

Non-Confidential

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By Email

**Mr Dale Seymour
Anti-Dumping Commissioner
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000**

Dear Commissioner,

RE: Dumping and Subsidy Investigation – Exports of Certain Railway Wheels from the People’s Republic of China – Submission by CCCME on Material Injury & Causation, the Preliminary Affirmative Determination and Related Matters

As you know, we act for the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (**CCCME**) in relation to the dumping and subsidy investigation into certain railway wheels exported from the People’s Republic of China (**China**).

CCCME represents Maanshan Iron & Steel Co. Ltd and Taiyuan Heavy Industry Railway Transit Equipment Co., Ltd. in relation to this investigation.

1. Introduction

In its Application, Comsteel claimed that it incurred injury in the following forms:

- Lost sales volumes;
- Loss of market share;
- Price suppression;
- Lost profit and profitability;
- Reduced return on investment;
- Reduced attractiveness to reinvest;
- Reduction in employment numbers.

Comsteel claimed that it commenced to suffer injury from the dumped imports of iron ore railway wheels from China in 2016 and this injury has been further compounded in 2017 when sales volumes have been lost to increasing import volumes from China and France.¹ It also claimed that such injury was caused by loss of contracts/sales to BHP Billiton and Rio Tinto in

¹ Comsteel’s Application, p. 20.

2016 to exports from China and France at allegedly dumped prices that undercut its own prices for “like goods”.

Comsteel further claimed that “*there have been no other factors that have contributed to the injury other than lost sales volumes caused by the dumped imports from China, and dumped imports from France.*”²

The above claims are not supported by any evidence provided by Comsteel. As will be discussed below, the claimed injury occurred in 2017 only and was unlikely caused by the allegedly dumped imports.

2. Initial Observations

As you would not doubt be aware, it is not uncommon for the you or the Commission to state that you are “*satisfied*” as to certain matters or that the Commission “*disagrees*” with certain matters. That is fine. It is your and the Commission’s prerogative. But the exercise of that prerogative must be exercised in accordance with Australia’s domestic legal obligating’s, including those in Australia’s antidumping regime and associated jurisprudence and WTO international legal obligations and jurisprudence.

I am not “*satisfied*” that either you or the Commission could be “*satisfied*” or “*disagree*” with matters that you purport to be satisfied or disagree with.

It would be useful in this regard for all interested parties to be advised and understand:

- what is the particular issue that you are satisfied of or the Commission disagrees with;
- the reasons for such satisfaction or disagreement;
- the factual basis for such satisfaction or disagreement; and
- the evidence on which such satisfaction or disagreement is based.

This should not be a problem for you and/or the Commission to disclose and would be helpful for all interested parties to understand your and the Commission’s views on these issues. I assume that neither you or the Commission will disagree with this nor provide details and supporting evidence. Would you please provide such details and supporting evidence.

3. National Public Interest

As the Commission would well be aware, the Federal Government, in its June 2011 report on “*Streamlining Australia’s Anti-Dumping System*”, in response to the Productivity Commission’s Report on Australia’s Anti-Dumping Regime, which recommended the inclusion of a bounded public interest test in Australia’s antidumping legislation, stated that such a bounded public interest test was unnecessary as the Minister already had a discretion under existing legislation to take into account public/national interest considerations in his/her decision whether to impose antidumping measures.

In the Streamlining Report, it was stated, at page 26, that: -

“... However, the additional assessment that Customs and Border Protection will provide may include matters such as an assessment of the expected effect of any

² Comsteel’s Application, p. 28.

measures on market concentration and domestic prices. Customs and Border Protection will also report on any claims regarding impacts on downstream industries.

The Branch already examines the effect on the market in determining the causes of injury to the industry and will determine the non-injurious price, and it is now proposed the Branch will provide the Minister with information specifically on these matters.

The Minister will provide a direction to the CEO of Customs and Border Protection to give effect to this approach, which is intended to better inform the Minister prior to making a decision whether to impose antidumping or countervailing measures.”

This does not appear to have occurred since the establishment of the Commission, either in terms of the Commission in its reports to the Minister on national/public interest considerations or the publication of a Ministerial Direction on the issue. It is understood that a draft Ministerial Direction was prepared in accordance with the above but never finalised or published. It is unclear why these matters relating to the national/public interest have not been pursued or given effect either by the Commission or the relevant Ministers.

Nevertheless, it would seem that the Commission is under a statutory obligation to investigate national/public interest matters as falling within the Minister’s discretion and bring them to the attention to the Minister in its report to the Minister so that the Minister may take them into account when making his/her decision on whether to impose antidumping measures, assuming the existence of dumping/subsidisation causing material injury.

It is submitted that the imposition of antidumping measures in this investigation on the goods under consideration and/or like goods would not be in the national/public interest for the reasons set out in this submission, including for the following reasons.

It is understood from Comsteel’s Application that its ultimate parent company is American Industrial Partners (**API**), a US-based private equity firm located in the Cayman Islands.

The Commission, despite being an “*investigative body*”, has not investigated who is or are the ultimate shareholders of API or its officers or why API is registered in the Cayman Islands and what tax or other benefits accrue to it and/or Comsteel from such registration in relation to its shareholding in Comsteel or what implications that this may have for this investigation. This is apparent from the Commission’s Consideration Report and its Preliminary Affirmative Determination.

The question arises as to why the Commission is keen to know who the ultimate shareholders and officers of exporters but are not so keen on finding out who the ultimate shareholders and officers of the ultimate parent companies of the ‘Australian industry’ or

their accounts or any tax benefits and/or other benefits from API being registered in a known 'tax haven'. This would seem to be a "deficiency" in the investigation.

The Cayman Islands, of course, is a well-known so-called 'tax haven' with secrecy provisions to keep confidential the identities of the shareholders and directors of companies registered there, as well as their accounts. More fundamentally, registration in so-called "tax haven" jurisdictions has its objective, as has been recognised publicly in Australia, to minimise tax liabilities on revenues/profits from subsidiaries in other countries, as well as minimise the tax liabilities of such subsidiaries in the jurisdictions in which the subsidiary is registered.

It must be emphasised that this is not to suggest any wrongdoing by being registered in the Cayman Islands or by API. There is nothing unlawful or illegal in doing so and, along with other US companies registered in the Cayman Islands, it could be a sensible commercial decision with a variety of tax and other benefits. What arrangements may exist are not apparent from Comsteel's Application.

The question, nevertheless, arises as to whether it is the Federal Government's policy to provide tariff protection, at the expense of downstream Australian industries and taxpayers, through antidumping measures to a company whose ultimate parent is apparently seeking to obtain the benefits of being registered in a known 'tax haven', including keeping secret who is or are its ultimate shareholders and/or its officers, its accounts and what tax benefits accrue to it being a company registered in the Cayman Islands through transfer of profits to the parent company, if in fact that this is occurring and what implications this may have for this investigation.

Consequently, it is a question for the Commission to consider whether the imposition of antidumping duties, as requested by Comsteel, would actually be in Australia's national/public interest and, if so, how and why or would it simply result in increased profits for Comsteel that would be transferred to API in the Cayman Islands and protect its monopoly position (*see further below*). This presumably would or could result in Comsteel paying less tax in Australia and API paying no or minimal tax on those revenues/profits transferred to API in the Cayman Islands. Whether this is occurring and whether it is in Australia's national/public interest should be investigated by the Commission.

Equally importantly, the Commission should pay due consideration to the negative impacts of antidumping measures on downstream industries and the general public in Australia and decide whether it is in Australia's national interest to afford tariff protection to maintain a monopoly position of the Australian industry and tax benefits for the Australian industry and its parent company at the cost of downstream industries and the Australian economy.

There would seem to be no other reason for this arrangement between Comsteel and API, assuming it exists. Unfortunately, neither Comsteel's Application, nor the Consideration Report nor the Preliminary Affirmative Determination disclose what arrangements exist between Comsteel and its parent company regarding transfer of profits and tax liabilities contrary to WTO rules regarding transparency.

Is this being investigated by the Commission and are any such arrangements in Australia's national interest or would be in Australia's national interest if antidumping measures were to be imposed?

4 Preliminary Affirmative Determination (PAD)

The PAD issued by you raises a host of issues.

Pursuant to Section 269TD of the *Customs Act 1901* a PAD may be issued where it appears that there may be *sufficient grounds for the publication of a dumping/countervailing duty notice*.

The questions that arise are:

- were there grounds for the publication of a preliminary affirmative determination. That is, were there *sufficient grounds for the publication of a dumping/countervailing duty notice* and, if so what were those grounds (i.e. dumping causing material injury to an Australian industry producing like goods). This not detailed in the PAD; and
- what is the object of publishing a PAD? Of itself, the publication of a preliminary determination has no effect. Essentially, the publication of a PAD it is to enable securities to be taken to prevent injury occurring while the investigation continues. However, the PAD is silent on what injury would be or could be prevented from continuing while the investigation continues by the taking of securities. This requires you to identify precisely what injury have the "*goods under consideration*" caused and when and how to the Australian industry through the alleged dumping of such imports and how the taking of securities will prevent that injury from continuing to occur?

It also is unclear what injury, if any, material or otherwise, that could be prevented by the imposition of antidumping measures. This would seem to be a threshold issue that should be addressed in a preliminary affirmative determination, absent which there can be no justification for the imposition of provisional measures. This has not been addressed in the PAD.

This is not addressed in the PAD nor in your recent letter. Why not and how can the Commissioner be "*satisfied*" that the taking of securities is "*necessary*" if this has not been addressed? This raises the question of not only how the could possibly prevent so-called injury from occurring but also whether the imposition of antidumping measures could prevent injury from dumping.

For example, it is clear from the Commission's Consideration Report and the PAD that the injury claimed by Comsteel was due to loss of tender contracts. Obviously, in such circumstances the injury is incurred on the loss of the contract despite your views to the contrary and not at some subsequent time. The supply of goods over the term of a contract does not "*continue*" to cause further injury during the investigation. The Australian industry will not supply "*like goods*" to the end-users in substitution of the goods being supplied under those contracts while those contracts subsist. The injury has already occurred on the awarding of the contract and the imposition of provisional measures will not affect the continued supply of the "*goods under consideration*" under those contracts. They provisional measures will not

prevent any injury from occurring. If you are of a different view, please provide details as to how the taking of securities would or could prevent what injury to the Australian industry.

In this context, the question rather is whether any of the four end-users will be issuing tenders for the supply of the goods under consideration during the statutory timeframe for the investigation – i.e. on or before 20 September 2018. If not, what injury is being or could be prevented by the taking of securities? This does not seem to have been considered by the Commission. Why not?

Further, in the PAD you have calculated a preliminary dumping margin of 17% for exports from China. This is a preliminary dumping margin not based on verified evidence from Masteel. Nevertheless, this preliminary dumping margin is flawed as your methodology relied on a mere assumption that a “*particular market situation*” exists in China’s steel industry.

This is despite the fact that you stated you had made no preliminary decision on whether a “*particular market situation*” existed in China in relation to the sale of “*like goods*”, assuming that “*like goods*” were actually sold in the Chinese domestic market.

In the PAD, you stated in Section 7.2 that:

*“The Commission will continue to examine these claims, taking into account information including questionnaire responses from Masteel and the Government of China. For the purposes of this PAD, the Commission **has not made a preliminary finding that there is a particular market situation for railway wheels in China**. The Commission notes Masteel’s claim that it does not sell like goods on the domestic market and will investigate this claim as the investigation continues.”* (emphasis added)

You then ignore the fact that you have not made a “*preliminary finding*” on this issue and in complete contradiction of this you state in Section 7.3 of the PAD that:

*“At the time of publishing this PAD, I am **preliminarily satisfied** that the GOC’s involvement in the Chinese domestic steel market **has materially distorted competitive conditions in China for the steel material input to the manufacture of railway wheels**.*

*In reaching this **preliminary assessment**, I have relied on previous findings of the Commission in relation to **particular market situation determinations, competitive market costs and countervailable subsidy determinations for Chinese steel products...**”* (emphasis added)

In making these findings, you have completely ignored your own decision in Section 7.2 of the PAD, the submission of the CCCME on 4 June 2018 and Masteel’s responses to the exporter questionnaire on 4 June 2018. This raises the question of your competence in this investigation and the Minister responsible for this investigation.

For example. What is a “*competitive market cost*”? A “*cost*” is a “*cost*”. How can there be a “*competitive market*” for “*costs*”? This you have not explained and as someone with an accounting background, you presumably be aware of the difference between a “*cost*” and a “*price*” with only the latter being subject to market conditions.

Instead, you appear to have relied exclusively on the assertions contained in Comsteel's Application and findings in past investigations. The Commissioner has not explain at all why Comsteel's assertions were accepted and findings in past investigations were relevant to this investigation, nor with the positive evidence and arguments provided by CCCME and Masteel were not even considered. In doing so, youioner has failed to provide full opportunity for the interested parties to defend their interests as required under Article 6 of the WTO Anti-Dumping Agreement and has not made a decision in an objective and unbiased manner.

The relevance of previous findings is, of course, questionable at best and no explanation or evidence has been provided that previous findings are relevant to this investigation. It is unclear how you could be "*preliminary satisfied*" based on historical information that may or may not be current and may or may not apply to this investigation. This has not been addressed by you in the PAD.

In the A4 Copy Paper investigation the Commission found that there was no "*particular market situation*":

"The Commission considers that the GOC retains significant influence over the size and structure of the Chinese pulp industry. The Commission considers that this influence is likely to have distorted the domestic price for pulp during the investigation period to some extent. However, the Commission has concluded that the distortion was not of such an extent to result in a market situation. Findings in support of this conclusion include: • the domestic price for Chinese pulp is typically higher than comparable regional benchmarks; and • the broader industry has significant exposure to external markets resulting in alignment between domestic and regional pricing. This exposure to external markets includes the presence of foreign invested enterprises (FIEs) in China and the Chinese paper industry's dependence on imported pulp."

This would seem to be the situation here and consistent with the A4 Copy Paper investigation there should be a similar finding that there is no "*particular market situation*" in this investigation it is unclear why such a finding should or could be made in this investigation, especially as you have made preliminary finding that no "*particular market situation*" exists.

Further, as is evident from Masteel's response to the exporter questionnaire, Masteel obtains a considerable amount of its raw materials for the manufacture of steel used in the production of railway wheels from a variety of countries with only a minimal amount from Chinese sources. Your statements in Section 7.3 of the PAD would seem irrelevant to this investigation. Do "*particular market situations*" exist in these '*other countries*'? How do their prices compare with Chinese prices for the raw materials in question? Has the Commission or you investigated this before making the PAD and, if not, why not?

In addition, as CCCME requested for consideration by the Commission in its 4 June submission,

"In claiming there is a "particular market situation" in China's steel industry, Comsteel did not establish how the alleged situation has actually affected the price of steel billet, assuming the steel billet is actually purchased by producers of the "goods under consideration" in China and, if that price was actually distorted, how that distortion in the price of the raw materials has actually affected the sale price of the "goods under consideration" in the Chinese market. Thus, Comsteel has failed

to provide any evidence relating to “particular market situation” that is specific to this investigation.”

It, therefore, is unclear how you could be “*preliminarily satisfied that the GOC’s involvement in the Chinese domestic steel market has materially distorted competitive conditions in China for the steel material input to the manufacture of railway wheels*”, particularly when such inputs to manufacture of steel are sourced from overseas. What “*competitive conditions*” have been distorted, how and to what extent and for what inputs to the manufacture of steel and/or railway wheels? This you have not explained nor provided any details or evidence to support your contentions.

What involvement has the Government of China had in the “*Chinese domestic steel market*” that has affected the cost of production and prices of railway wheels in China when the primary source of raw materials for the production of steel for the production of railway wheels by Masteel are from overseas countries, such as Australia and Brazil. Has the Chinese Government influenced the market of such raw materials in, for example, Australia and Brazil to the extent that they are not competitive market prices? This has not been addressed in the PAD and the failure for it to be addressed gives rise to the administrative law principles of lack of evidence and, consequently, if there is a reasonable suspicion of bias. I would welcome your and the Minister’s thoughts on this as it goes to the integrity of the investigation.

Due to your failure to consider the relevant evidence provided by CCCME and Masteel, the calculation of the dumping margin in the PAD is unjustified. Therefore, the PAD should be withdrawn as provisional measures cannot be applied until there is a reasonable preliminary finding of dumping based on positive probative evidence to Article 7 of the WTO Anti-Dumping Agreement. You should also consider whether the investigation should be terminated on the grounds of no dumping or *de minimis* dumping margin if the alleged “*particular market situation*” does not exist or is irrelevant to this investigation according to the evidence provided by the interested parties.

If you or the Minister are of a different view, then I would like to see that explanation and supporting evidence by **cob 13 July 2018**. Failure to do so will be treated as an acknowledgement by you and the Minister that there was no basis for the PAD, nor, for that matter, for accepting Comsteel’s Application and that it was in error in this regard.

Finally, the foregoing requires consideration of the question of whether there has been a breach of administrative law principles by you as to failing to take into account relevant considerations, taking into account irrelevant considerations, the absence of probative evidence on which the findings were based and a reasonable suspicion of bias in this context. If you are of a different view, please provide details and supporting evidence relevant to this investigation.

5 General observations on injury and causation

The period for injury analysis is January 2014 to December 2017 (“*Injury Analysis Period*”).³

The evidence provided by Comsteel shows that the claimed injury occurred in 2017 only.

For the purpose of determining whether material injury has been caused to an Australian industry, Section 269TAE of the *Customs Act 1901* requires consideration of different injury

³ Consideration Report, pp. 5, 12.

indicators “*during a particular period*”. That is, the determination of injury must be based on such considerations during the Injury Analysis Period, and not merely on any specific year during the period.

As acknowledged in the Commission’s Dumping and Subsidy Manual, Section 269TAE of the *Customs Act 1901* reflects the rules on the determination of material injury established in Article 3 of the WTO Anti-Dumping Agreement.⁴

Article 3.1 of the WTO Anti-Dumping Agreement requires that determination of injury must be based on “*positive evidence*” and “*objective examination*”. This requires the investigating authorities to conduct an objective assessment of positive evidence in an unbiased manner.⁵

An injury determination based on *selective* data or period of investigation which tends to bias against a particular party and in favour of the other is not compatible with this “*objective assessment*” requirement.⁶ For example, in determining whether alleged dumping has had any price effect on domestic “*like goods*”, investigating authorities must conduct “*a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the [Injury Analysis Period]*.”⁷ Overall, the injury analysis must assess the impact of dumped imports on the state of the domestic industry as a whole.⁸ Such an assessment requires evaluation of all of the relevant injury factors showing either positive or negative effects on the domestic industry.⁹

It must be noted that according to Comsteel, the imports of iron ore railway wheels from China only commenced in 2015, and there were no imports of the such goods from France before 2017.¹⁰ The alleged effects on sales volume, price, profit and profitability, etc., did not occur until 2017. In all of the other years of the Injury Analysis Period, the evidence adduced in the Application does not show any injury on the domestic industry.

Rather, Comsteel’s own evidence shows that prior to 2017, Comsteel was able to increase production, sales, revenue, and profit despite the alleged dumped exports from China. In contrast, the alleged injury occurred after the commencement of imports of the goods under consideration from France in 2017. This suggests that dumping from China did not cause the injury.

It is also important to note that Comsteel maintained a monopoly position in the production and sale of the “*like goods*” (i.e. “*identical*” goods to the *goods under consideration*) in the Australian market for over 40 years before the imports of the “*goods under consideration*” from China commenced in 2015.¹¹ This position seems to have allowed Comsteel to maintain a high price and exploit the profit and profitability of the end users.

For example, despite the contraction of the domestic market for the “*goods under consideration*” in 2014-15 and the increase in the allegedly dumped imports since 2015, Comsteel was able to leverage its monopoly position to maintain the level of its domestic sale

⁴ Dumping and Subsidy Manual, April 2017, p. 15.

⁵ WTO Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

⁶ WTO Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 181.

⁷ WTO Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.

⁸ WTO Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.204.

⁹ WTO Panel Report, *China – X-Ray Equipment*, paras. 7.214-7.215.

¹⁰ Comsteel’s Application, pp. 15, 27.

¹¹ Comsteel’s Application, p. 15.

price and to secure steady and significant increase in production and sales.¹² This also is further addressed later below.

Comsteel's Application did not disclose its profit and profitability variations in 2015 and 2016. However, Comsteel admitted that its profit and profitability increased during the period and a decrease only occurred in 2017.

In addition, Comsteel submitted that in 2015 and 2016, it secured large volume capital railway wheels export sales to China (i.e. maintenance railway wheels and not railway wheel sets that included axles, etc), while such sales were significantly reduced in 2017 due to the decline in demand in China due apparently to excess capacity.¹³ It is unclear how Comsteel's exports to China of railway wheels for maintenance, if any, and any railway wheel 'sets' are relevant to this investigation. Exports of railway wheels to any export market in any form are irrelevant to this investigation.

It would seem likely that Comsteel is seeking to use the protection of antidumping measures to maintain its monopoly position in Australia. This is not addressed in Comsteel's Application, nor in the Consideration Report or the PAD. This could constitute the tort of interference with economic relations.

It is a well-established economic principle that monopolies create various market distortions and adversely affect the economic welfare of a nation. Without competition, there would be no incentive for Comsteel, for example, to increase production efficiency, improve quality of goods and related services, rendering the Australian railway wheels industry, as well as the downstream industries, uncompetitive in the global market.

As the Productivity Commission reported in 2016, antidumping measures has made Australia worse off on a national welfare basis¹⁴ and this is true when antidumping measures are used to isolate an established local monopoly from import competition. If the Commission is to consider the application of antidumping measures in this investigation, the Commission must also consider the fact that the only economic rationale for the use of antidumping measures is to avoid the creation of monopolies (i.e. through the so-called predatory dumping strategy, which has never occurred with the inception of antidumping measures by Canada in 1914). The use of antidumping measures to strengthen the monopoly position of Comsteel has no economic or other rational justification.

It adversely impacts on Australia's national welfare and is protectionist. The issue for the Commission is whether this is in Australia's national interest. That is, whether the imposition of antidumping measures will be of benefit to the four end-users of "*the goods under consideration*" from China and to the Australian economy generally or simply benefit Comsteel and its shareholders to maintain a monopoly position and exact monopoly rents from that position and tax benefits by its parent company being registered in a so-called "tax haven". Has or will the Commission investigate this?

¹² Comsteel's Application, pp. 16, 20-22.

¹³ Comsteel's Application, p. 26.

¹⁴ Productivity Commission, "Developments in Anti-Dumping Arrangements", Research Paper February 2016, available at: <https://www.pc.gov.au/research/completed/antidumping-developments/anti-dumping-research-paper.pdf>

In this context, it must be noted that Comsteel itself has acknowledged that it is and has been a monopoly supplier of identical railway wheels to the Australian market for a considerable period of time to those being exported from China.

In seeking the imposition of antidumping measures, it would seem apparent that Comsteel and its parent company are seeking to preserve that monopoly position. It must be noted that Comsteel has no right to maintain a monopoly position in the supply of the railway wheels in question to the four Pilbara end-user, nor to use antidumping measures to achieve this purpose.

Either its production costs, transportation costs, production quality, performance standards, etc. and its prices are globally competitive, or they are not. If the latter is the case, then antidumping measures will not render Comsteel's products competitive but simply provide temporary protection for an industry that is not globally competitive as is evident for by the effect of antidumping measures for other Australian industries.

This ignores the fact that the end-users of the railway wheels in question operate in global markets and in competition with other global suppliers of iron ore. This means that Australian suppliers of iron ore to global markets must be globally competitive, including on price as well as other factors. This, obviously, means that they need to reduce costs in their supply chain through, for example, adoption of new technologies and also globally competitive inputs to the production of iron ore for export. Has this occurred in relation to supply of railway wheels by Comsteel to the four end-users in question?

This also raises the question of whether a monopoly supplier, such as Comsteel, that, apparently, does not export "*like goods*" (i.e. either identical goods or goods closely resembling the goods under consideration) into overseas markets is selling like goods into the Australian market at globally uncompetitive prices.

A comparison of Comsteel's prices for "*like goods*" with those of producers, particularly in but not limited to Asia needs to be undertaken in this regard. If Comsteel's prices are higher, it needs to be examined why this is the case and whether it is due to its monopoly position and/or prevailing circumstances in Australia (e.g. government regulation, labour costs and union requirements on such labour costs and other entitlements, power costs, costs of inputs to manufacture, environmental requirements, etc). Absent such an examination, it is not possible to determine whether Comsteel's prices of "*like goods*", as a monopoly supplier, are in fact competitive on the Australian market or elsewhere and it is this that is causing the claimed "*material injury*".

This raises another issue. Masteel competes in a global market for the supply of railway wheels to its customers. This means that its prices for its railway wheels must be globally competitive as well as the quality of its railway wheels and the performance of its railway wheels. The question that then arises is whether Comsteel's prices for its railway wheels and its quality standards and performance standards for its railway wheels are globally competitive. Has this been investigated? If they are not globally competitive, is this the cause of its injury?

6 Volume Effects

In terms of sales volume, Comsteel's Application shows that its sales of the "goods under consideration" increased steadily during the majority of the Injury Analysis Period (i.e. 2014-16) and a decrease occurred in 2017 only.¹⁵ This was confirmed in the Consideration Report.¹⁶

The Application further shows that the allegedly dumped imports from China commenced to increase in 2016. In this period, however, Comsteel's domestic sales also increased.¹⁷ This parallel increase was most likely a result of the significant growth of the demand in the Australian market for railway wheels.¹⁸ In any case, the increase in the alleged dumped imports from China did not cause Comsteel's sales volume to fall. In 2017, Comsteel's sales volume apparently decreased by around 21 percentage points while the allegedly dumped imports increased by around 27 percentage points in the indexed tables in the Application. This raises the question of why Comsteel's sales volumes decreased by these percentage points while its sale price remaining at the same level.

This needs to be addressed by you.

7. Price Effects

Comsteel's sales price remained at the same level during the Injury Analysis Period despite the increase in the allegedly dumped imports.¹⁹ Thus, there is no evidence to show that the dumped imports have affected the sales price of Comsteel.

In relation to the alleged price undercutting, Comsteel has claimed price undercutting of between 13% to 30% due to dumping, presumably of the "goods under consideration" and no other goods. As indicated in CCCME's 4 June submission, it is difficult to reconcile the level of price undercutting to the alleged dumping margins. No attempt has been made to do this in the Application or the Consideration Report or the PAD.

Consequently, it is unclear whether the alleged price undercutting or the extent of the alleged price undercutting is due solely to allegedly dumped exports from China and France or whether other economic factors have led to such price undercutting by imports of the "goods under consideration", whether at dumped or un-dumped prices and, if dumping is occurring and price undercutting is occurring, whether the level of price undercutting can be attributed to the alleged dumped imports from China or whether it is due to high, monopolistic pricing by the Australian industry.

This requires a consideration of Comsteel's prices and whether they have been artificially inflated by Australian government's policies and regulations, the costs of inputs to manufacture, electricity prices, leasing costs (if any), transport costs, financing costs, labour costs and the effects of Australian unions on labour costs and Occupational Health and Safety costs, as well as environmental regulation costs, as well as its historical monopoly position in the Australian market and whether this also has made the "like goods" it produces uncompetitive globally and hence the apparent absence of exports.

¹⁵ Comsteel's Application, p. 16.

¹⁶ Consideration Report, pp. 32-33.

¹⁷ Comsteel's Application, pp. 14-15.

¹⁸ Consideration Report, p. 13.

¹⁹ Comsteel's Application, p. 21.

These costs and Comsteel's prices for "like goods" need to be compared with (i.e. so-called 'benchmarked' against) those countries in the Asia-Pacific region. Absent such a "benchmark" comparison, the Commission is not in a position to form a view on whether Comsteel's production costs and/or prices are artificially inflated by its monopoly position, Australian government influences and regulation and the influences of interested parties such as unions

Perhaps, it is Comsteel's high prices for "like goods" (i.e. the identical goods it produces to the goods under consideration) based on its high costs of production that explains why there seems to be no exports of "like goods" by Comsteel. Its railway wheels are not globally competitive.

Isn't dumping and subsidy investigations all about the price effects the "goods under consideration" on the domestic industry and the nature and extent of such effects through the allegedly dumped and/or subsidised prices of the "goods under consideration". That is, there needs to be a clear link supported by objective, probative evidence of the extent of the dumping and/or subsidisation of the goods under consideration with the alleged material injury caused to the domestic industry. Absent such evidence, there can be no justification for imposing antidumping measures as to do so would be based on mere speculation.

8. Profits and Profitability

The sales value of Comsteel continued to increase during 2014-16 as its sales volume increased in the same period.²⁰ The growth of sales volume seems to have also led to decrease in fixed costs and hence increased profits during the period.²¹

Therefore, the only year where the alleged impact on profit and profitability occurred was 2017 when Comsteel's sales volume decreased. However, as explained above, this decrease was unlikely a result of the imports of the "goods under consideration" from China.

9. Materiality of Injury

In Section A-9.5 of the Application, Comsteel makes the following statements on 'material injury':

"The injury experienced by Comsteel in 2017 is considered to be material as revenues have declined by xx per cent (with further reductions anticipated in 2018 due to lost sales at RTIO), reduced profit by approximately xx per cent, and xxxxxx profitability.

As indicated, Comsteel reduced its employment numbers (by approximately xx per cent) in 2015 in response to the commencement of lower-priced competition from China.

Comsteel has an installed capacity to manufacture approximately xxxxxx railway wheels (that includes iron ore railway wheels). In 2017, Comsteel has only manufactured approximately xxxxx iron ore railway wheels – a significant reduction on the xxxxxx iron ore railway wheels produced in 2016.

²⁰ Comsteel's Application, p. 16.

²¹ Comsteel's Application, p. 21.

The extent of the revenue and profit decline on Comsteel's long-established historic position in the local production and supply of iron ore railway wheels is viewed as extensive and material ..."

Thus, Comsteel asserts that it incurred reductions in revenues and profits in 2017 compared with 2016 and that this was likely to continue with "lost sales" to Rio Tinto. Precisely what sales were lost and how – under tenders or otherwise? How can Comsteel anticipate that it will lose sales to Rio Tinto, or the other end-users? Does Comsteel know that it will lose such sales and what evidence is there that this will be the case or, as would appear to be the case, Comsteel is merely speculating that this will be the case? Does this mean that Comsteel acknowledges that it is not competitive?

No mention is made of reduction of sales to other end-users although elsewhere in the Application, Comsteel has claimed that the injury it had incurred was due to reduced sales to BHP and Rio Tinto and the other mining companies in the Pilbara by allegedly dumped imports from China. It is difficult to reconcile these claims and whether such reconciliation is in fact possible.

Comsteel also claims that it has a certain production capacity for railway wheels. However, it is unclear whether that production capacity is for "like goods" (i.e. identical goods) or other railway wheels as well and, if so, the other railway wheels should be excluded from the analysis. Only "identical wheels" supplied by Comsteel to the end-users should be taken into account, as opposed to complete "sets" (i.e. wheels and axles, etc.).

Finally, Comsteel claims that the "extent of the revenue and profit decline on Comsteel's long-established historic position in the local production and supply of iron ore railway wheels [i.e. monopoly position] is viewed as extensive and material". No explanation is provided why the claimed "extent of the revenue and profit decline" is material. That is, what is the measure of 'materiality' that Comsteel has used to form such a view based on what evidence as opposed to merely asserting the 'materiality' of the claimed injury?

10. Subsidies

CCCME notes that, typically, in applications such as this on alleged subsidies received by exporters in China there is a 'shopping list' of subsidies in the forlorn hope that the Commission may find that the exporter received some of those subsidies and somehow that they are countervailable and are relevant to causing material injury.

Whether any such subsidies are actually received, in what amounts and to what extent they are relevant to this investigation, will no doubt be addressed in responses to the exporter questionnaire and, hopefully, in the investigation.

However, CCCME notes that Article 11.2 of the WTO Agreement on Subsidies and Countervailing Duties requires that applications for the imposition of countervailing measures meet certain requirements in order for an application to be accepted. These requirements have not been met in this investigation. It is not clear how the Commission

could accept an application that did not meet these international legal requirements, as well as Australia's domestic legislation. The CCCME would be grateful for the Commission's detailed explanation in this regard.

Further, the Commission usually finds that of the Chinese exporters investigated, none receive all of the subsidies identified in the Application and, at best, only a few subsidies are actually received and often at *de minimis* levels. CCCME expects this to be the case in this investigation but it begs the question of why the Application was accepted in the first place in breach of Australia's international legal obligations.

Given that history on the receipt of subsidies by Chinese exporters, it is unclear why the Commission accepts applications that simply provide a '*shopping list*' of subsidies with no evidence as to whether any of the subsidies have been received by exporters, in what amount or, in this case, any estimate of a subsidy margin. Query, therefore, what relevance Section C of the Application has to this investigation and, in particular, to the claims of material injury and causation. Is this simply a '*fishing expedition*' by the Australian domestic industry when it has no idea nor evidence of any subsidies that have been provided, received or caused it material injury, as is evident from its Application.

Further, CCCME is concerned that the questions posed by the Commission in Section C of the exporter questionnaire have not been posed by the Commission to an Australian industry in the application form for the imposition of antidumping measures. Why not? Does the Commission not believe that a "*particular market situation*" can exist in Australia where governments of Australia, public bodies and unions cannot influence an Australian industry's costs to produce and sell and its domestic prices through subsidies or otherwise? Does it not believe that a monopoly position that has been held by the Australian industry cannot lead to artificially high prices by the Australian industry that are not globally competitive?

Any such influence would seem to be a "*relevant economic factor*". This must be addressed by the Commission – that is, what influences have such entities had on the Australian industry's cost to make and sell and domestic selling prices "benchmarked" against those of similar industries in the Asia and what effect this has on the material injury and causation analysis. I would welcome your detailed explanation on why this has not been addressed and/or why it will not be addressed when it should be fully addressed to properly assess material injury and causation. If you or the Minister are of a different view, please let me know and provide detailed reasons and evidence to support your view.

CCCME notes that Rio Tinto, in its submission to the Commission, has raised similar concerns.

11. Causation

As noted above, Comsteel claimed that there were no factors other than the allegedly dumping of exports from China that caused the alleged injury to the Australian industry.

Evidently, Comsteel has failed to discharge its burden of proof on the issue of "*causation*", that is, to establish a *prima facie* case that the alleged injury was not caused by dumping-

unrelated factors. In fact, the alleged injury, if established, may be attributed to a number of other factors.

First, even while the decrease in price of Chinese exports of the goods under consideration to Australia is true, this may be explained by the Australia-China Free Trade Agreement which took effect in December 2015, and which reduced the import duty on the imports of the goods under consideration from China to 3% in 2016 and 2% in 2017 (from the general applicable duty of 5%).²²

Second, China has a comparative advantage in the cost of production of the “*goods under consideration*” compared to Comsteel’s cost of production of “*like goods*” (i.e. identical goods). Railway wheel manufacturing cost in China are obviously lower than that in Australia. This is reflected in the cost of raw materials, the lower cost of labour and the relatively higher production efficiency in China and greater economies of scale, as set out below: -

(a) raw materials – scrap steel

Scrap metal used in the production process for railway wheels in China is less than that in Australia. CCCME understands from Comsteel’s Application that Comsteel relies exclusively upon in its production of railway wheels on scrap metal.

In 2017, the price of scrap steel in China was slightly lower than that in Australia. According to China iron & Steel website information, the CFR of sheared scrap steel imported from Australia was about US\$256/t in Jan.~ Jun., and about US\$353/t in Jul.~ Dec. respectively. According to the information on *Steelhome.cn*, the price of scrap steel in China was RMB 1,704/t in Jan.~ Jun., which was equivalent to US\$247/t at the exchange rate of 6.90 in the corresponding period; the scrap steel price in Jul.~ Dec. was RMB 2,273/t, which was equivalent to US\$338/t at the exchange rate of 6.71 in the corresponding period.

Obviously, this provides a cost advantage to Chinese producers of railway wheels using scrap steel as part of their manufacturing process. That is, Comsteel’s production costs in relation to scrap metal are higher than those in China.

It, no doubt, will be alleged, that this is due to the Government of China’s influence on production costs in the Chinese steel industry. However, where is the current information that this is the case and that it applies to scrap metal prices and how does it apply to the cost of production of steel in China that use raw materials sourced from countries other than China? Again, this mere speculation with no evidentiary support.

If there is any evidentiary support for such contentions, please provide us and other interested parties with details of such evidence.

²² Comsteel’s Application, p. 11.

(b) raw materials for use in the manufacture of the “goods under consideration” are manufactured internally

It is CCCME’s understanding that raw materials used by Chinese producers and exporters of railway wheels are produced internally (i.e. that is they produce their own steel for railway wheels as well as for other uses employing raw materials sourced in China and from a variety of overseas countries).

For example, raw materials used by Masteel in the manufacture of railway wheels are produced internally by Masteel’s Special Steel Company.

Raw materials produced in the electric furnace of Special Steel Company consist mainly of molten iron (70%) and scrap steel (30%). In 2017, the average cost of blank wheels supplied to Masteel’s Wheel Division (CL60K) was much lower than amounts set out in paragraph (a) above. This should be reflected in Masteel’s response to the exporter questionnaire, which, of course, is confidential to Masteel.

Consequently, Chinese producers of railway wheels, such as Masteel, have an advantage in the cost of raw materials for the manufacture of railway wheels over that of Comsteel who solely uses scrap metal and purchases its scrap steel requirements in Australia. How do those scrap metal prices compare with those in other countries?

(c) labour costs obviously are lower in China than in Australia

Masteel’s public annual report indicates that the average annual salary of its workers was about RMB 100,000 in 2017, which was equivalent to US\$14,900 calculated at the year-end exchange rate 6.71.

However, according to website information, the annual salary of industrial workers in Australia in the same period was significantly higher, at about US\$60,000~90,000. This does not include other benefits paid to such employees under agreements negotiated with unions, nor overtime.

Clearly these labour cost differences provide another cost advantage to Chinese production, not to mention other on costs such as superannuation, occupational health & safety, etc., imposed on the Australian industry by Australian governments and unions under industrial agreements. No doubt the Commission will investigate such costs to determine whether they have made the Australian industry globally uncompetitive.

These are not the only economic factors that provide Chinese exporters with a comparative advantage over Comsteel but are indicative of why Australian

production of railway wheels is not competitive either on price or on other factors or a combination of all such economic factors.

CCCME notes that Rio Tinto in its submission to the Commission has expressed similar concerns in this regard.

- (d) Masteel maintains a higher capacity and efficiency and more advanced technology in the production of the goods under consideration and hence acquires a competitive advantage over Comsteel.

These include: -

(i) *World Class Production Capacity*

Masteel's Wheel Division has two railway wheel production lines and one strake and ring production line. Main production equipment includes 9 disk cold sawing machines, 8 annular furnaces, one 90MN, 50MN and 63MN oil press respectively, two 31.5MN oil presses, one 30MN hydraulic press, one DRAW1250 and DRAW915 vertical wheel rolling mill respectively, one MRX-4000 large ring rolling mill, one strake roughing mill and finishing mill respectively, 102 slow cooling furnaces, 28 pit furnaces, 12 wheel quenching platforms, 20 RQQ NC machining tools, 12 VF120 NC machining tools, 7 automatic wheel production inspection lines, two wheel paint spraying and baking lines and 26 material conveying manipulators.

It shows that Masteel has a world leading advanced and complete **wheel production equipment with an annual production capacity of 700,000 wheels and 200,000 strake rings in total**. According to the statistics, as of the end of 2017, it had 1,459 employees and its output was 349,857 wheels in 2017, with the per capita production efficiency of 240PCS/person.

Consequently, its per capita production efficiency is world class.

(ii) *Research and Development (R&D)*

It is of fundamental importance that Chinese companies, including those manufacturing railway wheels for the Chinese market and for export, invest both in their production facilities and in rhtier designs.

In this regard, CCCME understands that Masteel continuously invests in R&D and production equipment development to ensure that world class manufacturing standards, design and production capacity for railway wheels are maintained.

For example, CCCME understands that Masteel has invested in the following equipment: -

- (A) In 2013, a competitive wheel processing inspection line was constructed, with investment of RMB 70 million, which has the highly precision in-depth processing and inspection capacity for 50,000 PCS each year;
- (B) In 2017, Masteel invested RMB 15 million to construct a flexible processing and press fitting line to expand the production SN of wheels; it invested RMB 80 million to transform two-wheel inspection lines to upgrade the non-destructive testing equipment and realize material transfer automation, improve the wheel inspection level and ensure the surface quality of wheel production processes;
- (C) In 2013, a competitive wheel processing inspection line was constructed, with investment of RMB 70 million, which has the highly precision in-depth processing and inspection capacity for 50,000 PCS each year;
- (D) In 2017, Masteel invested RMB 15 million to construct a flexible processing and press fitting line to expand the production SN of wheels; it invested RMB 80 million to transform two-wheel inspection lines to upgrade the non-destructive testing equipment and realize material transfer automation, improve the wheel inspection level and ensure the surface quality of wheel production process.

In relation to R&D:

- (i) In 2012, Masteel established a new wheel-type design platform. At present, it has cultivated some product design engineers to continuously improve the product design capacity;
- (ii) In 2015, Masteel established a PDM drawing and document management platform to process the product design and process design process; it established a full life cycle information management system to meet the product quality tracking requirements;
- (iii) In 2016, based on the innovation capacity development project, Masteel invested RMB 50 million to construct a wheel inspection and test base to improve the testing and R&D equipment level.

It is evident from the foregoing that Masteel has undertaken a continuous development programme for its design and manufacture of railway wheels. No doubt the Commission's verification team observed and can confirm this.

CCCME also notes that Rio Tinto in its submission to the Commission has expressed similar observations in this regard.

(e) Marketing

Recently, focusing on the strategic positioning of developing “the most innovative competitive diversified iron & steel material group”, Chinese producers and exporters of railway wheels have adopted as a core philosophy that of creating and adding value with products and services and focusing on the “plant and market” to play roles of leading manufacturing and marketing their products.

Such companies establish an improved marketing service network. For example, Masteel has constructed nine processing and distribution centres and six regional companies in China and, in order to actively expand its global market. The company also established six overseas marketing subsidiaries in Australia, South Korea, USA and Germany to facilitate the marketing of its products in global markets.

These companies from the identifying customer requirements including manufacturing and supply processes, product design, technical services and provision of systematic solutions and then the company establishes a marketing strategy taking these into account, including integrating them into the globalized marketing network, APQP, “five-in-one” customer service system, EVI, marketing informatization platform and brand cultivation management system to accelerate the transformation from a manufacturer to a material supplier.

In order to strengthen to develop key Australian end-users and to cover the shortage of export sales in supply timeliness, Masteel rented a warehouse in Perth, Australia. Through providing a warehouse, wheels manufactured are first shipped to Australia for storage in it. After customers place orders, delivery will be arranged to effectively solve the problem of supply timeliness, as well as problems of customers’ inventory backlog and fund occupation. The abovementioned measure may fully meet the requirements of Australian customers; delivery in a DDP manner and door-to-door supply avoid the freight logistics link for customers. Meanwhile, for customers’ any technical or commercial problems proposed during product use, Masteel will actively respond, carefully research, and provide timely and effectively solutions to meet customer requirements

With abovementioned measures and based on their performance, CCCME understands that railway wheels of Chinese companies such as Masteel have a customer service advantage through systematically providing superior after-sales and technical services. In addition, these arrangements solve

issues of the timeliness of deliveries of railway wheels through providing a warehouse near Australian users' plants.

CCCME understands that Comsteel delivers its railway wheels from its plant in New South Wales to the four end-users in the Pilbara in Western Australia. This presumably gives rise to delivery time issues as well as transportation and insurance costs. Has this been addressed in Comsteel's pricing?

(f) Standards and Global Competitiveness

CCCME understands that Comsteel does not manufacture railway wheels that meet the standards in overseas markets, as opposed to simply meeting Australian AAR standards.

If this is correct, then Comsteel has confined itself to the Australian market comprised of the four end-users and their specific individual requirements for railway wheels and not invested in developing its production capacity and design, as well as reducing its production costs, to meet global demands, including global standards for railway wheels.

This obviously affects its production costs and revenues and exposes its revenues and profits as supply and demand in the Australian market fluctuate. Has this been taken into account in Comsteel's pricing?

12 Conclusion

In light of the foregoing and the matters addressed in CCCME's previous submission, it is evident that:

- (a) Comsteel's Application possessed numerous deficiencies and should have been rejected by the Commission;
- (b) the claims made by Comsteel in its Application concerning that the goods under consideration have been at dumped and subsidised prices, resulting in price undercutting and the consequent price and volume effects (i.e. have caused material injury to Comsteel) is not supported by objective, probative evidence;
- (c) injury incurred by Comsteel would seem to have more to do with it having been a monopoly supplier of the railway wheels in question to the end-users in the Pilbara resulting in artificially high prices that are not globally competitive;
- (d) other influences on Comsteel's production costs, such as those of Australian governments and unions, have resulted in Comsteel having artificially high prices that would appear not to be globally competitive;
- (e) no attempt has been made to "benchmark" Comsteel's production costs of the railway wheels in question or its prices for those wheels against railway wheel manufacturers production costs and prices in other jurisdictions; and
- (f) no attempt has been made by the Commission to determine whether the imposition of antidumping measures on exports from China would or could prevent material injury to

- the Australian domestic industry as is evident from the Commissioner's PAD and the deficiencies contained therein; and
- (g) no attempt has been made by the Commission to determine whether the imposition of antidumping measures on exports from China would be in the Australian national interest and, if so, why and how.

In addition, it must be reiterated that the Commissioner's preliminary finding of a dumping margin on the basis that a "particular market situation" exists is contrary to the Commissioner's statement that he had made no finding of a "particular market situation". Further, that a "particular market situation exists in the Chinese steel industry is exclusively based on assertions or speculations raised by Comsteel and on historical findings in past investigations that may no longer be current nor applicable to this investigation. It fails to consider positive evidence submitted by the other interested parties including CCCME and Masteel, nor does the margin take into account that there was no finding of a "*particular market situation*" by the Commissioner.

This gives rise to the question of whether the Commissioner/Commission in accepting the Application by Comsteel and/or the making of the PAD was not in breach of administrative law principles and/or provisions in the WTO Anti-Dumping Agreement and Part XVB of the *Customs Act 1901*.

In light of the foregoing, the PAD should be withdrawn, and this investigation should be terminated in accordance with s.269TDA of the *Customs Act 1901* as it lacks the factual basis, supported by objective, probative evidence for the imposition of antidumping measures.

If you or the Minister are of a different view on any of these matters, please provide me with a detailed explanation by **cob 27 July 2018**.

I will respond separately to your letter forwarded to me on 11 July 2018 in relation to the PAD, which was disappointing but unsurprising and the arguments contained in it were fundamentally flawed as I will elaborate on.

Please place this memo on the public file at your earliest convenience. Thank you.

Kind regards



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- cc. Senator the Honourable Zed Seselja Assistant Minister for Science, Jobs and Innovation
- cc. Senator the Honourable Kim Carr Shadow Assistant Minister for Innovation, Industry Science and Research