Australian Government

Anti-Dumping Review Panel

ADRP REPORT No. 13

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HOT ROLLED PLATE STEEL EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

Review of a decision by the Minister to publish a countervailing duty notice in relation to Hot Rolled Plate Steel including Quenched and Tempered (Q&T) Greenfeed Steel exported from the People's Republic of China.

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Application for review of a decision to impose Countervailing measures - Report of the Anti-Dumping Review Panel

THE APPLICATION FOR REVIEW

1. BlueScope Steel Limited (the applicant) applied, pursuant to s269ZZA(1)(a) and s269ZZC of the Customs Act [1901] (the Act), for review of a decision of the Minister for Industry (the Minister) dated 3 December 2013 which imposed countervailing duties in respect of hot rolled plate steel (plate steel or the goods) exported to Australia from the People's Republic of China (China).

2. The application for review was accepted and on 22 January 2014, pursuant to s269ZYA of the Act, the Senior Member of the Review Panel directed in writing that I be constituted to undertake the review. Notification of the review application was published in nationally circulating newspapers on 31 January 2014. Submissions in response to the review application dated 4 and 5 March 2014 respectively were received on behalf of two interested parties[1], Bisalloy Steel Group Limited (Bisalloy) and Australian company and Shandong Iron and Steel Company Limited (Jigang) a Chinese company. Non- confidential copies of the submissions were entered on the public register. In addition to the application and REP198 I have considered the relevant information and conclusions based on that information contained in the submissions.

3. On 21 March 2014 pursuant to authority granted in s269ZZL of the Act I requested the Anti-Dumping Commissioner (the Commissioner) to reinvestigate an aspect of the findings made in REP198. A report on the reinvestigation (RR198) was dated 20 May 2014. Copies of the request and RR198 have been placed on the public record.

4. In accordance with s269ZZK(1) of the Act the panel must recommend that the Minister either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review S269ZZ requires the panel to determine a matter required to be determined by the Minister in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter. In carrying out its function the panel is to have regard only to 'relevant information' as that is defined in s 269ZZK(6)(a) i.e. information to which the Commissioner had, or was required to have, regard in reporting to the Minister.

[1] as that term is defined in s269T of the Act

BACKGROUND

5. On 21 December 2012 BlueScope lodged an application under s269TB of the Customs Act [1901](the Act) requesting that then Minister[2] publish a dumping duty notice in respect of plate steel exported from a number of countries and a countervailing duty notice in respect of the same goods from China. BlueScope is the sole Australian manufacturer of plate steel in Australia. BlueScope is described as an integrated steel manufacturer because it produces plate steel from slab and hot rolled coil (HRC) both of which it also manufactures. Non-integrated plate steel manufacturers do not produce the slab or hot rolled coil from which plate steel is made but buy those products from other producers. Primarily plate steel is used in Australia in the mining, engineering and construction and the transport and equipment manufacturing industries.

6. The Anti-Dumping Commission[3] (the Commission) published a Statement of Essential Facts (SEF198) on 1 August 2013 in which a twelve month investigation period from 1 January to 31 December 2012 was set. Additionally the period for determining whether material injury had been caused to the Australian industry was determined commencing on 1 January 2008. The goods are described as:

   '*Flat rolled products of:*
   - *iron;*
   - *non-alloy steel; or*
   - *non heat treated alloy steel of a kind commonly referred to as Quench and Tempered (Q and T) Green Feed*

   of a width greater than 600 Millimetres(mm), with a thickness equal to or greater than 4.75mm, not further worked than hot rolled, not in coils, with or without patterns in relief'.

Some grades of plate steel were excluded from the investigation and these need not be considered as part of this review[4].

7. After submissions made in response to SEF198 had been considered a report (REP 198) was made to the Minister. The recommendations in the report were stated to be accepted by the Minister and separate dumping and countervailing duties notices dated 3 December 2013 were issued. In this application review is sought only of the countervailing duties decision. For plate steel exported by all exporters from China except Jigang the subsidy margin was found to be 36.9% and for Jigang it was calculated to be 2.6%.

8. Jigang, like BlueScope, is an integrated manufacturer of plate steel. It was the only Chinese exporter which cooperated in the completion of the questionnaire sent by the ADC to all Chinese plate steel exporters.

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[2] at the time Ministerial responsibility was vested in the Minister for Home Affairs

[3] The function was then the responsibility of the Australian Customs and Border Protection Service. Since 1 July 2013 the ADC has assumed responsibility.

[4] SEF198 at para 3.3.1.

9. Bisalloy is the only Australian customer for the Q and T green feed manufactured by Jigang[5]. Q and T greenfeed is described in Bisalloy's submission as:

> '*..purely an intermediate alloyed product used in the manufacture of quenched and tempered alloy steel plate and is unsaleable for any typical Q and T application without further specific heat treatment…involving shot blasting, hardening, quenching, tempering and levelling.'*

Jigang is one three companies which supplies Q and T green feed to Bisalloy. The other companies supplying Bisalloy are BlueScope and a Korean company, Posco.

THE GROUNDS FOR REVIEW – THE APPLICANT

10. The grounds on which BlueScope claims that the Minister's decision is not the correct or preferred decision are:

    (i) The benchmark used by the ADC to assess whether coking coal sold in China was sold at less than adequate remuneration by Chinese exporters was inappropriate because it was inadequate; and

    (ii) The finding that [material] injury to BlueScope in the Q and T Greenfeed market was not caused by subsidized exports made by Jigang to Australia on a number of grounds considered later in these reasons.

11. In the review application BlueScope requested that a recommendation be made to the Minister to have the Commission reinvestigate both of the above matters. In view of the recommendation required to be made by the Panel under s269ZZK(1) to the Minister in the event of a recommendation to overturn a decision under review, the panel requested clarification from BlueScope as to the substituted decision it was seeking. [redacted]

THE SUBMISSIONS ON BEHALF OF JIGANG AND BISALLOY

12. The submissions on behalf of Jigang and Bisalloy agree with the applicant that the Minister's decision is not the correct or preferred decision. Their reasons for doing so differ from those nominated by BlueScope.

13. Jigang maintains that it sources [redacted] different types of the coking coal each of different grades used and that accordingly [redacted] different benchmarks would be required to be established. Irrespective of the issue connected with the differing grades of coking used it is submitted that-

    (a) The use of a pulverized coke injection system(PCI) reduces the production cost of coking coal used in the production of plate steel below the .[redacted]% per tonne asserted by BluesScope to .[redacted]% per tonne, and,

    (b) There is no requirement for use of benchmark pricing because there is no need to calculate a constructed normal value under s269TAC(2)(c) as

[5] ibid at para 9.9.1

the prices of Chinese coking coal are not influenced by the GOC and are competitive market prices.

The submissions from Jigang relating to ground 2 of the application concerning Q and T greenfeed are, where necessary, dealt with later in these reasons.

14. The Bisalloy submission maintains that no material injury has been caused to the Australian industry from the importation of Jigang's Q and T greenfeed from China. It also submits that no countervailing subsidy has been received by Jigang because REP198 fails to establish that SIEs supplying coking coal used in the manufacturing process are 'public bodies'. Finally it is submitted that no analysis has been undertaken to establish whether Jigang received a benefit from sourcing coking coal from the SIEs. The submission requests that the grounds be considered in the order set out in the submission.[6]

15. Both of the Jigang and Bisalloy submissions not only address the grounds set out in the application but also seek a recommendation that Jigang be exempted from the imposition of countervailing duties on grounds unrelated to the grounds specified in the application. For the reasons which follow under the heading of Preliminary Issue I have decided that the review should be limited to an examination of the grounds specified in the application.

PRELIMINARY ISSUE

16. Jigang and Bisalloy were both 'interested parties' and could have made applications for a review of the Minister's decision based on the grounds advanced in their submissions made in response to the application. The response submissions raise grounds not canvassed in the application, in particular in maintaining that there has been no subsidization by the Government of China (the GOC) of the coking coal used by Jigang in the production of the goods. In my view, for the following reasons, the panel is constrained from considering grounds relied on in response submissions which effectively constitute an application for review.

17. Jigang and Bisalloy are 'interested parties' and both were entitled to lodge review applications, relying on any grounds which it was maintained that the Minister had not made the correct or preferred decision, but did not do so.

18. Consistently with the requirement contained in s269ZZE(2)(b) of the Act that a review application set out the grounds relied on, S269ZZI (2)(b) mandates that in the publication of notice of a review that the grounds for seeking the review should be stated. s269ZZJ then provides who may make submissions in answer to the review application 'in accordance with that notice'. s269ZZI(2)(c) invites interested parties to lodge submissions 'concerning the application' (emphasis added).

[6] this request was stated to be based on an earlier opinion expressed in the review report in the Dole review. The approach contained in that review report was made with respect to the grounds contained in an application and has no applicability to the grounds contained in a submission to an application.

19. To permit new grounds in response submissions to be raised when those grounds could have been the subject of an application, results in the bypassing of the formal procedural requirements found in the following sections of the Act:

- s269ZZD setting the time limit in which an application can be made;

- s269ZZE setting out the formal requirements to be included in an application;

- s269ZZG permitting rejection of an application for review if the Review Panal is not satisfied that the application sets out reasonable grounds for review; and

-s269ZZH requiring an application not accompanied by a non-confidential summary to be rejected.

These are important procedural requirements designed to ensure sufficient accurate information is provided leading to public notification of the application under s269ZZI. The public notice must indicate that the Review Panel proposes to conduct a review. Clearly the review is intended to be carried out by reference to the grounds relied on in the application.

20. S269ZZI(2)(b) mandates that the public notice must set out the decision to be reviewed and must also state the grounds on which the review is sought. The section also provides that 'interested parties' may make submissions '…concerning the application'. The section does not specifically limit response submissions to the grounds raised in the application. However as the following reasons demonstrate the scheme of the Act suggests that this is intended.

21. S269ZZI applies a 30 day time limit from the date of publication of the review notice within which response submissions must be made. The Act does not contain any provision permitting the time to be extended. Nor does the Act provide any procedure for a review applicant, or any party who is able to file a response submission to an application but has not done so (as set out in s269ZZJ), to reply to a new ground raised in a response submission. The Jigang and Bisalloy submissions were lodged in the closing days of the 30 day period permitted for the making of submissions provided for in s269ZZJ. There would not have been sufficient time for the notification to the applicant or other parties able to lodge a reply within the 30 day period for the making of submissions even if, as is not the case, that the Act made provision for a reply to be lodged.

22. The Act does not expressly mandate that response submissions are limited to the grounds canvassed in an application. All that is required, as s269ZZI(1) provides, is that notification be given that the panel proposes to conduct a review. However potential unfairness arises to an applicant, and other parties, if response submissions are permitted, in effect, to become applications. This would seem to provide support for the implied restriction that it was not intended that response submissions should be permitted to raise new grounds of review.

23. In my view it is clear from the cumulative effect of the provisions mentioned that there is an implied restriction limiting submissions to grounds raised in the application. The panel is constrained from considering new grounds raised in submissions.

24. For the above reasons I have not considered Jigang's submission that there was no basis for the Minister's decision to have recourse to a benchmark arising from calculating a constructed normal value pursuant to s 269TAC(2)(c). Nor have I considered Bisalloy's submission that Chinese SIEs supplying coking coal are not 'public bodies'.

THE LEGISLATION

25. S289T of the Act relevantly provides the following definition of a subsidy:

'subsidy, in respect of goods exported to Australia, means:

(a) a financial contribution:

(ii) by a public body of that country or a public body of which that government is a member;

that involves:

(vii) the provision by that government or body of goods services otherwise than in the course of providing normal infrastructure:

if that financial contribution …confers a benefit (whether directly or indirectly) in relation to the goods exported to Australia.'

26. S269TACC provides that the question of whether a financial contribution confers a benefit is to be determined 'having regard to all relevant information'. s269TACC is based on Article 14(d) of the World Trade Organisation Uruguay Round Agreement on Subsidies and Countervailing Measures which relevantly provides:

'(d) the provision of goods …shall not be considered as conferring a benefit unless provision is made for less than adequate remuneration…The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good…in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)' .

27. S269TACC(3) sets out guidelines to which the Minister must have regard in determining whether a financial contribution confers a benefit. S269TACC(3)(d) relevantly provides that the provision of goods or services does not provide a benefit unless done so for less than adequate remuneration. What is constituted by 'adequate remuneration' is not a defined but S269TACC(4) provides it is to be decided having regard to the prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

CONSIDERATION

GROUND 1: THE BENCHMARK

28. As a practical matter the adequacy of the remuneration against which subsidized goods can be compared is achieved by determining a benchmark price. A submission made on behalf of Bisalloy to the ADC succinctly defines a benchmark as follows:

> *"A benchmark is defined in the Oxford English Dictionary as…'a standard or point of reference against which things can be compared' and implies a reference point that is transparent, reliable, authoritative and productive of fair comparisons."*[7]

29. The purpose of setting a benchmark is to enable the benefit referable to the payment of the subsidy to be determined. The subsidy is the difference between the benchmark which establishes an adequate remuneration and amount paid by the exporter for, in this case, coking coal. The ADC concluded that there is no internationally accepted benchmark price for coking coal. It was unable to determine the basis on which references to a 'global price' or 'competitive market price' in the submissions were made. It then considered the following three options[8] to determine a benchmark price vis-

-private domestic prices,

-import prices, and,

-external benchmarks.

30. Of the above options the Commission rejected private domestic prices and import prices as being suitable. It did so the basis that private domestic prices were influenced by the subsidization provided through the Chinese SIEs and the imposition of export quotas both of which resulted in downward pressure on the domestic price of coking coal. Import prices, because of the small volume imported compared to the large volume of domestically produced coking coal, were also considered by the Commission as being likely to be affected by the GOC policies. Only 8% of China's use of coking coal is constituted by imports which are required to supplement a shortfall in China's domestic production capacity.

31. The applicant does not challenge the Commission's conclusions rejecting the use of domestic and imported coking coal prices to determine a benchmark. The submission on behalf of Jigang is critical of the ADC's analysis rejecting the use of the import price of coking coal as a benchmark. Jigang maintains that the price of imported coking coal is comparable to that produced domestically with both reflecting competitive market prices. However those criticisms are based on Jigang's view that the price of domestic coking coal is not influenced by the policies of the GOC a proposition which, for the reasons stated earlier, I am not prepared to consider.

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[7] submission 21 August 2013

[8] in the order as established by the World Trade Organization Appellate Body

32. No new assessment was undertaken for purposes of determining the benchmark price adopted in REP198. The external benchmark options examined in investigation 193 (INV 193) were adopted. While INV193 concerned the dumping and subsidization of galvanized and aluminium zinc coated steel from China, coking coal was also a component in their manufacture. The investigation periods overlapped with the final six months of the INV193 investigation period coinciding with the first six months of the Rep198 period.

33. The external benchmark options considered in INV 193 are as follows:

- Chinese export prices of coking coal compared to the export prices of the top 5 exporting countries in the world;
- Australian export prices of coking coal- Australian being one of the major producers of coking coal;
- Import prices of a third country. India is one of the major producers of coking coal and has similar geographical location and economy. Indian import prices has (sic) been compared to the import prices of the top 4 importing countries in the world; and
- Korean and Taiwan prices for coking coal.[9]

Of the options outlined the ADC determined the most appropriate benchmark to be the export price of Chinese produced coking coal (exclusive of export tax), from information provided to it by the GOC. It is this decision which the applicant challenges submitting that Australian export prices of coking coal would provide a more appropriate benchmark.

34. The reasons for selecting the Chinese export price were also adopted from INV 193 and can be summarized as follows:

> -Australian export prices of coking coal may have been unusually high and unsuitable for comparison in the period July 2011 to December 2011 because of floods disrupting production and supply10;
>
> -that owing to a variety of factors it was not possible to determine the quality or form of coking coal from the import/export data from each of the top five countries trading in coking coal. Given this the coking coal exported by the GOC is considered to be the most comparable to that purchased domestically;
>
> -the reliability of export price data provided by the Government of China,
>
> -the export price proposed was more directly relevant to Chinese producers and exporters,
>
> -the production cost of coking coal for the Chinese domestic and export markets is likely to be similar if not the same,

[9] SEF 198 at appendix A2.3.2(iii)

[10] while this falls outside the investigation period determined in SEF198 and it is accepted that it is probable that the price would take some time to recover, this point has not been considered as a factor in conducting the review.

-the Commission found Chinese export prices for coking coal to be comparable to the export prices of the top 5 exporting counties in the world,

-there is no comparable economy market producing as much coking coal and because of the size of that market it is appropriate to determine remuneration of Chinese domestic prices based on a benchmark of Chinese export prices.

35. It was acknowledged in REP198 that the use of Chinese export prices was not without problems. One problem noted was an inability to identify the quality of coking coal exported. This was not because of any apparent withholding of information but arises from an absence of source information. As noted in the preceding paragraph the lack of specific qualitative information with respect to coking coal is not limited to the Chinese market, including the export of coking coal, but extends to the top five world exporters of coking coal. Despite acknowledging some difficulties associated with the information provided from the GOC the Commission concluded that what overall the information provided was reliable. No challenge was made in either the application or the submissions to this conclusion.

36. The applicant submits that the use of Chinese export prices is not the correct or preferred decision because those prices are for low grade coking coal whereas hard grade coking coal, which is not produced in China, is used in combination with low grade coking coal in the manufacture of plate steel in China. It maintains that hard grade coking coal is sourced from imports of coking coal made to China from a variety of countries including from Australia.

37. The sole support identified for the above proposition in the review application comes from the following statement quoted in the review of the termination decision in Investigation 193 (INV193), undertaken by the Senior Member of the Panel:

> *"…the coal for which the export prices were ascertained (and used) as the benchmark to determine adequate remuneration, was not of comparable quality to the coal purchased by Chinese manufacturers to manufacture coated steel products".*

38. The quote relied on by the applicant from REP193 was from a termination review decision relating to subsidies said to be paid by the GOC in respect of coking coal used in the manufacture of coated steel products. The quote is stated as a finding of fact. It is however incomplete and taken out of context. It ignores the immediately preceding qualifying words which clearly state that what is being discussed amounts to a 'real possibility' only.[11]

39. The decision to terminate considered in INV 193 is reached by the Commissioner prior to an investigation being completed. In the instant case the investigation has been completed and the evidence on which it is recommended the Minister reach a decision has been finally established.

[11] paragraph 19 of Review of Termination Decision 193(i)

The issue in the instant case is not as to whether an affirmative decision to terminate must be made, where a low 2% threshold applies as was the case in INV193, but rather whether, on the totality of the information arising from a completed investigation, the correct or preferable decision has been reached. Different and non-comparable circumstances arise for consideration in the two reviews. For these reasons the above quoted passage from INV193 does not provide evidence, or a conclusion based on evidence from a completed investigation, which supports the applicant.

40. Jigang submits that the applicant has not provided any evidence which supports what quality of coking coal is used in the Chinese production of the goods. It is also submitted, as is the case, that the determination of an appropriate benchmark must turn on the circumstances and facts of each particular investigation. Jigang submits that the applicant does not point to any facts arising from the investigation in this case which support its contention that Chinese manufacturers use a blend of low grade and high grade coking coal in the production of plate steel.

41. Jigang uses nine different types of Chinese sourced coking coal is used in its production process and comments that each would require a separate benchmark. It would of course be impractical and unsustainable to treat each qualitative variant as if an established difference. However the substantive point being made on behalf of Jigang is that the coking coal used in its production process is exclusively sourced domestically. As part of that process it uses a pulverized coke injection (PCI) system which not only reduces the amount of coking coal used but also makes the grade of coking coal used in the manufacturing process 'largely irrelevant'.

42. In a response to further information I sought from the Commission, I was informed, and accept, that PCI coal is from 'the relatively abundant lower grades of coal'. The Commission accepted in REP198 that Jigang's utilization of the PCI system in production process constitutes another form of coking coal. While the Commission was unable to confirm, on the information provided by Jigang, whether the PCI system uses a lower volume of coking coal thereby reducing the percentage of coking coal estimated on a per tonne basis to produce plate steel,[12] the evidence establishes that Jigang does not access imported hard grade coking coal for use in its production process of plate steel. The information provided by Jigang was provided prior to the publication of REP198 and was available to BlueScope at the time the review application was lodged but was not challenged in the application.

43. It is not possible to conclude from the processes used by one manufacturer (Jigang) that all, or even a majority of, other Chinese manufacturers

[12] The submission to the review restated what was submitted in the confidential email to the Commission of 20 August 2013 that the [redacted]% figure relied on by BlueScope as being the volume coking coal used in the production of one tonne of plate steel was overstated a margin of [redacted]%. Jigang's review submission did not address the verification concerns expressed in REP198 about Jigang calculations.

exclusively rely on the use of locally sourced low grade coal in the manufacture of plate steel. Jigang is one of hundreds of Chinese plate steel manufacturers and no information concerning the quality of coking coal used by them was available, other than the generalized proposition that what is used is likely to be low grade coking coal. However what can be concluded is that the evidence provided by Jigang to the Commission does not support the proposition advanced by BlueScope namely that imported hard coking coal is an essential component in the Chinese manufacture of the steel slab.

44. The evidence supports a conclusion that the import of coking coal by China is to fill a shortfall in its own production sources and that the quality of the imported coking coal may not be a, or even the, major consideration in its use. If this is so it tends to confirm that a mismatch would occur if, for instance, higher priced Australian hard coking coal was to be used as the benchmark. Adopting such a course would be antithetical to the setting of a benchmark price applicable to the Chinese market and supports the reason advanced by the Commission to rely on Chinese export prices. The Chinese export prices are more directly relevant to Chinese producers and exporters than would be if qualitative different imports from another country, such as Australia, was used to establish the benchmark.

45. The inability of the GOC to provide information on the quality of coking coal exported from China has earlier been noted. That difficulty is accentuated by the failure other Chinese steel manufacturers to respond to questionnaires sent by the Commission. The fact that a number of differing qualities of coking coal can be sourced adds to the difficulties associated with determining which, or which combinations of, qualities are exported. Given that this is a difficulty faced in the international market I accept that for purposes of setting the most appropriate benchmark for China that data provided by the GOC is likely to have not only a lower risk of creating a mismatch as concluded by the Commission but also that it is the most directly relevant to Chinese producers of the exported goods.

46. The applicant makes no challenge to the other grounds set out earlier in these reasons which were relied on by the Commission in setting the benchmark. Those reasons are open and logically based. I am satisfied that the Commission considered and weighed the various external benchmarks before determining that Chinese export price of coal as being the most appropriate to determine the benchmark and that the approach taken and conclusion reached by the Commission are reasonable.

GROUND 2: Q AND T GREENFEED

47. In the second ground the applicant submits that the finding that [material] injury sustained to BlueScope was not caused by Jigang's subsidized exports of the Q and T greenfeed to Australia is incorrect because:

    i. the Commission's analysis takes account only of price-effect injury experienced by the Australian market and fails to adequately consider the 8,384 tonnes of lost volume that it is claimed BlueScope would otherwise have produced and sold, and,

ii. no consideration was afforded to the likely threat of material injury from JIGANG's subsidized exports to its joint venture Australian partner and the sole customer in Australia for Q and T green feed, Bisalloy Steel Group Limited (Bisalloy), and,

iii. the inadequacy of the benchmark for assessing the margin of subsidy understates the 2.6% subsidy margin determined, and

iv. BlueScope sells to Bisalloy on an import parity price (IPP) tender basis. BlueScope submits that the determination of the IPP is not simply a matter of it meeting the Jigang price plus the 2.6% subsidy margin but that it must also take account a large price disparity of between $200-250 between Jigang's export price and that of Posco, and,

v. for the first time and without any advance notice REP198 assessed injury in respect of Q and T green feed as a separate market from the broad hot rolled plate steel market. The correct approach, it is submitted, would have been to aggregate the injury assessed with respect to the Q and T green feed with the plate steel imports from China to arrive at a combined injury figure.

48. On behalf of Bisalloy it is submitted that exports from China of Q and T greenfeed have not caused material injury to the Australian industry. The submission identifies an inconsistency between the conclusion in REP198 that any injury caused to the local market from the import of Q and T greenfeed was not attributable to the claimed subsidized product from China and the decision of the Minister, while accepting the findings of the report, to impose a countervailing duty. It submits that that Q and T greenfeed should be excluded from the goods on which the countervailing duty is imposed.

49. It is desirable to provide some further background on Q and T greenfeed before considering the issues. The Bisalloy submission explains:

> *"Alloyed Q and T steel plate in both its immediate and finished form is very different product to non-alloyed steel plate. The combination of additive amounts of alloys and the subsequent heat treating process together with precise specification of chemical profiles and grain structures are designed to achieve high strength, impact and abrasion resistance mechanical properties that non alloyed steels cannot provide."*[13]

Consideration of the points made in support of ground 2 follow seriatim.

(i) Sales Volume

50. BlueScope submits that the Commission, while it examined price effect injury, failed to consider injury arising from a loss of sales volume. Contrary to this assertion the Commission expressly considered sales volume of Q and T green feed[14]. It examined the total Australian sales comparing those

[13] Bisalloy submission para 7

[14] Rep198 at 8.8.1

to the exports from both China and Korea. It concluded that there was a spike in Chinese exports in 2011 which displaced BlueScope's sales volume in that year and demonstrates that since that time Chinese exports to Australia have remained stable. The graph, prepared from data provided by BlueScope of sales volume commencing from 2008, illustrates an increase in BlueScope's sales volume in the 2011-12 years. The summary of major injury indicators set out at paragraph 8.8.5 of Rep198 includes 'loss of market share' in support of BlueScope's claim.

51. It is not readily apparent from the data how the figure of 8,384 tonnes referred to in BlueScope application has been calculated but it most probably reflects the volume of Q and T greenfeed purchased by Bisalloy from Jigang – ie a figure representing claimed lost BlueScope sales to Bisalloy absent Bisalloy purchasing the lower priced subsidized Jigang goods or the undumped and unsubsidized goods from Posco. As the submission on behalf of Jigang points out this would assume that, absent purchasing from Jigang, Bisalloy would have only purchased from BlueScope. Posco was indisputably another source of supply for Bisalloy. REP198 concluded that Posco's price for the goods was relatively similar to that charged by Jigang[15]. It is unlikely that with an ability to purchase from a similarly lower priced source (Posco) that Bisalloy would source its Q and T greenfeed from BlueScope at a higher price. This point cannot succeed.

(ii) Joint Venture

52. No material is provided to support BlueScope's assertion that material injury is likely to arise from Bisalloy being in a joint venture with Jigang in the production of Q and T greenfeed in China. The existence of the joint venture was known to the ADC and published as part of the visit verification report.[16] I could find no submission from the applicant to the Commission which commented on this aspect and nothing in the relevant material which otherwise addressed this concern.

53. The participation in a joint venture with an exporter does not of itself lead to a conclusion that material injury will result from exports produced by that joint venture entering the Australian domestic market. The existence of such joint ventures is unexceptional business practice and it may lead to Bisalloy having a preference to purchase Q and T greenfeed from its joint venture partner, Jigang. That is not of itself a ground for the imposition of countervailing measures. In the absence of any other factual material on which to base a finding this aspect is unable to be sustained.

(iii) Benchmark

54. This aspect has been covered in the reasons given earlier in this decision where the adequacy of the benchmark is confirmed.

(iv) Import Parity Pricing

[15] Rep 9.9.2 at page 78

[16] Bisalloy visit report at 4.1

55. REP198 acknowledged that BlueScope's pricing strategy was based on IPP[17] and that found that Bisalloy's purchases of Q and T greenfeed from BlueScope were mostly tender prices based on IPP.[18] The report also acknowledges BlueScope's claim that in order to maintain domestic sales volume it was required to match import prices of the Chinese subsidized Q and T greenfeed. The only time that the higher list prices were charged by BlueScope to Bisalloy was when there was a need for stock at short notice coupled with a shortage of supply. The IPP tender price was estimated to undercut BlueScope's list price by approximately 28%.

56. In the application for review BlueScope asserts that the Chinese Q and T greenfeed export prices to Australia undercut those from Korea by approximately $200-250 per metric tonne and that this is a factor it must take into account when determining its IPP. BlueScope has not provided any substantiation for its assertion that Jigang's prices undercut those charged by Posco by the stated figure. In the absence of that substantiation there is no reason not to accept the conclusion reached by the Commission in REP198 that the export prices of Jigang and the undumped and unsubsidized goods from Posco are relatively similar.

57. The price is a, if not the, key determinant in setting the level of an IPP. BlueScope's setting of an IPP is a matter it must determine taking into account market prices. The Commission concluded from a comparison it undertook for Posco's undumped and unsubsidized Q and T greenfeed exports that Posco and Jigang's export prices were 'relatively similar'.[19] The similarity between Posco and Jigang's export prices, while it may put pressure on the IPP price BlueScope determines, is a market issue and not one affected by the alleged subsidization of Jigang.

SEPARATE MARKET

58. BlueScope submits that the Commission erred in separating the Q and T greenfeed market from the broad hot rolled plate steel market in the assessment of material injury. It submitted that the correct approach, which it is pointed out the Commission had undertaken in SEF198, was to aggregate the Q and T greenfeed market with the balance of the plate steel market to calculate a comprehensive assessment of material injury. BlueScope asserts that it was not forewarned that the Commission would adopt a different approach from that outlined in the SEF and was not provided with an opportunity to comment on the change.

59. As stated earlier Q and T greenfeed was found to have significant differences from non-alloyed plate steel and the products are not substitutable. As evidenced by the fact that Bisalloy is the only purchaser of Q and T greenfeed in Australia the market is also very different. The existence of differing production processes and markets justifies a separate assessment of material injury from that undertaken in respect of the alloyed steel plate market. Clear authority for the Minister for this is found in Panasia

[17] REP198 at 9.5 at p66

[18] ibid at 9.9.3 at p78

[19] ibid 9.9.2 at p78

Aluminium (China) Limited v AG of the Commonwealth [2013] FCA 870 at 145:

> *"However, it is important to keep in mind that there is nothing in Part XVB of the Act (or the Anti-Dumping Agreement) that requires that duty be imposed upon goods within a relevant class (such as G1, G2 and G3) that are sold at or above normal value. On the contrary, pursuant to s 269TL of the Act, the Minister may decide, on the recommendation of the CEO, not to impose dumping duty on "particular goods or on goods of a like kind to particular goods".*

While the Panasia case was concerned with anti-dumping measures there is no reason not to apply the conclusion to countervailing measures.

60. While it would have been preferable for the Commission to have at least notified the applicant of this and invited comment a failure to do does not provide a sufficient reason of itself to recommend the Minister's decision should be revoked on that ground.

61. Other than the procedural failure the applicant does not provide any substantive reason which would justify cumulating the alloyed and non-alloyed goods in the assessment of material injury.

62. However a point is raised in the submission of Bisalloy which the panel believes should be brought to the attention of the Minister. Consistent with the approach adopted earlier in these reasons under the heading "Preliminary Issue" it is not a matter about which the panel will make a formal recommendation. The issue involves a claimed internal inconsistency in the Minister's decision to accept the finding in REP198, one aspect of which was that no material injury had been caused to the Australian industry from Jigang's export of Q&T greenfeed, and the decision to then impose duties in respect of those goods. That circumstance, raising as it does an apparent error on the face of the record, is distinguishable from the earlier ruling that the panel should not consider new issues not raised in an application, and is an issue which legitimately arises for consideration.

63. After undertaking the separate material injury assessment the Commission concluded:

> *"…the Commission considers that any injury to BlueScope in the Q and T green feed market was not caused by Jigang's subsidized exports of those goods in that market".*[20]

There were two reasons for the Commission's finding. The first was the minor nature (less than 2% of the Q and T greenfeed revenue) of the injury arising to any BlueScope loss was attributable to the 2.6% subsidy. The second was, as commented on earlier, that Posco's undumped and unsubsidized export prices for the goods was relatively similar in the same period for those charged by Jigang. Those findings support the Commission's stated conclusion that material injury to BlueScope could not result from any subsidized Q&T Greenfeed exported by Jigang to the Australian market.

[20] Rep198 at para 9.9.2 on p78

64. S269ZZM(3) provides authority for the Minister to review this issue when considering the panel's recommendation.

RECOMMENDATION

65. For the above reasons I recommend that the Minister affirm the decision under review.

Graham McDonald
Panel Member

18 June 2014