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Investigations IV. Relations with third Countries for Trade Defence Matters

NON-CONFIDENTIAL

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ANTI-DUMPING INVESTIGATION ON IMPORTS OF QUENCHED AND TEMPERED (Q&T) STEEL PLATE ORIGINATING IN OR EXPORTED FROM FINLAND, JAPAN AND SWEDEN

Submission by the European Commission regarding the initiation of the Expiry Review (Continuation inquiry No 683)

On 5 November 2014, the Australian Minister for Industry, Science and Technology imposed anti-dumping measures on flat rolled products of alloyed steel plate, known as Q&T steel plate from Finland, Japan and Sweden. The measures were extended on 5 November 2019.

Following an application of the domestic industry, Australia initiated on 4 December 2023 another continuation enquiry – a second expiry review - into these measures.

The European Commission ('the Commission') would like to thank the Australian authorities for the opportunity to present its comments in the framework of the above-mentioned proceeding. These comments are without prejudice to further interventions at further stages of the procedure.

With reference to the Notice of Initiation¹ and after having analysed the non-confidential version of the application, the Commission would like to raise the following issues:

I. GENERAL

It is recalled that according to Article 11.1 of the WTO Antidumping Agreement ('ADA') "*An antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*" (emphasis added).

The *Panel in US –DRAMS* described the requirement in Article 11.1 whereby anti-dumping duties "*shall remain in force only as long as and to the extent necessary*" to counteract injurious dumping, as "*a general necessity requirement*", stating that:

"[We] note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping

¹ AND 2023/084 Initiation of a Continuation Inquiry No 638 into Anti-Dumping Measures

*duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of **positive evidence** that circumstances demand it. In other words, **the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.**²”*

Thus, the Commission would like to express its disappointment about the initiation of this investigation, since measures currently under review have been in place since 2014, and the conditions to further prolong them do not seem to be met.

In this context, it is further recalled that antidumping duties should not be simply "rolled-over" after expiry reviews. In fact, the **WTO ADA clearly requires a revocation of the measures after five years**. The continuation of the antidumping duties based on assumptions made by the sole applicant appear particularly problematic, bearing in mind that over time, the situation which might have warranted the imposition of duties in the first place have ceased to exist or otherwise changed.

II. TREATMENT OF CONFIDENTIAL INFORMATION

It is reiterated that according to Article 11.4 of the WTO Anti-dumping Agreement (‘ADA’) *“the provisions of Article 6 regarding **evidence and procedure** shall apply to any review carried out under this Article [...]*”

Therefore, *“whenever information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation. Due process requires that **interested parties have a right to see the evidence** submitted or gathered in an investigation and have **an adequate opportunity for the defence of their interests**. As the Appellate Body in EC –Fasteners (China) has stated, **‘that opportunity must be meaningful in terms of a party's ability to defend itself’**.”*

*Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but **establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests.**”*

In this case, the information provided by the domestic producer in the non-confidential application is **not sufficient** to allow the parties to have a proper understanding of all the elements at stake and therefore to be in a position to properly exercise their rights of defence as required by Article 6.2 of the WTO ADA.

For example, all injury factors (market share, output, productivity, stocks, growth, ability to raise capital or investments, impact on cash flow, return on investment, employment, capacity utilization etc) are **missing**. Other important information such as import volumes and price development is mentioned, but the magnitude of the trend is not indicated, and comments are limited to "increase" or "decrease".

² Panel Report, US –DRAMS, para. 6.41 and para. 6.42.

The approach regarding confidentiality is understandable given that the application was submitted by a single complainant. However, the information disclosed in the application is considered **insufficient and prejudicial to the rights of defence of interested parties**. A way to comply with the confidentiality requirements could be achieved by **indexing the annual information** for each factor (see under III. Likelihood of recurrence of dumping and injury).

Finally, according to Article 6.5.1 of the WTO ADA, if confidentiality of certain data is an issue, as in the present case, the parties should explain why, however **no statements of the reasons why summarisation is exceptionally not possible were provided**.

*"As the Panel in EC – Fasteners (China)³ found, 'Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process'. In respect of information treated as confidential under Article 6.5, Article 6.5.1 obliges the investigating authority to require that a non-confidential summary of the information be furnished, and to ensure that the summary contains 'sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'. The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it **must permit a reasonable understanding** of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.*

*Article 6.5.1 contemplates that in 'exceptional circumstances' confidential information may not be 'susceptible of summary'. In such exceptional circumstances, a party may indicate that it is not able to furnish a non-confidential summary of the information submitted in confidence, but it is nevertheless required to provide a '**statement of the reasons why summarization is not possible**'. Article 6.5.1 relieves a party of its duty to provide a non-confidential summary of information submitted in confidence only if doing so 'is not possible'. It is not enough for a party simply to claim that providing a summary would be burdensome or costly. Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.⁴"*

The lack of information prevents interested parties from properly exercising their rights of defence and therefore the investigating authority is requested to provide meaningful summaries of the information provided in confidence (Confidential Appendixes), e.g. in the form of indexes or ranges, and to make them **available in the public file as soon as possible**.

III. LIKELIHOOD OF RECURRENCE OF DUMPING AND INJURY

Expiry reviews are complex investigations as they involve a prospective analysis based on positive evidence. In the present case, it appears that the complainant is basing its request for an extension of the anti-dumping duties on unsubstantiated allegations and mere estimations. Indeed, it is difficult to understand the request in the absence of any data on alleged dumping or continuation or recurrence of dumping or injury.

³ Panel Report, EC – Fasteners (China), para. 7.515

⁴ Appellate Body Report, EC – Fasteners (China), paras. 541-544

1. Likelihood of recurrence of dumping

According to WTO jurisprudence, a likelihood analysis has to be based on **positive evidence**.

The *Panel in US – Corrosion-Resistant Steel Sunset Review* underlined the importance of the need for **sufficient positive evidence** on which to base the likelihood determination:

*"The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient **factual basis** to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."*⁵

According to Article 11.3 of the WTO ADA the determination on likelihood of continuation or recurrence of dumping and injury should be supported by a **reasoned and adequate explanation and not merely by assumptions**.

a. Likely import prices

The complainant did not provide any data or evidence regarding import prices of the product concerned, nor any information to show if EU export prices continue to be dumped or that dumping would recur. Although Bisalloy claims that in 2023 it continues to experience price undercutting by the dumped imports from Finland and Sweden and that the effect of the imports is preventing a price increase. Clearly, mere allegations are **not sufficient to establish any price-effect** nor that price suppression or price undercutting are continuing or would recur if measures were allowed to lapse.

b. Likely import volumes

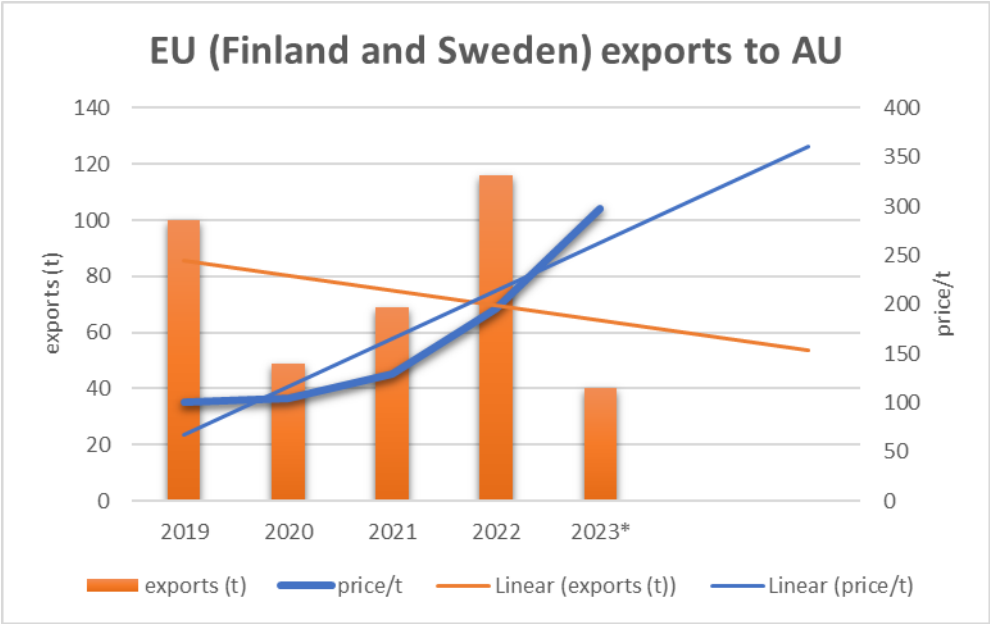
As far as import volumes are concerned, and as mentioned above (II. Treatment of confidential information), there is no information available on import trends, either in absolute terms or relative to production or consumption in Australia, since the last extension of the anti-dumping duties on imports of Q&T steel plate in 2019. The applicant claims that *"For the 12 months ending December 2021, subject country export volumes increased by approximately [XX] percent when compared to CY2020. They then increased a further [XX] percent during CY2022 (Confidential Attachment 4: Import statistics."* and *"provides at Confidential Appendix A-2 an estimate of these volumes [..]"*

Furthermore, no analysis is provided as to the likely volumes imported if measures were allowed to lapse.

In the absence of data provided in the application and in the light of missing information on the evolution of the volume and prices of the allegedly dumped imports, Eurostat data show

⁵ Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114.

that following the extension of duties in 2019, EU exports to Australia, in particular from Finland and Sweden, have **decreased** while **prices have increased**.



Source: Eurostat data (indexed)
* 2023 annualised

On the basis of this evidence, it appears that the measures have been effective, as EU imports have decreased significantly since 2019 (**-60 index points**) and prices are almost three times higher (**+198 index points**). In the absence of any other evidence or data it also cannot be concluded that the situation is likely to change in the future.

Furthermore, according to the applicant, consumption of the product under investigation in Australia has grown. The marginal increase in imports (+16 index points) in 2022 could indicate the inability of the sole producer to meet the increased demand.

Consequently, the likelihood of continuation or recurrence of dumping alleged by Bisalloy has not been demonstrated or supported by any evidence and does not reflect the factual situation.

2. Likelihood of recurrence of injury

a. Situation of the domestic industry

Similarly, no data or evidence was provided regarding the situation of the domestic industry. The applicant alleges material injury on the basis of the 2019 investigation and the CON 506 report, but no information on the current situation of Bisalloy is provided as all numerical information regarding the various injury indicators has been kept confidential in the Confidential Appendixes.

However, it would seem that the measures have indeed been effective, as imports have decreased significantly and the situation of the domestic industry appears to be quite good, in fact.

According to producer's announcements, Bisalloy had enjoyed "*another amazing year*", has "*beat daily production record not once, but twice, took great strides in safety efforts and set positive sustainability goals to become a carbon-neutral business by 2030*"⁶

Furthermore, as stated in the Bisalloy Financial Report for six months ended 31 December 2022⁷, "*Australian demand for Q&T steel plate remains strong. Despite steel prices declining from historically high levels resulting in distributors managing their inventory levels more tightly, we [Bisalloy] have managed to increase our sales volumes in H1 FY23 versus H1 FY22 as a result of significantly improved marketing and selling strategies.*" Additionally, "*Group Revenues in the period were \$78.415k, up 42.1% from corresponding period last year.*"

In addition, the FY23 outlook clearly indicated that **there may be other reasons for reduced profits** than imports from the countries concerned (profit after tax decreased by 5% to \$7,369k from \$7,771k according to the Bisalloy Financial Report). In any event, imports are under measures and therefore not injurious. The Financial Report states that "*Throughout the recent macroeconomic and geopolitical volatility, Bisalloy has continued to demonstrate strength and resilience in its business performance. With this volatility ongoing, we are anticipating a continuation of the trend towards normalisation of product margins, along with the impact of higher energy and transportation costs. We also cannot discount the impact of future disruptions caused by COVID-19, potential recessions in global markets and ongoing supply chain disruptions, particularly sea freight. Therefore, Bisalloy continues to project a reduction in profits in FY23 compared to FY22.*"⁸

Nevertheless, the industry claims that the improved situation is merely provisional due to the COVID-19 pandemic and the continuation of duties is necessary in order to ensure that no imports reach the Australian market after the pandemic. The applicant states that "*The market analysis confirms that over the four-year period 2019-2023 the Australian market for Q&T steel plate has evolved as a consequence, in part, due to the impacts of the SARS-CoV-2 (COVID-19) global pandemic. As supply chains stabilise, Australian industry sales volumes will become vulnerable to exports as a result of an increase in volumes.*"

It appears that the complainant intends to use the trade defence instruments to permanently close the domestic market through a series of anti-dumping measures. It is recalled that the purpose of anti-dumping measures is to remedy unfair trade practices and not to protect the sole producer of the product under investigation for a decade simply to maintain a monopolistic market position in Australia.

⁶ 2023 Year In Review – Bisalloy; <https://www.bisalloy.com.au/news/2023-year-in-review/>

⁷ Announcement-on-Half-Year-Results-FY23; <https://www.bisalloy.com.au/app/uploads/2023/02/ASX-Announcement-on-Half-Year-Results-FY23.pdf>

⁸ Announcement-on-Half-Year-Results-FY23; <https://www.bisalloy.com.au/app/uploads/2023/02/ASX-Announcement-on-Half-Year-Results-FY23.pdf>

It appears that Bisalloy has become accustomed to a very comfortable position and the aim of another continuation review is maintaining this comfortable position and to resist any competition.

b. *Changes in the market conditions*

As with all other claims made by Bisalloy in the application, no evidence, proof to back it up or analysis is provided regarding changes in market conditions that might lead to recurrence of dumping or injury from the subject countries.

The complainant writes that *"As evidenced above, subject producers have the means, existing supply channels, and motive to export substantial volumes of Q&T steel plate to Australia. Given the attractiveness of the Australian market and its geographic proximity, they would not hesitate to do so without the discipline of the measures."*

First, the evidence to which the applicant refers is allegedly provided in another Confidential Appendix. As mentioned above (II. Treatment of confidential information), at least a summary should have been provided to allow interested parties to have a proper understanding.

Secondly, it is difficult to understand the *"geographical proximity"* of EU producers which Bisalloy is describing. This would seem to apply more to Bisalloy's own production centres in China or its distribution joint ventures in Thailand, Indonesia and China.

In addition, the complainant supports its request for a continuation of the anti-dumping duties based on the OECD Report⁹.

Indeed, the OECD report confirms the ongoing global trend of capacity expansion, falling demand and lower capacity utilisation. However, the OECD is also very specific in its analysis of capacity developments. The report clearly describes regional developments and capacity levels as follows:

- *Overall capacity in Asia has remained almost constant, although there are significant differences within the region; in ASEAN, capacity growth is very rapid and outstrips regional demand.*
- *The two largest steel producing countries (China and India) currently account for 52% of world capacity. However, given China's much larger size, even small rates can lead to significant volume challenges for international steel markets.*

Similarly, the OECD notes the **pronounced expansion of steel capacity in ASEAN** countries from 54.4 mmt in 2016 to 80.4 mmt in 2022, an increase of 47.8%; **EU steel capacity, on the other hand, contracted by 3.7% over the same period (from 221.8 mmt in 2016 to 213.6 mmt in 2022).**

Moreover, the report is very transparent about the future capacity trends by region. It reads: *"Asia will continue to experience substantial increases in steelmaking capacity, in volume terms, over the next three years if all the ongoing projects are ultimately realised (and not offsetting closures). The region currently has a total of 35.4 (+2.2%) mmt of capacity*

⁹ <https://www.oecd.org/industry/ind/latest-developments-in-steelmaking-capacity-2023.pdf>

*additions underway for start-up during 2023-25, with an additional 65.3 mmt (+6.2%) in the planning stages. **China and India account for 70% of the steelmaking capacity increase in Asia.***

Steelmaking capacity additions are expected to grow [...] 2.5 mmt (+1.2%) in the European Union."

In the light of the above, it is difficult to understand the complainant's argument that EU steel producers will seek to exploit their significant overcapacity. The countries which are in fact geographically close to Australia (ASEAN), and where Bisalloy has its own production centres (China) and distribution joint ventures (ASEAN), are the ones which are expected to massively increase their production. Evaluating the variables involved in these market changes, no reasoned projections can be made that the EU would pursue an increase of exports to Australia if the measures were allowed to expire.

Finally, it should be noted that the countries subject to this review are the only ones with anti-dumping duties in place on imports of quenched and tempered steel plate into Australia. Bisalloy filed an application in 2021 against imports from the United States, claiming the following: *"Bisalloy submits that it is **suffering injury that is "material" as a direct consequence of the dumping** of exports of Q&T steel plate from the USA to Australia. As indicated, SSAB has switched supply sources away from its traditional source in Sweden (where the majority of its Q&T steel exports have been sourced from historically) to now sourcing from its facility in the USA which is free from any IDD.¹⁰"*

However, following an investigation, the Australian Anti-Dumping Commission found that the margin of dumping on US exports to Australia was negligible (1.7%) and Bisalloy had not suffered any material injury. The investigation was terminated in August 2022¹¹.

On the basis of the above, it is therefore very difficult to argue that injury to Bisalloy is likely to recur if the anti-dumping duties on imports from the EU, namely from Finland and Sweden are removed in November 2024.

IV. CONCLUSION

As seen above, the criteria to prolong these antidumping measures, (which have been in place since 2014) for another five years are not met, in particular:

- **The application is not compliant with WTO** rules and jurisprudence.
- The applicant's claims for **confidentiality are excessive**, thus depriving the parties of their rights of defence;
- Measures have been effective; EU imports have decreased and the situation of the domestic industry has improved;
- There is no evidence that imports from Finland and Sweden are being dumped or would be dumped in the future;

¹⁰https://www.industry.gov.au/sites/default/files/adc/public-record/578_-_001_-_application_-_australian_industry_-_bisalloy_steel_pty_ltd_-_application_for_an_investigation.pdf

¹¹ Anti-Dumping Notice No 2022/077

- The application does not contain any information regarding relevant economic factors describing the situation of the domestic industry; however, based on information publicly available, the situation of the domestic industry appears to be good and thus injury is unlikely to recur if measures are allowed to lapse;

Therefore, this review investigation **should be terminated** without the continuation of measures. Any other course of action would be in breach of WTO rules and well-established jurisprudence.

The Commission trusts that the investigating authority will thoroughly examine the points raised above and refrain from extending measures, if not warranted, in full compliance with WTO rules and obligations.