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8 February 2019

Ms Carina Oh
Assistant Director
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne
Victoria 3000

By email

Dear Carina

Scaw South Africa and Haggie Reid Anti-circumvention inquiry – wire ropes from South Africa

We write further to our previous submissions and in response to the submission of BBRG Australia Pty Ltd (“BBRG”) dated 30 January 2019.

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A BBRG’s 9 October submission

BBRG asserts that its submission dated 9 October 2018 rebuts the statements made by the Anti-Dumping Commission (“the Commission”) at Section 6.1 of the Haggie Reid verification report. BBRG’s assertion is incorrect.

The integrity and validity of BBRG’s 9 October 2018 submission has been called into question by our clients’ submission of 8 November 2018. BBRG has yet to respond to the issues raised in our clients’ submission. Instead, BBRG maintains that it “*does not seek to engage in ongoing debate*” about the differences between 9 strand rope and 6 and 8 strand rope.

In BBRG’s 30 January 2019 submission, it asserts that “*BBRG Australia does not consider it necessary to repeat the statements made at Section VI. [o]f [sic] its 9 October 2018 submission*”. We agree with BBRG’s judgement that those statements should not be repeated. We have shown those statements are based on unduly manipulated information and the misapplication of technical data. It

would be a disservice to BBRG for it to simply repeat statements that have been rebutted and cannot be defended. We do not ask that BBRG repeat itself; we ask that it respond to the issues raised in our clients' submission of 8 November 2018. Failing this, BBRG's 9 October 2018 submission remains defeated.

B BBRG's submissions about inability to increase price

BBRG states, in its most recent submission:

This statement is incorrect. BBRG Australia has sought to increase prices following the successful antidumping measures imposed on the goods following Investigation No. 401. However, with the introduction of the circumvention goods by Haggie Reid (i.e. the "innov 9" marketed goods), BBRG Australia has been unable to recover its pre-injurious pricing position due to the dumping of the circumvention goods.

First, we wish to remind BBRG that this is not an anti-dumping investigation, in the sense that it appears to suggest in this extract. The present inquiry is concerned with whether 9 strand wire rope constitutes a slight modification of lesser-stranded ropes. This is answered by reference to Regulation 48(3) of the *Customs (International Obligations) Regulation 2015* which is silent on issues of dumping and injury.

That said, we wish to comment as follows.

The Commission verified Haggie Reid's price increases for the Inno9 product as compared with the 6 and 8 strand products, to the extent of around **[CONFIDENTIAL TEXT DELETED – number]**% across the board. Despite this significant price increase, BBRG still claims to be "unable to recover its pre-injurious pricing position". Does this not suggest that our clients have never been and are not the cause of any "injury" claimed by BBRG? There are many extraneous and substantial factors influencing the performance of Australia's wire rope industry, including changes in carbon rod prices and new competitors such as Usha Martin. For BBRG to pin its "injuries" on the price of our clients' Inno9 defies reason.

Our clients have evidence that BBRG lowered its prices since the imposition of the anti-dumping duties. For example, Haggie Reid previously supplied **[CONFIDENTIAL TEXT DELETED – product, customer and pricing]**. After the imposition of the anti-dumping duties, BBRG undercut our clients' **[CONFIDENTIAL TEXT DELETED – product]** rope prices to **[CONFIDENTIAL TEXT DELETED – customer]**. In **[CONFIDENTIAL TEXT DELETED – relevant date and customer]** informed Haggie Reid that it would cease sourcing **[CONFIDENTIAL TEXT DELETED – product]** ropes from our clients in favour of BBRG's cheaper **[CONFIDENTIAL TEXT DELETED – product]** ropes:

[CONFIDENTIAL TEXT DELETED – customer's price comparison comments]...¹

The information that has been redacted from BBRG's 30 January 2019 submission is described as "[details re supply to customer]". This description suggests BBRG may have supplied pricing information in respect of only one customer. Alternatively, BBRG may have only supplied pricing information in respect of a minority of its customers. Even if BBRG has increased prices for a minority

¹ See Attachment 1 - email from **[CONFIDENTIAL TEXT DELETED – customer]** to Haggie Reid **[CONFIDENTIAL TEXT DELETED – date]**.

of its customers, such price increases are not necessarily reflective of BBRG's overall pricing practice since the imposition of the anti-dumping duties. BBRG may have increased prices for a select minority customers, but decreased prices for others.

C Slight modification criteria are not met

Regulation 48(2) of the *Customs (International Obligations) Regulation 2015* ("the Regulations") prescribes the following circumstance as a "circumvention activity":

The circumstance is that all of the following apply:

- (a) *goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;*
- (b) *before that export, the circumvention goods are slightly modified;*
- (c) *the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;*
- (d) *had the circumvention goods not been so slightly modified, they would have been the subject of the notice;*
- (e) *section 8 or 10 of the Customs Tariff (Anti-Dumping) Act 1975, as the case requires, does not apply to the export of the circumvention goods to Australia.*

Regulation 48(3) then sets out a number of factors that the Commissioner may have regard to in considering whether the facts of the circumvention activity specified in Regulation 48(2) are achieved. The first observation we would make, consistent with what we have said above, is that dumping and injury, BBRG's favourite hobby horse, are not mentioned in either of these sub-regulations.

There are a few key aspects to the Regulation 48(2) criteria that are apposite to the present situation.

First, with respect to paragraph (b), Scaw's Inno9 wire rope is not slightly modified before it is exported. Inno9 is a product made on a continuous line of production. For a product to be slightly modified before export, it obviously needs to have been a different product before it was modified. Inno9 wire rope is not made from 6 or 8 strand wire rope. Paragraph (d) reinforces this interpretation, juxtaposing goods that have been slightly modified from the goods they were before that modification took place.

Further, if the Commission takes the view that paragraph (b) requires a comparison between the goods subject to measures and the circumvention goods, to determine whether the circumvention goods are only slightly modified "versions" of the goods subject to measures, then it can categorically be stated that Inno9 is a new and quite different product, in its specification, production, performance, cost, and price. This has also been evidenced, in the information we have dutifully provided to the Commission.

Secondly, paragraph (c) is equally inapplicable, for the same reason as paragraph (b). That said, we have provided evidence relating to the performance of Inno9 both in a general sense and in different

applications, which establishes that **[CONFIDENTIAL TEXT DELETED – product performance and customer perceptions]**.

Each of paragraphs (a) to (e) must apply to establish circumvention. They do not. And, contrary to BBRG's submissions, dumping or injury are not mentioned.

D International comparisons reinforce that Inno9 is not a slight modification

The question before the Anti-Dumping Commission is whether the differences between Scaw's 9 strand wire rope on the one hand, and Scaw's 6 and 8 strand wire rope on the other, constitute only a "slight modification" or are more than a "slight modification", as described by Regulation 48 of the Regulations.

In this regard international opinion and comparative law can be of some assistance to the Commission in its deliberations.

Internationally, "*circumvention*" has been given consideration directly in submissions in the World Trade Organisation ("WTO") forum, and definitions and procedures for investigating circumvention have been enshrined in the laws of some WTO Members. We leave to one side the fact that there is no description of circumvention nor any reference to or procedures for circumvention inquiries in the WTO Anti-Dumping Agreement, and that many WTO Members do not agree with the stance that has been taken by the main anti-dumping user countries with respect to circumvention. Rather, we focus on the sentiment of those anti-dumping users and the manner in which they have decided key cases on "slight modification", however so-called under their respective laws.

Our review of comparative law reinforces the proposition that 9 strand wire rope is not a slight modification of 6 and 8 strand wire rope.

Firstly, we draw attention to practice in the United States ("US"). The US formally expressed its view on minor alterations to WTO Members in a 2005 communication to the Negotiating Group on Rules.² The US here records its views as follows:

*The United States described the first form of circumvention as involving minor alterations and later developed forms of the product covered by the measure. The key is that the alteration of the original product be relatively minor, such that the altered product has essentially the same characteristics and uses as the original product covered by the measure.*³

The emphasis here is on a consideration of what is relatively minor, in the context of the alteration to the product, i.e., is it relatively minor in an objective sense. The market's response to the altered product is also relevant to this question, as evidence of customer's perceptions that the alteration is indeed minor.

The US *Tariff Act* utilises the phrase "minor alterations" in defining a circumvention product.⁴ When considering this phrase, the Department of Commerce considers:

² TN/RL/GEN/71 (14 October 2005); TN/RL/GEN/29 (8 February 2005).

³ *Ibid*, page 2.

⁴ 19 U.S.C. § 1677j(c). 19 C.F.R. § 351.225. The latter is the regulation implementing the former.

- the overall physical characteristics of the product;
- the expectations of the ultimate user;
- end-use;
- channels of trade and advertising; and
- cost of any modification relative to the total value of the products at issue.⁵

We note the following examples of the application of the test of minor alterations in US law and practice.

In *Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*⁶ the US Department of Commerce decided that wire rod with a diameter of 4.75 to 5.00 mm was only a minor alteration of wire rod having a diameter of 5.00mm. That finding was based on the extremely similar physical appearance of the two, and that there were no meaningful commercial differences between the two products.

In *Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China*⁷ the Department of Commerce found that the singular addition of a cross bar to folding metal tables with legs (which were otherwise identical) was not enough to improve the strength or stability of the folding metal tables. It therefore constituted nothing more than a “minor alteration”.

In *Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products from Japan*⁸ the product that was subject to the circumvention inquiry was differentiated from the range of flat-rolled carbon steel products that were subject to the anti-dumping order by the addition of boron. The Department of Commerce indicated that there were enough commercially and metallurgically viable reasons for the addition of boron, in terms of imparting different characteristics, to establish that the alteration was not minor.

In light of these comparisons, we can fairly readily conclude that our client’s 9 strand wire rope would not be found to be a slight modification under US law. The first and second examples above are clearly minor alterations. The complexity of 9 strand wire rope and its different performance characteristics, which in turn **[CONFIDENTIAL TEXT DELETED – product performance]**, is quite a different case to merely changing the diameter of a product, or attaching something to the dumped product. The third example above shows how the different end-use profile of the product concerned magnified the importance of the alteration. With respect to Scaw’s 9 strand wire rope, not only is the product substantially different in its design and construction, technical specification, cost and price, **[CONFIDENTIAL TEXT DELETED – product performance and customer perceptions]**.

⁵ Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 71, 100th Cong., 1st Sess., at 100 (1987)

⁶ *Carbon and Certain Alloy Steel Wire Rod from Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, (77 FR 59892).

⁷ *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China* (74 FR 20920)

⁸ *Final Results of Anti-Circumvention Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products from Japan* (68 FR 33676).

The legal terminology adopted in the EU also uses the words “slight modification”.⁹ This test has been discussed in *Case T-385/11: BP Products North America v Council*. In this case the General Court was called upon to compare various types of biodiesel blends. Specifically, in this case the goods subject to dumping measures were blends containing by weight 20% or less of pure biodiesel. The alleged circumvention goods were blends containing by weight more than 20% of pure biodiesel. BP claimed that the fuel blend with greater levels of pure biodiesel should not be considered to be a “slight modification” of the lower level fuel blend, by virtue of their different classifications within the diesel industry based on their respective biodiesel content, and because they were distinguishable as chemical products with different transportation and storage requirements. The General Court was not persuaded by these arguments. Moreover, with respect to BP’s third claim – that the goods did not have the same end uses – the General Court observed that the basic physical, chemical and technical characteristics of the blends were so similar that the circumvention goods could undergo dilution processes in order to make them suitable for final consumption in the EU in the same way as products made from the dumped goods.

Thus, none of those claimed differences were found to justify the proposition that the circumvention goods were only slightly modified. Simply having a different concentration of fuel, being a concentration that could easily be reversed and transformed back into a competitive final product, could not in that case defeat the proposition that the circumvention goods were slightly modified.

Those factual circumstances are far removed from the circumstances presently before the Commission. Scaw’s Inno9 wire rope is manufactured on machinery that has been modified and re-tooled. It has different technical specifications which impart different performance characteristics. Once manufactured it cannot be changed back into 6 or 8 strand wire rope. The market has identified that those characteristics **[CONFIDENTIAL TEXT DELETED - product performance and customer perceptions]**.

Overall, considering the above interpretations and the products to which they were applied, it can be concluded that products will be found to be “slightly modified” when the differences between the products in question are minimal, and do not affect their performance. Here, the 9 strand wire rope is substantially different from the 6 and 8 strand wire ropes, in the context of “slight modification”.¹⁰ These differences are more complex and substantial than, for example, different diameter steel rods, simple attachments to folding furniture, and different concentrations of biodiesel. The construction of a 9 strand wire rope affects the functionality and operation of the wire rope as a whole. **[CONFIDENTIAL TEXT DELETED - product performance and customer perceptions]**.

E Performance of 9 strand wire rope

We repeat what has been said in our previous submissions, to the effect that Inno9 differences are readily apparent **[CONFIDENTIAL TEXT DELETED - product performance and customer perceptions]**.¹¹ **[CONFIDENTIAL TEXT DELETED - product performance and customer**

⁹ Council Regulation (EC) No 1225/2009 of 30 November 2009, art 13; Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Art. 13.

¹⁰ Letter to Anti-Dumping Commission dated 12 September 2018.

¹¹ See Attachment 2 - email from **[CONFIDENTIAL TEXT DELETED – customer]** to Haggie Reid **[CONFIDENTIAL TEXT DELETED – date]**.

perceptions] it underscores the significant differences between 9 strand ropes and 6 and 8 strand ropes.

In view of the above and our previous submissions, we request the Commission to terminate this inquiry, on the demonstrated basis that our clients' 9 strand wire rope does not constitute a slight modification of lesser-stranded wire ropes that are subject to dumping measures.

Yours sincerely

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

Daniel Moulis
Partner Director

Encs