

Telephone: +61(0) 425 221 036

Email: Andrew.percival@percivallegal.com.au

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By Email

Mr Mick Kenna
Assistant Director
Investigations 4
Anti-Dumping Commission 55 Collins Street
Melbourne VIC 3000

Dear Mr Kenna

RE: Statement of Essential Facts No. 466 – Certain Railway Wheels exported from the People’s Republic of China

As you know, I act for the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (**CCCME**) and Maanshan Iron and Steel Co., Ltd (**Masteel**) in relation to this investigation.

The following comments are made in response to the Australian Anti-Dumping Commission’s (Commission) Statement of Essential Facts No. 466 (**SEF466**). These comments are to be read in conjunction with the previous submissions to the Commission made on behalf of our clients. The previous submissions include submissions by the CCCME on 4 and 9 October 2018 which the Commissioner was of the opinion that ‘having regard to these submissions would prevent the timely placement of this SEF on the public record’.

Unfortunately, there seem to be numerous deficiencies with SEF466.

Sub-section 269TDAA (1) of the *Customs Act 1901* (**the Act**) requires that:

*“The Commissioner must,, place on the public record a statement of the facts (the **statement of essential facts**) on which the Commissioner proposes to base a recommendation to the Minister in relation to that application. (underlining added)*

As required by sub-section 269TDAA (1), the SEF is meant to be about findings of “*fact*”. I draw your attention to the definition of “*fact*” in Macquarie Dictionary, which is:

“what has really happened or, is int the case, truth reality or something known to have happened – a truth known by actual experience or observation”.

Further the Oxford Dictionary defines a “*fact*” as:

- “1. a thing that is known or proved to be true.*
- 1.1 **facts:** Information used as evidence or as part of a report or news article.*
- 1.2 **the fact that** used to refer to a particular situation under discussion.*
- 1.3 **law:** The truth about events as opposed to interpretation.”*

The SEF meets none of these requirements of setting out findings of “fact”. It merely presents the Commissions opinions, views, assumptions and speculation on a variety of matters. It does not set out findings of “fact” on which the Commissioner proposes to base a recommendation to the Minister in relation to the subject application.

Furthermore, sub-section 269TDAA (1) incorporates Australia’s obligations under the WTO. Article 6.9 of the WTO Anti-Dumping Agreement relevantly provides:

“The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.”

Evidently, sub-section 269TDAA (1) is intended to keep consistency with Article 6.9 of the WTO Anti-Dumping Agreement. However, in this investigation the Commission’s practice falls far short of the WTO standards given the deficiencies in SEF466. The relevant WTO jurisprudence essentially requires investigating authorities to disclose at least the facts that form the basis for its determinations of dumping, injury and causation.¹ These facts are not adequately set out in SEF466. A major example is the following:

- In the Commission’s determination to disregard Masteel’s costs of the steel raw materials for railway wheels, non-confidential Appendix 2 of SEF466 sets out the claims and submissions made by the Applicant and the Government of China. However, it completely ignores Masteel’s responses to exporter questionnaire and various submissions which have amply shown the facts that (1) Masteel produces its own steel requirements and does not purchase steel billets, and (2) the steel Masteel manufactures for its own use, including for the manufacture of railway wheels, is manufactured from a variety of grades of raw materials sourced from Australia, other overseas countries and China.²

Thus, the SEF466 has failed to disclose one of the most relevant facts for the determination of dumping. This necessarily puts into question the Commission’s decision to disregard Masteel’s costs for the calculation of normal value and use an external benchmark for that purpose.

In relation to the external benchmark, the SEF466 fails to set out the facts which form the basis for the use of “the costs incurred by the French railway wheel producer” (see page 23). The SEF466 merely assumes that the French costs “represent competitive market costs”. What are the factual bases for this decision?

In addition, the Commission decided not to “adjust the benchmark to reflect any comparative differences that might be present in the Chinese market [on the ground that] ... such an adjustment would not be possible particularly given the significant involvement of the GOC in relevant markets.” The SEF466, however, fails to set out the facts that the Commission has considered in making this decision, such as what comparative differences China has, and what aspects of GOC influence have or have not contributed to China’s comparative differences. The Commission’s allegation that the GOC influence is hard to quantify does not exempt the Commission from the obligation to disclose essential facts.

Finally, we remind the Commission again of Australia’s WTO obligation to make adjustments when a benchmark cost is applied. Article 2.2 of the WTO Anti-Dumping Agreement requires investigating authorities to use “the cost of production in the country of origin” for the construction of normal values. In *EU – Biodiesel*, the Appellate Body has ruled that this requires investigating authorities to “adapt the information used in their calculation in order to ensure that it represents the cost of

¹ Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (China – GOES)*, WT/DS414/AB/R, (adopted 16 November 2012) para. 241.

² See eg. File no. 066 – Submissions by the CCCME dated 10 October 2018.

production in the country of origin”; hence the EU authorities had failed to make such adjustments by using surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina.³ In this investigation, the Commission’s decision to not make adjustments to the external benchmark adds another potential violation of WTO rules by Australia.

Accordingly, I would be grateful if you would provide a revised Statement of Essential Facts that sets out the Commission’s findings of “*fact*” as required by law.

I also make some comments on the Preliminary Affirmative Determination and comments in the SEF on uncooperative exporters. Please see attached.

It is of concern that antidumping measures (i.e. customs tariffs) are sought to being used to protect Australian industries that are producing substandard/defective products that are not globally complete and cannot be at any price due to their inferior quality that will simply increase costs for Australian end-users, consumers and Australian economy in general. No antidumping measures in the form Customs Tariffs cannot rectify this. It requires the Australian industries to remedy their products.

This does not seem to be addressed in the SEF. Why?

Best

Andrew Percival

T: +61 (0) 425 221 036

E: andrew.percival@percivallegal.com.au

W: www.percivallegal.com.au

³ Appellate Body Report, *Union—Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016, para. 6.81.

Attachment

Preliminary affirmative determination & Uncooperative Exporters

Preliminary Affirmative Determination

The submission of Masteel dated 2 July 2018, was made in reference to the Preliminary Affirmative Determination (PAD) made by the Commissioner on 18 June 2018. The Commission's only response to that submission was in SEF 466. In its response the Commission failed to present any evidence that the Commissioner was satisfied at the time of making the PAD that it was necessary to require and take securities to prevent material injury to Comsteel while the investigation continues. Rather, the Commission ignored the facts as presented in the submission and instead made its own interpretation of the submission and imposed its own opinion, speculating that the submission *'seems to rely on the proposition that all such contracts are exclusive, allow no variation to their terms or operation under any circumstances and are not subject to renegotiation in the course of the investigation.'*

There is nothing in the submission of 2 July 2018 that says or speculates on any of the views expressed by the Commission in SEF 466. The fact is that any alleged injury to the Australian industry occurred at the time the tender was awarded to another party. Any railway wheels supplied under the contract signed as a result of the winning tender cannot cause any further injury and the imposition of securities will not remedy any injury already deemed to have been caused at the time the tender was last by the Australian industry. This fact is supported by the Commission's predecessor, the Anti-Dumping Authority, in its report to the then Minister on 'tender dumping'. This has been put to the Commission in our submission of 4 October 2018 and we request the Commission address the matters raised in that submission in the context of the responses to SEF 466.

The only support tendered in SEF 466 for the making of the PAD on 18 June 2018 is based on an event occurring sometime after the making of the PAD. The Commission states at point 4.3, page 11 of SEF 466 that:

'The Commission is aware of competitive processes undertaken by Australian customers to purchase railway wheels in the months following the making of the PAD and decision to require and take securities. As a result, the Commissioner was satisfied that the taking of securities was necessary to prevent material injury to an Australian industry occurring while the investigation continued.' (underling added)

Satisfaction at the time of making a PAD cannot be based on future events unless the Commissioner has factual evidence at the time of making the PAD that competitive processes were to be undertaken by Australian customers to purchase railway wheels in the months following the making of the 18 June 2018 PAD. Such evidence has not been provided in SEF 466. As it stands there is evidence that the Commissioner was not satisfied at the time of making the PAD on 18 June 2018 that it was necessary to require and take securities to prevent material injury to Comsteel while the investigation continues. Accordingly we request that the Commission immediately cancel any securities remaining in place as a result of the PAD made on 18 June 2018.

Dumping margin calculations

As we have previously advised, Masteel manufacturers steel from a variety of sources including Australia for use in manufacturing amongst other things its railway wheels that it supplies to its Australian customers.

There is in our view, as previously submitted, no basis for substituting steel billet costs from and MG-Valdunes (**Valdunes**). Even if there were, the Commission has ample evidence to make the required adjustments in the calculation of the normal value. If you require further information in this regard, please let me know.

In page 24 of Dumping Assessment in the SEF, it reads: In relation to other differences that may exist in the comparative steel input costs, the Commission notes that Valdunes' steel input cost is based on the purchase of the steel from an unrelated party. While this purchase price may include some element of profit and selling expenses, the Commission does not have any information upon which to estimate the level of these amounts. The Commissioner will consider any information provided in response to this SEF on the appropriate level of adjustment to the steel costs used to replace the costs from Masteel's records.

In order to estimate the level of profit and selling expenses, Masteel could provide some references for your consideration. One European steel company "schmolz-bickenbach" who has similar products and business operation as Valdunes' steel input providers, it is a publicly listed company in Switzerland. Please refer to the link:

https://www.schmolz-bickenbach.com/fileadmin/uploads/tx_sbagnews/S_B_Annual_Report_2017.pdf for the annual report of the company.

Masteel also provides some financial information of European steel enterprises as attached for your reference. See attached.

Uncooperative Exporters

The Commission determined that there were uncooperative exporters and is proposing to recommend to the Minister that an interim dumping duty be imposed at rate of 19% for Chinese 'uncooperative exporters' and 37.2% for French 'uncooperative exporters'. This is in spite of the facts established by the Commission that Maanshan Iron & Steel Co Ltd (**Masteel**) and Valdunes were the only exporters of railway wheels to Australia in the investigation period.

Nevertheless, the Commission ignored the fact and proceeded to follow what we can only assume to be a 'template for an anti-dumping investigation' and determined that '*all exporters who did not provide a response to the exporter questionnaire or request a longer period to provide a response within the legislated period to be uncooperative exporters*'. See sections 8.4 and 8.5 of SES 466.

Where are the facts and supporting evidence that there are other exporters of the goods under consideration that did not cooperate with this investigation? The determination by the Commission that there were 'uncooperative exporters' in this investigation is mere speculation contradicted by the facts as determined by the Commission.