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BY EMAIL: Mick.Kenna@adcommission.gov.au
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October 2, 2018

Mr. Mick KENNA
Assistant Director
Investigations 4
Australia Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

**Re: 466 Investigation-Dumping and Subsidization
Railway Wheels exported from China (DCV) and
France(D)
Submissions of Exporter MG VALDUNES**

Dear Mr. Kenna:

On behalf of our client, MG Valdunes ("Valdunes"), we write to the Anti-Dumping Commission ("ADC") to submit the following in reference to the ADC's investigation.

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1. Verification of Valdunes and the ADD Methodology

On May 25, 2018, Valdunes provided to the ADC a completed Exporter Questionnaire in furtherance of its cooperation with the ADC's investigation into allegations of dumping of certain railway wheels exported from France.¹

On June 18, 2018, the ADC Commissioner made an Affirmative Preliminary Determination of Dumping in respect of certain railway wheels produced and exported in France in which he Preliminarily assessed a margin of dumping for Valdunes of 28.2 percent.²

The verification of the data and information provided by Valdunes proceeded by a visit by ADC officials over several days, at Valdunes' facilities in France. Subsequent to that visit, a Verification Report in reference to that event was prepared and published by the ADC in this investigation.³

The Verification Report concluded by informing that the margin of dumping calculated by the ADC in this investigation was actually higher than that preliminarily ascertained and was to be found to be 37.2 percent during the investigation period. Valdunes most vehemently refutes the very premise that it dumped its railway wheels sold for export to the Australian market.

In making its determination of dumping by Valdunes, the ADC firstly concluded that railway wheels produced and sold by Valdunes for its domestic market were not like goods as defined in accordance with

¹ Inv. 466, Exhibit 007.

² Inv. 466, Exhibit 016, Preliminary Affirmative Determination ("PAD"), AD Notice No. 2018/99, Paragraph 7.5.1

³ Inv. 466, Exhibit 042.

subsection 269T(1) of the *Customs Act 1901*. Valdunes does not disagree with this assessment.

This led the ADC to proceed to consider the calculation of normal values (NV) based on Valdunes' Cost to Make and Sell (CTMS). While Valdunes agrees with the ADC's methodology of relying on CTMS to calculate NV, it strongly disagrees with the approaches used by the verification team in reaching the calculations of the CTMS. Valdunes notes that by proceeding to make its own adjustments to CTMS and denying those adjustments proposed by Valdunes, the ADC artificially and falsely inflated the CTMS and consequent NV. As the Export Price was ascertainable by the established contract price for the sale of Valdunes wheels to its customer(s) in Australia, the resulting hyper inflated NV directly led to the high margin of dumping calculated by the ADC as a result of its verification of Valdunes.

Under the provisions established by the World Trade Organization ("WTO") in the Agreement on Anti-Dumping Duties ("ADD"), the Investigating Authority (ADC, in this instance) is required to adhere to certain rigorous standards in investigating dumping, notably:

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. *Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in*

which costs during the period of investigation are affected by start-up operations.

2.2.2 For the purpose of paragraph 2, *the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.* When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.⁴

In considering the evidence provided by Valdunes, it is noted that the ADC appears to have misapplied or misinterpreted several costing elements in the CTMS of railway wheels, notably by:

- 1) Having over adjusted any necessary uplift of variances from standard costs to actual costs in the calculation of constructed normal value based on CTMS;
- 2) Having overstated by in fact unreasonably denying those downward adjustments proposed by Valdunes of its accounting SGA costs as incurred by Valdunes in the ordinary course of business;
- 3) Having overstated CTMS export sale selling expenses by allocating general costs as well as adding into the constructed normal value a

⁴ Articles 2.2.1.1 and 2.2.2 of the ADA, with emphasis added to the quote, https://www.wto.org/english/res_e/publications_e/ai17_e/anti_dumping_e.htm.

commission expense incurred in Valdunes' sales to Australia, thus double counting that charge;

- 4) Having understated certain Domestic Credit Costs, and finally;
- 5) Having overstated any applicable export credit costs in regards to its sales to Australia.

These adjustments made and/or denied by the ADC were done so within the discretionary proviso of the ADC's verification team. The use of such discretion, which in itself is understandably imbedded in the functional and operational practice of the investigating authority, in such a manner would appear to give rise to a denial of procedural fairness.

Moreover, in respect of certain adjustments claimed by Valdunes to production overheads, and selling, administrative and administrative costs, the ADC gave no explanation or evidence in support of its rejection of the adjustments proposed, in rather stark contrast to obligations arising under the ADA:

... we {the Panel} see no evidence on the record of the investigation that the merits of the alternative allocation methodologies put forward by the respondents after the Preliminary Anti-Dumping Determination were weighed or reflected upon.⁵

As such, the determination of NV by the ADC based on CTMS unfairly and improperly resulted in an egregious overstatement of these costs in complete abstraction of the "alternative" adjustments – in fact, said adjustments were consistent with Valdunes' ordinary accounting practices – as proposed by the respondent. Simply put, the resulting dumping margin

⁵ WT/DS427/R, China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States, Report of the Panel, 2 August 2013, paragraph 7.195.

in respect of the goods exported to Australia by Valdunes is, accordingly, wrong.

2. Information Raised on the Public Record

This Investigation has already raised several very serious challenges to the allegations made by the Australian industry in its complaint. Notably several end-users with intimate and very detailed knowledge of the Australian market for railway wheels have raised compelling arguments in respect of like products, the quality of Commonwealth Steel Company's ("Comsteel" or the "complainant") domestically produced wheels and the concomitant causality of dumping to injury resulting from imported wheels having entered the Australian market.

(a) The "Like Product" Analysis

Turning first to the "like products"⁶ arguments put forward by end-users, BHP Billiton Iron Ore Pty Ltd. ("BHP") has raised significant and credible elements of fact in support of its claim that the railway wheels produced by Comsteel are not like products to those produced and exported by Valdunes. The unique and specific design of the wheels sold to Australia is confirmed by the ADC's finding that indeed, while being one of the EU's most important producers of railway wheels, the ADC found that none of Valdunes's wheel produced for domestic consumption offered any similar or like characteristics to those designed and produced for the Australian market.

⁶ See ADA, Article 2.6: Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

More pointedly, BHP indicates its Submission of 25 July 2018⁷ that several factors support the contention that its specifications for the wheels are unique and designed with BHP's needs in foremost consideration:

- The “generic” description of the railway wheels as presented in the Complaint does not meet in fact BHP's specifications – this indeed Valdunes can confirm since the BHP wheels are designed and produced per unique and user-specific specifications⁸;
- Comsteel's exclusion of axles and other components leads to a mischaracterization of the railway wheels themselves since as noted by BHP, “the axles loads specified by BHP are a key aspect of the wheels purchased by it because they directly impact the specific wheel design.” Moreover, as one of Europe's foremost designers and producers of steel railway wheels, Valdunes can confirm the veracity of BHP assertion that:

..... as the axle load increases, the wheel designed will need to review such items as wheel steel materials, thickness of material in high stress areas, wheel geometry, changes in thermal loading under braking, condemning diameter, and FEA analysis to ensure that the wheel has the required safety factor to prevent the wheel failing in service. A wheel designed for higher tonne axle loads will differ in many ways

⁷ Inv. 466, Exhibit 032.

⁸ In its Submission of 11 September 2018, Exhibit 049, BHP adds that:

Each end use of iron ore railway wheels purchase wheels which meet its own specification rather than a generic specification. Railway wheels manufactured to the specification of one end user are not interchangeable with railway wheels manufactured to the specification of another end user. Accordingly, the issue of whether or not imported iron ore railway wheels and domestically produced railway iron ore railway wheels are like goods can only be addressed by an end user in relation to wheels manufactured for it. BHP does not know whether, for example, iron ore railway wheels manufactured overseas and imported for use by Rio Tinto Limited (Rio Tinto) are identical to or closely resemble iron ore railway wheels manufactured domestically for use by Rio Tinto, as BHP has never purchased or used those goods. Additionally, those goods might closely resemble each other in the context of the Rio Tinto railway system but not the BHP railway system, as the railway systems may have different operational characteristics.

to a wheel designed for lower axle loads and one is not a substitute for another.⁹

- To this point, Valdunes can confirm that even the specific environmental stresses that characterize the use of the ore car wheels will affect the design of the wheels themselves such as a wheel designed for use in colder climates such as Canada or Sweden for ore carriage could not be substituted for those used in Australia.

(b) Production and Wheel Quality Considerations

To the points above, BHP adds that differences in the very production process employed by Valdunes in contrast to Comsteel affect the “like goods” analysis in most fundamental ways as the continuous casting process differs from ingot casting by eliminating the levels of “inclusions” or impurities” that taint the steel as results from Comsteel's ingot casting method. The inherent impurities found in steel bloom produced from scrap necessarily results in finished goods that are “inferior to {those produced by} the continuous casting method in {the latter's} ability to remove inclusions and achieve a molten steel of higher purity”¹⁰

Valdunes agrees with BHP when it states that the “wheels manufactured by Masteel and Valdunes do not contain this high level of impurities, have not experiences similar failures to the Comsteel wheels, and so have demonstrated through their performance that they comply with BHP's specification and are able to be used for the purpose and in the manner for which the specification was designed.”¹¹

⁹ Id., at page 3 of Exhibit 032.

¹⁰ Id., at page 4. Note that Rio Tinto, another end-user of the iron ore railway wheels with significant knowledge of the product has noted its agreement with this view, see Inv. 466, Exhibit 047.

¹¹ Id.

To Comsteel's plea in its 14 August 2018 rebuttal to BHP¹² that "... At this point in time (i.e. mid 2018) BHP would not likely have any wheels produced using continuous cast (as the wheels in operation have not operated sufficiently long enough to reach, or be close to, end-of-life) that are of the same age (as Comsteel supplied wheels) or experienced the same operating conditions. .."¹³, Valdunes reminds the ADC that it has been pre-qualified by and working with BHP for close to thirty years. We believe that BHP is in a very good position to determine for itself the operational qualities of Valdunes' wheels in the conditions uniquely proper to BHP's railway system.

This fact alone speaks to the cogency of Comsteel's arguments. But if that were not enough, when Comsteel adds that in its view the only "relevant point here is that the wheel conforms to the standard and the manufacturing process is irrelevant where the finished goods meet the required outcome(s) as detailed in the specification..."¹⁴ demonstrates a complete disregard for its customer's needs and a surprising disregard for the costly and potentially devastating consequences of wheel failures that could lead to derailments. Valdunes on the other hand is acutely sensitive and responsive to these concerns. In this, BHP's statements are very true when they state that as it is "the only user of the relevant wheels, it is the only party in a position to provide the Commission with reliable evidence as to their quality, functionality and commercial substitutability in the context of BHP's railway operations."¹⁵

In short, Valdunes proudly rejects the assertion made by Comsteel that "the like goods produced from Comsteel's ingot is comparable to products produced from continuous cast feed from other manufacturers ... " by

¹² Inv. 466, Exhibit 036.

¹³ Id.

¹⁴ Id.

¹⁵ Inv. 466. Exhibit 049 at page 3.

pointing to the statements of end-users BHP and Rio Tinto¹⁶ in Australia themselves.

In its Comments to the Importer Verification Report, BHP provided a critical chronology of key events.¹⁷ In that document, BHP addresses its past and current relationship with Comsteel as well as with Valdunes and Masteel. Valdunes notes that it has been a qualified supplier to BHP for decades and that sometime in 1996 it was actually the sole qualified supplier to BHP as a result of Comsteel having had its qualification suspended due to quality issues. In this timeline, BHP states that in 1998:

Comsteel reinstated as an approved supplier to BHP, alongside Valdunes. Comsteel changes manufacturing process to use a fluted ingot aiming to improve steel cleanliness. Unfortunately variation in steel cleanliness continues with Comsteel wheels. BHO continued to work with Comsteel seeking to address these issues and Comsteel subsequently introduced a number of different QA/QC control changes including improved Non Destructive Testing processes. As evident by the wheel breakages below (later in time), these changes have been unsuccessful.¹⁸

The statements introduced onto the record by BHP in July were re-iterated and expounded upon in a subsequent submission of 11 September 2018¹⁹ as well as having been echoed in a submission by Rio Tinto dated 5 September 2018.²⁰ These observations made by end-users as to conditions

¹⁶ Inv. 466, Exhibit 047.

¹⁷ Inv. 466, Exhibit 032.

¹⁸ Exhibit 032, at page 2.

¹⁹ Inv. 466, Exhibit 049.

²⁰ Inv. 466, Exhibit 047.

in the Australian domestic market are of material relevance to the ADC's consideration of Comsteel's plea. Valdunes supports these submissions.

Clearly, end-users in Australia do not feel that Comsteel's manufacturing practices and any changes introduced into those practices have been sufficient to address and / or correct the quality defects with Comsteel wheels so abundantly discussed by those with direct and material knowledge of the issue.

(c) Packaging Issues

In its submission, Rio Tinto addresses the relevance of certain issues raised by packaging safety and efficiency concerns. It is important for the ADC to note that Valdunes has also been concerned with packaging safety and efficiency throughout the markets it services and that innovative, safer and more efficient packaging solutions are always been improved at Valdunes.

(d) Material Injury and its Causal Link to the Subject Goods

BHP has undertaken an impressive forensic examination of the material injury allegations and evidence on the record refuting any injury incurred upon Comsteel in its 11 September 2018 Submission.²¹

It points to, among many other factors, the 500% increase in Comsteel's market share in Australia since 2014, the lack of correlation between Comsteel's pricing in the market and its costs as well as to factors other than dumping which would suggest explanations for any profitability losses to the domestic industry.

²¹ Inv. 466, Exhibit 049.

This analysis, which Valdunes is confident will be thoroughly undertaken by the ADC, will have to be governed by the principals established in the ADA:

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

And in so doing, the ADC will have to consider those factors in light of the WTO Appellate Body's consideration of the obligations befalling on the Investigating Authority, as discussed in US – Hot-Rolled Steel:

The provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time "as the dumped imports". Second, investigating authorities must ensure that injuries which are caused to the domestic

industry by known factors, other than dumped imports, are not “attributed to the dumped imports.”²²

As noted above, Valdunes believes that the ADC has improperly preliminarily concluded that the railway wheels it produced in France for export to Australia were actually dumped but even setting this aside, the evidence clearly raised before the ADC by directly affected end users²³ puts into question any actual material injury or threat thereof and most assuredly points to a plethora of factors well outside the presence of imports that would indicate that the imports are not the cause of injury.

²² WTO Appellate Body Report, WT/DS184/AB/R (24 July 2001), United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, AB-2001-2, paragraph 222.

²³ See for example, the WTO's Panel Report, WT/DS122/R (28 Sept. 2000) in Thailand Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland where it established that “other ‘known’ factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of the AD investigation”, paragraph 7.273.

3. Conclusion

For the reasons exposed herewith and in previous representations, Valdunes respectfully disagrees that there is evidence supporting the proposition that it has dumped steel railway wheels produced in France for export to Australia. Moreover, Valdunes urges the ADC to carefully and meticulously consider all the evidence on the record of this investigation in considering whether it actually establishes any material injury sustained on the Australian domestic industry and most importantly, establishes that dumped or subsidized imports were actually the cause of any such injury.

Yours truly,

DS LAWYERS CANADA LLP

A handwritten signature in black ink, appearing to read 'Vincent M. Routhier', with a long horizontal flourish extending to the right.

Vincent M. Routhier