

5 June 2013

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commercial+international

By email

Dear Ms Reid

Union Steel China Co., Ltd
Alleged subsidisation of certain coated steel from China
Response to Statement of Essential Facts 193

We refer to the publication of Statement of Essential Facts No 193 ("SEF 193") in this matter on 15 May 2013.

Union Steel China Co., Ltd ("USC") has been a fully cooperative exporter in both the countervailing and dumping investigations conducted by Australian Customs and Border Protection Service ("Customs") regarding aluminium zinc coated steel (the "goods") exported to Australia from China.

USC's positions in relation to the findings contained in Statement of Essential Facts No 190 ("SEF 190") concerning the allegations that a particular market situation existed in the Chinese market for aluminium zinc coated steel, and the hot-rolled coil ("HRC") cost substitution that was practiced against USC as a result of the alleged particular market situation, can be found in its responses to the Exporter Questionnaires and its submissions in both the dumping and countervailing investigations concerning the goods.¹ USC's positions on those issues are relevant to the allegation that it benefits from a subsidy constituted by the provision of HRC by the Government of China at less than adequate remuneration

¹ The findings regarding "particular market situation" and whether Chinese exporters' HRC costs "reasonably reflect competitive market costs" are relevant to the alleged "Program 1" subsidy in SEF193 because Customs claims that the Chinese domestic market for HRC is distorted, and that instead an out-of-country benchmark must be used to determine if the HRC sold by SIEs confers a benefit on the exporters. Further, in SEF 193, it is stated:

In the circumstances of HRC in China, a competitive market cost is considered to be adequate remuneration for those goods, and vice versa. Consequently, the same amount has been applied by Customs and Border Protection in each context (hereafter referred to as 'the benchmark' irrespective of the context of its use).

USC considers that assessments of "adequate remuneration" and of "competitive market cost" are separate issues which call for different analysis. We disagree with the proposition that there is a legislative basis to seek an out-of-country benchmark. Certainly, if Customs seeks to adopt an out-of-country benchmark, it must step its way through the tests set out in the report of the Appellate Body in *United States – Final countervailing duty determination with respect to softwood lumber from Canada* (WT/DS257/AB/R, 19 January 2004) and must adjust for prevailing market conditions in China. None of these things have been done.

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("Program 1").

A summary of USC's positions on those issues is as follows:

- USC rejects Customs' finding that there is a particular market situation in China rendering USC's selling price of the goods as being unsuitable for normal value purposes;
- USC rejects the proposition that the cost of the goods as recorded in its own financial accounts does not "*reasonably reflect competitive market costs*".

USC notes and endorses the comments made by the Government of China regarding these issues in its submissions in both the dumping and countervailing investigations concerning coated steel.

In light of Customs' more recent findings in SEF 193 and the information pertaining to the calculation of USC's subsidy margin, USC has instructed us to provide the following further comments regarding the alleged "Program 1".

A USC's suppliers of HRC are not "public bodies"

Like the findings made in SEF 190 concerning the alleged "particular market situation", the findings regarding the status of SIEs providing hot rolled coil ("HRC") to aluminium zinc coated steel exporters such as USC have been made without giving consideration to evidence relating to the time period of the current investigation. Instead, the findings in this regard are said to be "*based on the findings in REP 203*". This is so despite these facts:

- REP 203 relates to the period of investigation of that Report, namely 1 July 2010 to 30 June 2011, whereas SEF 193 relates to the period of investigation of 1 July 2011 to 30 June 2012.
- the direct evidence quoted in REP 203, in support of its finding that State-invested HRC manufacturers in China are vested with government authority relates to only two companies, Maanshan Steel and Baosteel Group, whereas during the period of investigation, USC purchased HRS from 10 different SIEs, only one of which is Baoshan Iron and Steel Co., Ltd
- USC is a wholly foreign owned private company, not a Chinese SIE. USC has never conducted business with any SIE on the basis that the SIE is a government entity or that in conducting that business it is exercising a government function. In light of the fact that USC has 10 strongly competing suppliers, and that pricing, product specification and terms of trade are all determined on a negotiated and open market basis, the idea that any SIE supplier is selling HRC to USC cheaply as part of some government directed scheme is absurd. Additionally, we do not know how it is said that all Chinese SIEs in the ill-defined "iron and steel industry" are public bodies, without any analysis of the facts pertaining to each of them. As stated in REP 203, there is no legal basis for a finding that SIEs are public bodies. Only a legal basis would be capable of labelling all SIEs as public bodies. As the finding is said to be a factual one, then we would have assumed that the facts relating to each of USC's suppliers should have been considered individually before such a finding could have been made in respect of any one of them. However no such consideration is evidenced in SEF 193 whatsoever.

REP 203, which is considered to be the sole "basis" for the finding in SEF 193 regarding Program 1, appears to suggest that any enterprise that "contributed" or "participated" in "further[ing] the Chinese economy" or "develop[ing] iron and steel industry" is "in fact exercising government functions". However USC is a participant in that industry, and there are a huge number of non-SIEs participating in that

industry, USC rejects the proposition that the Government of China or State-invested enterprises can exercise government functions in an openly competitive market. USC cannot accept the proposition that those of its suppliers are SIEs are arms of the Government of China that are carrying out some government function and are thereby “vested with government authority”. From USC’s observations, based on its practical experience in China, the SIEs that it deals with are commercially operated enterprises that are subject to the market forces that are at play in the Chinese market. Again, so far as USC is aware from its course of dealing with SIE suppliers, they conduct themselves fully in accordance with Chinese law in their sales behaviour. USC sees no evidence that SIEs operate as government entities in either the Chinese or the international markets.

B Determination of “adequacy of remuneration”

In making its “Program 1” finding, SEF 193 considered the “adequacy of remuneration” paid by USC for its HRC suppliers. To do this, SEF 193 advises that a “benchmark” was constructed. The comparison of that benchmark to USC’s actual costs was then said to be the amount of the alleged subsidy concerned.

As mentioned above, USC’s view is that the HRC market in China is an open and competitive market, Furthermore, not all HRC manufacturers are SIEs. Therefore, even if certain SIEs, or all SIEs, manufacturing HRC are to be regarded as “public bodies”, a “benchmark” for the purpose of determining the adequacy of remuneration for HRC in China should nonetheless be derived from the Chinese market. If that is done, then it will be self-evident that there is no benefit because SIEs sell HRC at competitive prices determined in accordance with the prevailing market conditions in China.

Without prejudice to USC’s positions that there is no “Program 1” at all, and that no “benefit” could have been conferred on USC even if there was such a “Program 1”, USC would like to make further submissions regarding the identification and calculation of the benchmark using Korea and Taiwan prices as indicated in SEF 193.

In relation to how the amount of subsidy under Program 1 was determined, SEF 193 states:

In accordance with s.269TACC(5), the adequacy of remuneration was determined by reference to a ‘benchmark’ for adequate remuneration, established having regard to the prevailing market conditions in China (discussed in detail in Appendix 2).

Section 269TACC (5) of the Customs Act 1901 specifically provides:

For the purposes of paragraphs (4)(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased. [underlining supplied]

In Appendix 2 of SEF 193, the options of using Chinese “private domestic prices” or Chinese “import prices”, were rejected on these stated bases:

private domestic prices of HRC in China are still not suitable for determining a competitive market cost free from government influence as they are equally affected by government influence.

it is likely that import prices were equally affected by the government influences on domestic prices

SEF 193 went on to consider the use of “external benchmarks”, and stated:

Customs and Border Protection has determined that an appropriate benchmark for HRC costs in China is the weighted average domestic HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea ^[70] and Taiwan ^[71], at comparable terms of trade and conditions of purchase to those observed in China.

...

For the purpose of calculating the benchmark, all HRC purchases by the cooperating exporters were adjusted to delivered prices. [underlining supplied]

[70] *Dongbu Steel and Union Steel*

[71] *Chung Hung Steel, Yieh Phui Enterprise and Sheng Yu Steel*

The same statement is made in SEF 190 (which relates to the dumping investigation concerning coated steel from China) regarding the benchmark for an HRC cost which Customs assessed as “reasonably reflect[ing] competitive market costs” in China.²

Further, SEF 193 states that:

Customs and Border Protection considers it reasonable to determine that the benchmark established to determine adequate remuneration for HRC in China is also suitable for use to determine competitive market costs for those goods.

Naturally, it follows that the above statements amount to a finding that the “HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea and Taiwan” subject to adjustment regarding terms of trade, was considered to be the benchmark for determining adequate remuneration for HRC. In the view of SEF 193, this benchmark:

- had regard to the prevailing market conditions in China;
- reflected competitive market cost free from government influences; and
- was not affected by the so called “government influences”

We reiterate that the following comments regarding the use of the price paid by Korean and Taiwanese exporters as a “benchmark” are without prejudice to USC’s overriding position in relation to “Program 1”. USC is also disappointed to note that SEF 193 disregards the findings and recommendations made by the TMRO regarding the issues of “public body” and provision of HRC at less than adequate remuneration in its review of Report 177.

However, having reviewed the “benchmark” spread sheet as provided by Customs, it now appears that USC – and all interested parties – have been misled in relation to the benchmark claimed to have been used by Customs. Apparently, the benchmark does not represent the HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea and Taiwan as was claimed by

² SEF 190, pages 51 and 52. Further, SEF 190 claims that the approach to the replacement of HRC costs used is based on WTO Appellate Body findings. This is incorrect. The Appellate Body authority to which it refers relates to benefit determination for the purposes of countervailing investigations. The replacement of USC’s HRC costs with a replacement cost on the basis that the costs do not “reasonably reflect competitive market costs” is not supported by the SCM Agreement or by any WTO precedent.

both SEF 190 and SEF 193.

That spread sheet sets out the “*surrogate HRC data*” for “*Hot Rolled Coil delivered (Taiwan and Korea HRC data)*”, The following “note” is contained in the data table of the spread sheet:

Note 1. All HRC imported by Korean and Taiwanese exporters have been excluded

Obviously, the HRC markets in Korea and Taiwan, and the HRC “price paid” by Korean and Taiwanese exporters, include both:

- the price of domestically produced HRC; and
- the price of imported HRC.

If the above note is correct, it appears to USC that the benchmark calculation is flawed and is wrongly explained in both SEF 190 and SEF 193. Evidently, it is not the “*HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea and Taiwan*” Instead, it is a selection of some but not all of the prices paid by cooperating exporters of galvanised steel and aluminium zinc coated steel in Korea and Taiwan.

If the HRC prices of Korea and Taiwan markets are to be used for the purpose of determining the:

- competitive market cost of HRC in China; and
- adequate remuneration of HRC in China,

then all prices on those markets must be taken into account. We see no legal or factual basis to exclude any prices on the Korean and Taiwanese HRC markets. The exclusion of the prices of HRC imported into those markets is not consistent with the stated findings of SEF 190 and SEF 193. USC notes that it has repeatedly requested to be provided with benchmark calculation data, but that this was not provided by Customs. The same benchmark has been used for both cost surrogation under SEF 190 and for subsidy determination under SEF 193. SEF 190 was published on 18 March 2013 - almost two months prior to SEF 193. USC has only now (on 21 May) became aware of the actual benchmark data (only the quarterly benchmark, and still without any calculation or detailed data concerning the working-out of the benchmark) and of the “exclusion”. Moreover, no explanation is offered as to why the exclusion was made.

USC is deeply disappointed not only with the fact of the exclusion, but also by the lack of transparency regarding this matter. It has not previously been informed of the exclusion, and has not had the opportunity before now to consider that matter and to provide its comments.

USC understands that the final report in relation to the anti-dumping investigation, based on the findings stated in SEF 190, has already been provided to the Minister. The exclusion of the prices of imported HRC purchased by Korean and Taiwanese exporters is not mentioned in SEF 190.

USC expects that the exclusion of the “price paid” by Korean and Taiwanese exporters for imported HRC will have had the effect of artificially inflating the benchmark. In fact the reason for USC’s repeated requests for details about the calculation of the so-called “competitive market cost” in the anti-dumping investigation was USC’s disbelief of the magnitude of the cost uplift practised against it by Customs in its margin calculations. USC is a related company to Union Steel Co., Ltd of Korea, which is itself a purchaser of HRC from China. Based on USK’s data, the cost uplift did not appear to be accurate – now,

belatedly, the reason appears to have been revealed.

If the benchmark “picks and chooses” between prices that existed in the Korean and Taiwanese markets during the period of investigation, then it is not fair and reasonable, and does not reflect a market price. In that situation, the outcome will be an arbitrary one. The inclusion of some market prices but not others – in view of Customs’ views on the operation of markets – is self-contradictory. We are instructed that the exclusion of prices of HRC that was imported into the Korean and Taiwanese markets will result in artificially high dumping and subsidy margins for USC.

C Conclusion and request

Once again, USC submits that:

- there is no “particular market situation” in the aluminium zinc coated steel market in China;
- USC’s own costs must be used in determining its dumping margin, and not to be surrogated with a “benchmark” cost for HRC;
- the finding that SIEs supplying HRC to USC are “public bodies” is wrong;
- even if Chinese SIEs are public bodies, the domestic prices of HRC purchased from non-SIEs are a relevant benchmark for determining the amount of any benefit (there is none); and
- Customs should find that USC has not received any benefit under the alleged Program 1.

These are the primary submission of USC.

Additionally, USC submits that an external benchmark based on the HRC “*price paid*” of “*all HRC purchases*” by Korean and Taiwanese exporters must be done correctly. The price paid by Korean and Taiwanese exporters for imported HRC must not be excluded from that calculation.

Further, to avoid confusion and to ensure the transparency of the investigation, USC requests that it be provided with full data relating to the benchmark calculation, with any information indicating the identity of specific companies redacted for confidentiality purpose. Given that the benchmark calculation is based on HRC purchase prices of five different companies in two different regions, we believe that it must be possible for Customs to provide data at a level and with suitable redactions so that the confidential information of any particular company is not disclosed.

Yours sincerely



Charles Zhan
Solicitor