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6 September 2016

The Director
Operations 5
Anti-Dumping Commission
Level 10, Industry House
10 Binara Street
CANBERRA ACT 2600

BY EMAIL operations5@adcommission.gov.au

Dear Director,

Response to the submission of Shandong Shiheng Special Steel Group Co., Ltd (Shiheng) dated 28 August 2016 - Subsidy Investigation No. 322 (*Steel reinforcing bar exported from the People's Republic of China*)

The Australian industry refers to the response of Shandong Shiheng Special Steel Group Co., Ltd (**Shiheng**)[1] to the Anti-dumping Commission's (**Commission**) *Statement of Essential Facts No. 322* (**SEF**), and makes this submission further to the issues raised therein.

Summary

The Australian industry observes:

- Shiheng has overlooked or ignored the Commission's assessment of State Invested Enterprises (**SIEs**) as 'public bodies';
- The Commission's findings of the existence of public bodies responsible for the financial contributions under *Programs 2* and *177* were correct;
- The Commission was correct to find that funds provided to Shiheng were procured by reason of Program 177, and would not have otherwise been procured by Shiheng;
- The Commission was correct to measure the benefit of Program 177 as the full value of the loans;
- The Commission should also include the funds procured under a further loan (loan 5) as a result of Program 177 and should also be assessed in the measure of benefit;
- Shiheng failed to provide sufficient disclosure to the Commissioner at relevant times, and the Commissioner ought to assess Programs 2 and 177 on the verified information before him under subsection 269TAACA(1)[2], and not on the mere assertions contained within Shihengs's post-SEF submission;
- Shiheng has failed or refused to make a summary of evidence it considers confidential, such that permits a reasonable understanding of it, and as such should be disregarded by the Commissioner under subsection 269ZJ(5); and
- Shiheng's reference to price differences in the Chinese market for coking coal, is not sufficient to justify an adjustment to the external benchmark, especially as the

[1] EPR Folio No. 322/045
[2] References to any statutory provisions shall be references to provisions of the *Customs Act 1901*, unless otherwise expressly stated.

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Commissioner has determined that private prices are distorted because of the predominant role of the Government of China (**GOC**) in that market as a provider of the same or similar goods, and because the prices so quoted by Shiheng are government prices the subject of Program 2.

SIEs as 'public bodies'

Shiheng has oversimplified the Commission's consideration of the 'public bodies' ' status of (a) the 'guarantor entity' in the case of Program 177 (Loan Guarantees), and (b) the 'coking coal supply entities' in the case of Program 2 (Coking coal provided by the Government of China at less than adequate remuneration).

Shiheng alleges:

> *"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.'"*[3] (emphasis added)

With respect, Shiheng has failed to pay regard to *Attachment 5* of the SEF, where a full assessment of whether Chinese SIEs, in this case, are public bodies within the meaning of Australian domestic legislation, given:

- the control and governance structures relevant to SIEs in China, imposed and enforced by the GOC; and
- the level of cooperation and disclosure (in this case) of the GOC on this issue.

In fact, Shiheng, repeats this misguided criticism of the Commission in relation to its finding that the 'coking coal supply entities' were in fact public bodies. Indeed, without any apparent effort to inform itself of the Commission's analysis of whether the SIEs here were in fact public bodies (and the reasons for so finding), Shiheng again launches an attack on the Commission's consideration of the issue:

> *"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.*
>
> …
>
> *"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*

[3] *EPR Folio No. 322/045* at p. 1.

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> *whether the enterprise determined to be a state-invested enterprise was the major or largest shareholder of the enterprise guaranteeing the relevant loans."*[4]

For the avoidance of doubt, the Commission's consideration of DS379, and the subsequent findings of the WTO Disputes Settlements bodies in DS436[5] and DS437[6] and organisation of Chinese SIEs are all referenced and considered by the Commission in the SEF.[7]

Therefore, Shiheng's objections to the Commission's findings in relation to relevant SIEs (in this case) to be public bodies for the purpose of providing the respective financial contributions, ought to be dismissed.

Specifically, in relation to Program 177 (Loan Guarantees), Shiheng alleges that in any event, the "guaranteeing enterprise"; or to use its correct legal title, "the guarantor"; was not in fact the SIE, but instead the SIE was a shareholder of the guarantor. This may be true (and should be tested), however, it does not of itself invalidate the conclusions reached by the Commission. Indeed, by this admission Shiheng has confirmed the status of the guarantor as a SIE.

However, irrespective of the final view held concerning the shareholding of the guarantor, clearly inadequate disclosure was made by Shiheng in its response to *Exporter Questionnaire* concerning the source of the guarantee and identity of the guarantor. The post-SEF submission period is not the time for Shiheng to be disclosing information that should otherwise have been disclosed within the response to *Questionnaire* period. However, to ensure that all the circumstances of the program, including the relationship of the guarantor are known, the Australian industry supports the Commission issuing a *Supplementary Exporter Questionnaire* on this (and other issues identified below) to the exporter, and the guarantor and the so called "intermediate enterprise". This will ensure that some measure of the related party relationship between the exporter, the guarantor and the 'intermediate enterprise' can be assessed on positive evidence, rather than Shiheng's unverified mere assertion. Furthermore, as discussed below, a *Supplementary Questionnaire*, will also resolve the issues concerning the loan that go to the amount of benefit conferred.

In relation to Shiheng's coking coal supplier, there is no question that it is a SIE, and the Australian industry's view of the Commission's assessment of its standing as a 'public body', is sound and defensible on the available information before it.

Program 177 – Loan Guarantees

The Commission has concluded on the available evidence that the full value of the loan has been determined as the amount of the subsidy. This conclusion is entirely open to the Commission where it is found that the provision of the guarantee enabled Shiheng to procure a loan which it could not otherwise actually obtain. In other words there is no other benchmark loan within the meaning of Article 14(b) of the *SCM Agreement* to which comparison can be made for the purpose of determining benefit.

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[4] EPR Folio No. 322/045 at p. 2.
[5] *United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/AB/R, adopted 8 December 2014
[6] *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.
[7] EPR Folio No. 322/044 at [A5.4]]

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It is completely irrelevant for Shiheng to point to another loan obtained by it, purportedly from the same bank, as evidence that it would have obtained the actual loan the subject of the guarantee (and Program 177). The question is whether or not Shiheng would have obtained the subject loan, if not for the guarantee provided by the SIE, and the plain answer on the evidence is, no. To conclude otherwise, would usurp the evidence that clearly demonstrates that the lender would not advance the funds to Shiheng without the guarantee facility in place.

The question for the Commission in measuring the benefit of the loans (so-called "loans 4 and 12") is not as narrow as Shiheng suggests the *Dumping and Subsidy Manual* puts it, i.e. was the borrower uncreditworthy. But rather, to act consistently with the *SCM Agreement*, the Commission should measure the benefit of program 177 by reference to a 'benchmark loan', which has been interpreted by the Appellate Body to mean a *"loan which the firm could actually obtain on the market"*:[8]

> *"A loan only confers a benefit when and to the extent that it has been granted on terms that are not otherwise available in the market place."*[9]

Therefore, if the Commissioner has found on the available evidence, at the relevant time, that Shiheng "could" not obtain a "comparable loan" on the market without the existence of the guarantee (Program 177), then it is open to the Commissioner to conclude that the measure of benefit, is the full value of the loan. Indeed, the Appellate Body warns against the alternative conclusion:

> *"As the Panel stated, it is not reasonable to assume that, when there is no actually obtainable commercial loan that is comparable in every respect, an investigating authority must conclude that there is no benchmark, and that, therefore, no benefit amount can be determined."*[10] (emphasis added)

With respect, it is too late now for Shiheng to submit that it would have received these facilities in the absence of the government guarantee under Program 177, by reference to another subsequent funding facility (loan 5). The Commissioner is within his right under subsection 269TAACA(1) to reach the conclusion proposed in the SEF based on the verified information obtained in the course of the investigation.

However, even if the Commissioner was to entertain the proposition that the subsequent facility (loan 5) demonstrates Shiheng's capacity to obtain loans in the absence of the government guarantee (Program 177), there is an equally compelling conclusion, that the guarantee obtained by the 'identical' lender facilitated the procurement of loan 5, as it permitted the lender to increase its credit risk exposure to Shiheng across three loans, (4 - 5 and 12). In other words, Program 177 reduced Shiheng's credit risk to the lender, enabling a line of credit that would not have otherwise been available. The Australian industry proposes that the Commissioner also

[8] Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, at [490]
[9] Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, at [490] quoting Appellate Body Report, *Canada — Measures affecting the export of civilian Aircraft*, WT/DS70/AB/R, adopted 2 August 1999 at [155] – [158]
[10] Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, at [485]

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measure the benefit obtained from Program 177 by further including the funds advanced under loan 5.

Further, Shiheng now submits that payments have been made to loans 4 and 12 - however, remains silent on the repayment of loan 5. Again, this assertion has not been verified. The Australian industry submits that further inquiry must be made by the Commission in the form of *Supplementary Questionnaires* to Shiheng, the guarantor, the intermediate entity and the lender (of loans 4 – 5 and 12).

Program 2 – Coking coal

Shiheng makes a number of unsubstantiated allegations around the different physical characteristics of the coking coal sourced by it. Again the time to support such claims was at verification, which has now passed. The Commissioner is referred to subsection 269TAACA(1) and is encouraged to make recommendation to the Assistant Minister to act on the facts available, and considered reliable to him.

Again, Shiheng makes it impossible for the Australian industry to engage meaningfully on the question of the alleged price comparability between the different grades of coking coal. To the extent that this "summary" of the so-called evidence does not contain sufficient detail to allow a reasonable understanding of the substance of the information, then it should be disregarded by the Commissioner under subsection 269ZJ(5). In any event, Shiheng appears to be pointing to evidence of price differences in the supply of coking coal by its 'public body'/government supplier, which would be expected given that the essence of the program complained of is one of supply at less than adequate remuneration. Therefore, the comparison proposed is not informative of any issue of comparability.

Although the Australian industry acknowledges that when the Commission uses an alternative benchmark to private prices in the country of provision, it is obliged to ensure that the alternative benchmark it uses relates or refers to, or is connected with, prevailing market conditions in the country of provision, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale), with a view to determining, ultimately, whether the goods at issue were provided by the government for less than adequate remuneration. However, mere evidence of a difference in price is not, without more, a cause for adjustment, especially where, as the Commission has done here, concluded that private prices of coking coal in China are distorted because of the predominant role of the government in the market as a provider of the same or similar goods. And again, the Australian industry reminds the Commission that it appears that Shiheng is quoting price differences of its 'public body' supplier of the coking coal.

Accordingly, Shiheng has not established a sufficient basis to avoid the Commissioner's use of the external benchmark, and there is insufficient evidence or undisputed facts to justify the adjustments to the benchmark there proposed by Shiheng.

Conclusions

The Australian industry submits that the Commissioner's assessment of the provision of the financial contribution by 'public bodies' is sound with respect to Programs 2 and 177, in this case. The Commissioner's measure of the benefit is also consistent with the *SCM Agreement* in

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relation to Program 177, and should in fact also include the additional funding facility (loan 5) obtained by Shiheng. The Commissioner's assessment of an external benchmark in relation to the provision of coking coal by the GOC at less than adequate remuneration is also sound, and Shiheng has failed to provide any evidence warranting the making of any adjustments to the external benchmark there selected.

Shiheng has clearly failed to provide relevant evidence in the course of the investigation, and the Australian industry would support a decision by the Commissioner to disregard the information provided by Shiheng in its post-SEF submission. However, if the Commissioner is inclined to consider this information, then it should be done in the context of full and final disclosure, capable of further verification following compliant responses to a number of *Supplementary Questionnaires* directed to, not only, Shiheng, but also, the 'guarantor', intermediate entity, lender (under loans 4 – 5 and 12) and suppliers of coking coal.