PUBLIC VERSION

PO Box 3026
Manuka, ACT 2603
Mobile: +61 499 056 729
Email: john@jbracic.com.au
Web: www.jbracic.com.au

28 August 2016

Director Operations 4
Anti-Dumping Commission
GPO Box 1632
Melbourne VIC 3001

Investigation into Steel Reinforcing Bar exported from the Peoples Republic of China

Dear Director,

Please accept and consider this submission on behalf of Shandong Shiheng Special Steel Group Co., Ltd, (Shiheng) in response to the Anti-Dumping Commission's (the Commission) Statement of Essential Facts Report No. 322 (SEF 322).

Program 177 – Loan Guarantees

Shiheng strongly disputes the Commission's preliminary findings in relation to Program 177 and considers that it is based on a complete disregard of the Commission's existing policy and WTO jurisprudence. In summary, the Commission's preliminary finding that Shiheng has benefited from loan guarantees by the full amount of the applicable loans is founded up:

a) a flawed interpretation that any amount of ownership of an enterprise by the Government, is sufficient to consider the relevant enterprise to be a public body;
b) a misunderstanding of statements made by Shiheng regarding the implications of the guarantees by other third party enterprises; and
c) an incorrect calculation of the benefit by disregarding its own policy interpretations.

Financial contribution - Public body

The Commission has preliminarily determined that in the case of certain loans guaranteed by enterprises, those enterprises were state-invested enterprises and hence public bodies. This finding appears to be solely based on an assessment of ownership where the Commission concludes '*[a]s the largest shareholder of this company is state owned, the visit team considered the guarantor company to be an SIE, and hence a public body.*'

By continuing to rely on ownership alone for determining whether an enterprise meets the definition of a public body, the Commission continues to ignore and disregard findings made by the Appellate Body in DS379. In reversing the WTO panel's findings, the Appellate Body drew a distinction between entities merely owned or controlled by a government and entities

that exercise some degree of "governmental authority." According to the Appellate Body, "*[a] public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.*"[1]

Beyond the mere reference and reliance on shareholding, it is noted that the Commission does not refer or provide any further evidence to support a finding that the guaranteeing enterprise in relation to Shiheng's loans 4 and 12, possesses, exercises or is vested with governmental authority. The only criteria applied by the Commission is whether the enterprise determined to be a state-invested enterprise was the major or largest shareholder of the enterprise guaranteeing the relevant loans.

Notwithstanding the obvious flaw in the Commission's approach to defining public body, Shiheng considers that the Commission has in any case erred by determining the state-invested enterprise to be the largest and major shareholder of the guaranteeing enterprise. As demonstrated by the shareholding information provided by Shiheng and outlined below, it clearly shows that the state-invested enterprise is not the largest or major shareholder.

The two , and , jointly own and control over % of the guaranteeing enterprise by ownership of and . Even on an , holds a bigger share of the guaranteeing enterprise than the relevant state-invested enterprise, when including and . Therefore, the state-invested enterprise is a minor and the smallest shareholder of the guaranteeing enterprise.

Based on this information and applying the Commission's own definition of public body then, the guaranteeing enterprise is clearly not a public body as the major and controlling shareholders are natural persons.

Shareholder of :

1. .			%
2. .			%
3. .			%

Shareholder of :

1.			%
2.			%
3. .			%

Shareholders of :

[1] Appellate Body Report; WT/DS379/AB/R; para 317, page 122.

1. [redacted]	[redacted]
2. [redacted]	[redacted]

Finally, it is important to note that the neither the Government of China or any other government authority, is directly invested in the guaranteeing enterprise. Instead, it is an intermediate enterprise that holds a share of the guaranteeing enterprise that is considered by the Commission to be a state-invested enterprise. This is relevant as Shiheng considers that the Commission is required under the Appellate Body's interpretation of a public body, to establish that the Government of China firstly directed that the state-invested enterprise carry out a governmental function, and then that the state-invested enterprise authorised or directed that the guaranteeing enterprise carry out a governmental function. As noted earlier, no such assessment appears to have been undertaken and no evidence has been identified which would support such conclusions.

<u>Determination of Benefit</u>

The allegation of loan guarantees being provided by the GOC made by the applicant in respect of Program 177, is that a benefit exists to the extent that the government loans are granted on terms more favourable than the recipient would actually obtain on the market. Based on the Commission's own preliminary calculations which compare the applicable rate of interest received by Shiheng in the case of loans 4 and 12, to the benchmark rate of interest, the benefits received by Shiheng from loan guarantees amounts to [redacted]%.

However, the Commission has instead preliminarily determined that the benefit to Shiheng amounts to the full value of the loan, or effectively treated the loan as a direct transfer of funds (ie. a grant). This finding appears to be entirely based on the Commission's understanding of a response from Shiheng during the verification visit, that without a guarantor, Shiheng would not be able to obtain the loans without a guarantor.

In Shiheng's view, the Commission has misunderstood Shiheng's response as the evidence and facts verified by the Commission clearly demonstrates that its understanding is incorrect. As such, Shiheng wishes to further clarify its response.

Firstly, Shiheng's explanation during the verification visit that it may not have received the loan without the guarantee was never intended to suggest that it was uncreditworthy and unable to successfully apply for and receive loans without a supporting guarantee. This is clearly demonstrated from the verified loan information relied on by the Commission which shows that Shiheng's largest loan (Loan 5) was received without any supporting guarantees. Importantly, this loan was in fact provided by the same bank relevant to loan 4. Therefore, it is mistaken for the Commission to hold the view that Shiheng would not have received the loans 4 and 12 without a supporting guarantee from a third party.

The point expressed by Shiheng during the verification visit was to explain that had it not had supporting guarantees from third parties, it may not have been offered the corresponding loans under with the same terms and conditions. As explained to the Commission, the supporting guarantees, regardless of whether provided by a private or public body, provides

the borrowing company with the ability to [redacted] and [redacted] [redacted].

So in the absence of loan guarantees for loans 4 and 12 and all other things being equal, Shiheng may not have received those loans with those same terms and conditions. Instead the relevant banks may have proposed a higher rate of interest to reflect the increased risk. Alternatively, and as was the case for loan 5, in the absence of a supporting guarantee Shiheng is able to [redacted]. **[Confidential loan terms and conditions]**

Therefore, it is unreasonable for the Commission to conclude that '*… no loan can be obtained without the loan guarantee*'. The Commission has identified no evidence which demonstrates or supports this view. Instead, the evidence presented and considered by the Commission shows the converse to be the case, and that Shiheng did in fact receive a loan of a greater value and a lower rate of interest, without the need for a supporting guarantee from a third party enterprise. The Commission's finding then that Shiheng would not have received the corresponding loans 4 and 12 without supporting guarantees is baseless and without any support.

It is noted that the Commission's Dumping and Subsidy Manual provides guidance on the evidence to be examined and assessment to be undertaken in examples where a loan is treated as the equivalent of a grant. It explains that the creditworthiness of the exporter will be assessed by examining financial indicators including the ability to meet costs and financial obligations from cash flow; evidence concerning the enterprise's future financial position and project/loan appraisals. Shiheng is unaware of any such assessment being undertaken by the Commission and has not received any requests for supplementary information to allow for such an assessment to be undertaken.

Instead the evidence plainly shows that Shiheng was able to secure loans of greater value with the same bank and with a lower rate of interest, without the need for any supporting guarantees.

As correctly highlighted by the Commission in SEF 322, the determination of benefit in the case of loan guarantees:

> *… will be the lower of the following two possibilities:*
>
> *- the difference between the fees actually paid and the fees which should have been paid to make the program viable or;*
> *- the difference between the amount the enterprise pays on the guaranteed loan and the amount that it would pay for a comparable commercial loan in the absence of the government guarantee.*

Shiheng contends that the evidence shows that there was no benefit received by Shiheng when comparing the rates of interest achieved on loans 4 and 12, to loan 5 where no supporting guarantee was offered.

<u>Calculation of Benefit</u>

As outlined above, Shiheng contends that the Commission has erred by firstly finding that loans have been guaranteed by a public body, and secondly by considering Shiheng to be uncreditworthy and treating the loans as grants with the benefit being the full amount of the loans. In the event that the Commission continues to hold this view, Shiheng considers that the Commission has erred in its calculation of benefit as it has completely ignored its own policy outlined in its own Dumping and Subsidy Manual.

Firstly, the Commission appears to have treated the loans as short-term loans and expensed the full amounts in the investigation period. Whilst this is reasonable in the case of loan 12 which represents a short-term loan corresponding to the investigation period, loan 4 is a long-term loan with the investigation period falling within only ████████ of the loan period.

The Commission's Dumping and Subsidy Manual provides instruction on which and when loans are expensed and amortised, and the method for calculating the attributed amount of amortised benefits to the investigation period:

> ***Attribution of the loan to a particular time period***
>
> *Short term loans*
> *For short term loans the Commission will expense the benefit from that loan to the year in which the company is due to make the interest payments on the loan.*
>
> *Long term loans*
> *For long term loans having a concessionary fixed rate of interest the calculation involves determining a present value of the benefit that has occurred over time. The total interest differential over the life of the loan will be calculated and the present value of that total benefit stream will be calculated and treated like value y in the formula – this amount to be allocated over the life of the loan in line with the calculation methodology set out above under 'Attributing amortized benefits to each year including the investigation period'.*
>
> *This formula will be used in the case of:*
> *• government provided loans and the loan to which it is compared – the benchmark loan – have different maturity periods or repayment schedules;*
> *or*
> *• government provided loans where the only difference to the benchmark loan is the difference in repayment terms.*

The Dumping and Subsidy Manual further explains:

> *Subsidies that are generally expensed*
>
> *Short term loans (operational); grants for operational expenses; tax credits, refunds, and exemptions; tax deferrals; excess relief of indirect taxes and import duties; provision by government of goods or services used for operations (and discounts on electricity, water and other utilities); purchase of goods by government; price support; freight subsidies; export promotion assistance; wage subsidies; and upstream subsidies.*

<u>Subsidies that are generally amortized</u>

Long term loans (non-operational); loan guarantees (non-operational); equity infusions and debt to equity swaps; grants for capital assets (non-operational); provision of goods (capital assets) and infrastructure (non general); debt forgiveness; plant closure assistance.

These examples are illustrative only.

<u>Attributing amortized benefits to each year including the investigation period</u>

Where benefits have to be amortized over the AUL of assets, the formula to be used will be:
$A K = y/n + [y - (y/ n)(k-1)]d / 1 + d$
Where:
Ak *= the amount of the benefit allocated to year k,*
y *= the face value of the subsidy,*
n *= the AUL of assets in the industry being investigated,*
d *= the discount rate, and*
k *= the year of allocation where the*
year of receipt = 1 and $1 < k < n$.

The formula calculates the annual benefit amount for each year using the variables: face value of the subsidy; AUL; and the interest rate 11 . The numerator can be seen to be like principal (subsidy) plus an interest component. The denominator brings the benefit back to day 1 dollars.

Year 1: in year 1 the numerator becomes $y/n + (y)(d)$ *(as* $k-1=0$*), and* y/n *is the 'principal' added to* $y(d)$ *which is the 'interest' on that years allocated subsidy. On day one of the first year the subsidy part of the benefit is* y/n *and on day 364 of the first year the benefit is* $y/n + (y)(d)$*. The denominator brings the benefit back to day 1 dollars. i.e., discounts the benefit at the end of the year 1 to day 1 of that year.*

Year 2: in year 2 k equals 2 and (k-1) equals 1, and the numerator becomes $y/n + [y - (y/n)]d$*; the numerator still consists of the interest component where* y/n *is the face value of the benefit allocated in year 2 added to the interest on the outstanding 'principal' in year 2. Because some of the subsidy (principal) has been attributed to year 1, there can be no interest component on that portion I year 2. Therefore the formula subtracts* y/n *from the face value of the grant before deriving the interest in year 2. On day 1 of year 2 the benefit is still* y/n *and at the end of year 2 the total benefit is* $y/n + [y - (y/n)]$*. As in year one the denominator brings the total benefit back to year 2, day 1 dollars. i.e., discounts the benefit at the end of the year 2 to day 1 of that year.*

In following years while y/n *stays the same, the interest component declines. The result is that benefit line slopes down over time because the interest component decreases each year.*

The interest, or discount, rate is based upon information relating to the year in which the subsidy was originally provided. The rate used will be in order of preference: the cost of long term fixed rate loans paid by the company under examination; or the average of long

term fixed rate loans in the country. This interest, or discount, rate is used to take into account in the benefit calculation the time value of money. Because the benefit from the subsidy is being allocated over a number of years the formula incorporates the interest rate in order to account for the time value of money. ($1000 received today is worth more than $1000 received one year later. This basic principle is incorporated in the calculations as it is considered to result in a more meaningful measurement of the benefit stream that is received by the recipient accruing from the face value of the subsidy).

Shiheng notes that the Commission's calculation of the benefits from loan 4 have not been properly amortised and attributed accordingly to the investigation period, in a method consistent with its policy and practice.

Secondly, as the Commission has effectively treated the full loan amounts as received grants, Shiheng considers that the Commission has erred and overlooked the payments made by Shiheng on loans 4 and 12, which are required to be accounted for in calculating the net benefit received. For example, the Commission's Dumping and Subsidy Manual explains that:

Grants

In the case of a grant, where none of the money is repaid, the benefit from this most basic type of subsidy is the amount of the grant. The benefit will normally have been regarded as having been received on the date the company first received the grant. [Emphasis added]

Whilst not explicitly stated in the Dumping and Subsidy Manual, it is understood from the above text that the Commission's practice in the case of a grant where part or all of the grant is repaid, is to calculate the benefit as the difference between the amount received plus an interest component and the amount repaid.

As demonstrated to the Commission during verification, Shiheng had continued to make repayments towards both the interest and principal amounts of the loans and has now fully repaid the loans including all corresponding interest amounts. This is supported by evidence at **Confidential Exhibit A** which shows the full repayment of loans 4 and 12. In these circumstances, the Commission is required to calculate the benefit received by Shiheng in accordance with the calculation procedures outlined above.

Conclusion

In conclusion, Shiheng submits that the Commission's preliminary findings outlined in SEF 322 are fundamentally flawed as they ignore:

- the WTO jurisprudence on the definition of public body made by the Appellate Body in DS379;
- the findings of the Anti-Dumping Review Panel in its review of zinc coated galvanised steel and aluminium zinc coated steel exported from China; and
- its own policy and practice with respect to the determination and calculation of the benefit attributable to the investigation period.

Shiheng requests the Commission to have regard to the views expressed in this submission and reconsider its preliminary findings with respect to Program 177.

Program – Coking coal

Shiheng again considers that the Commission has erred in its determination that state-invested enterprises supplying coking coal, meet the definition of a public body. As stated earlier in the submission, such findings are not consistent with interpretations provided by the Appellate Body in DS379.

Of greater importance in Shiheng's case, is the Commission's flawed approach to the determination of an appropriate benchmark and in particular the lack of any meaningful assessment as to whether the benchmark product can be properly compared with the domestic purchases in China.

Coking coal benchmark

The Commission recognises and states in SEF 322 that it '*is not aware of any international benchmark price for coking coal*'. Despite the lack of any published or directly relevant pricing information for like or comparable products, the Commission has simply relied upon information presented by the applicant in its application.

The source of the benchmark prices is Platts Australian Low Volume Premium HCC (Hard Coking Coal) FOB export prices. The Commission explains that it is '*satisfied that this is an appropriate benchmark for the following reasons:*

- *Australia is a major producer of coking coal and is a significant supplier to China; and*
- *The Commission was able to cross reference the Platts data against Australian government data to ensure the Platts data being used was reliable;'*

Strangely, there is no mention or discussion in SEF 322 of the Commission's assessment or analysis as to whether Australian Low Volume Premium HCC is an identical or even comparable product to the coking coal sourced by Shiheng during the investigation period. For example, it is noted that Platts' Methodology and Specification Guide for Metallurgical Coal[2] identifies the following properties and physical characteristics for Australian Low Volume Premium HCC:

ASSESSED SPECIFICATIONS

	CSR	VM	Ash	S	P	TM	Fluidity
Peak Downs Region:	74%	20.7%	10.5%	0.60%	0.030%	9.5%	400
Premium Low Vol:	71%	21.5%	9.3%	0.50%	0.045%	9.7%	500
HCC 64 Mid Vol:	64%	25.5%	9.0%	0.60%	0.050%	9.5%	1700

By contrast, the Commission makes no mention of the different types of coking coal sourced by Shiheng during the investigation which includes:

[2] http://www.platts.com/methodology-specifications/coal

- [redacted];
- [redacted];
- [redacted]; and
- [redacted].

It is important for the Commission to understand the properties and characteristics of each of these different types in order to understand which if any, is most comparable to the benchmarked product, and for those with different characteristics, to understand the level of adjustment necessary to ensure proper comparison. For example, CSR (coke strength after reaction) is a measure of a coke's "hot" strength and is widely used as an indicator of a coke's strength and performance. Generally, a higher CSR indicates a stronger coke.

It is reasonable then to expect that a stronger and better performing coke will attract a price premium over a weaker and worse performing coke. Given then that different types of coke have different quality and performance characteristics which will affect price, it is imperative that the Commission's calculation of benefit properly ensure that it is comparing like with like product, and properly adjusted where not alike.

This is further evidenced by the different purchase prices for the different types of coking coal sourced by Shiheng during the investigation period. As shown in the table below, when comparing purchase prices from the same raw material supplier on the same purchase date for both [redacted] and [redacted], it is evident that [redacted] unit prices range from [redacted]% - [redacted]% below that of [redacted] unit prices. That again reflects the performance and characteristics of the coking coal types.

[Confidential table removed]

Similar price differences are evident between [redacted] and [redacted] with the [redacted] type being significantly higher priced than the [redacted].

By contrast, the Commission has simply compared the unit prices of each of these different types against a single common price for low volume premium HCC, without any reasonable evidence that they are indeed comparable.

It is important to remind the Commission that the primary aim of establishing a benchmark price for coking coal in China is to arrive at a price that is representative of a competitive market cost in China during the review period. In doing so, the Commission is guided by s.269TACC(4) of the Act and Article 14(d) of the WTO Subsidies and Countervailing Agreement (SCM). In considering the question of what types of alternative benchmarks could be relied upon in a manner consistent with Article 14(d) of the SCM, the Appellate Body found in *US – Softwood Lumber IV*[3] that, where an investigating authority relies on an external benchmark, "*it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).*"

[3] Appellate Body Report, WT/DS257/AB/R, para 106, page 43

The Appellate Body further "*underscored the importance of making appropriate adjustments to ensure that alternative benchmarks reflect prevailing market conditions in the country of provision*" which require the adequacy of remuneration to be determined in relation to prevailing market conditions for the goods in questions in the country of export (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Given the lack of any explanation in SEF 322 outlining the Commission's views on the comparability of the benchmark coking coal product and the coking coal products sourced by Shiheng in China, it is considered that the preliminary findings of a benefit received by Shiheng to be flawed and without any reasonable basis.

<u>Conclusion</u>

Shiheng requests the Commission to undertake a meaningful analysis and assessment of the characteristics, properties and qualities of the various coking coal products sourced domestically in China, and properly compare to the benchmark price to understand whether further adjustments are required to allow for a meaningful comparison.

Yours sincerely

John Bracic