the upstream inputs through each entity in the chain. Thus, it is possible for a steel billet producer, who is found to be an SIE, to confer the benefit of Program 1 to the grinding bar producer/supplier. Whether or not the pass-through of benefit needs to be assessed by the Commission, depends on whether or not the transfer of grinding bar to the exporter/producer of the GUC occurred by arm’s-length transactions to unrelated parties. If not, then no pass-through test is required. If so, then a pass-through test of the benefit conferred to the grinding bar supplier needs to be undertaken by the Commission.

Program 2: Electricity provided by the government at less than adequate remuneration

Moly-Cop observes that the Commission has reached the preliminary conclusion that Program 2 (Electricity provided by the government at less than adequate remuneration) was not a countervailable subsidy. The basis for this conclusion appears to be on a narrow reading of the “specificity” of the subsidy and the “pass-through” of benefits from subsidised inputs.

20  US — Softwood Lumber IV at [141].
In SEF 316, the Commission held out the following reasons in support of this preliminary finding:

"In the absence of a GOC response, the Commission sought to establish if the grinding ball industry was eligible for a specific rate of electricity that was below the rate available to large industry.

"Provincial electricity tariff data was obtained for both the Jiangsu and Hebei provinces, the provinces in which the cooperating exporters are located, for both 2014 and 2015. The Commission compared the tariff data with the information supplied by each exporter and established that each exporter was subject to the tariff applicable to large industry. The tariff data indicated that certain industries were subject to preferential pricing, including the agricultural sector. The tariff data did not indicate that the grinding ball industry was subject to specific or preferential pricing." [emphasis added]

Unfortunately, the Commission has erred in its assessment of the specificity of the alleged countervailable subsidy program. The Commission has tested the specificity of the program as it relates to a subset of enterprises within the region, but not whether the countervailable subsidy was regionally specific. This approach is clearly at odds with WTO jurisprudence on this issue.

In EC and certain member States — Large Civil Aircraft, the Panel concluded that Article 2.2 of the SCM Agreement provides that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region:

"… when the text [of Article 2.2] is considered in its context and in light of its object and purpose, it is clear to us that Article 2.2 is properly understood to provide that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region." 2223

Further, the Panel in US — Anti-Dumping and Countervailing Duties (China) also addressed the question whether a “designated geographical region” in the sense of Article 2.2 must necessarily have some sort of formal administrative or economic identity, or whether any identified tract of land within the territory of a granting authority can be a “designated geographical region” for the purposes of a specificity finding pursuant to Article 2.2. The Panel concluded that a “designated geographic region” in the sense of Article 2.2,

“can encompass any identified tract of land within the jurisdiction of a granting authority" 24

22 Panel Report, European Communities and certain Member States – Measures affecting trade in large civil aircraft, WT/DS316/R, adopted 30 June 2010 (EC and certain member States — Large Civil Aircraft), at [7.1223]
24 US — Anti-Dumping and Countervailing Duties (China) at [9.144]
The Australian industry submitted evidence in support of the regional nature of this program.\textsuperscript{25} In the absence of any verified contradictory evidence from the GOC, the Commission is obliged to assess the program as a regionally specific one.

Further, the Commission must conduct a pass-through of benefit analysis in a manner consistent with that expressed above for Program 1 (\textit{Steel billet at less than adequate remuneration}).

\textbf{Summary}

In summary, Moly-Cop requests that the Commission apply the following prior to publishing the final report for \textit{Investigation No. 316}:

- Select a \textit{domestic} billet benchmark to substitute into the Chinese constructed cost model. Moly-Cop recommends MEPS domestic ex-works billet data for Mexico;
- Change the form of measure from \textit{ad valorem} to the combination method;
- Apply interim dumping duties retrospectively for importers responsible for a surge of dumped goods subsequent to initiation of \textit{Investigation No. 316}; and
- The subsidy investigation is incomplete, and the Commission should consider the pass-through of benefits conferred to upstream inputs, and the issue of regional specificity in the case of Program 2.

If you have any queries in relation to this submission, do not hesitate to contact me.

Yours sincerely

Matthew Voigt
Manager Finance & Commercial Services Moly-Cop Australasia

\textsuperscript{25} \textit{EPR Folio No. 316/005} at p. 8.