

PUBLIC RECORD

SUBMISSION ON BEHALF OF BISALLOY STEEL GROUP LIMITED TO THE ANTI-DUMPING REVIEW PANEL CONCERNING A REVIEW OF A MINISTERIAL DECISION TO PUBLISH COUNTERVAILING DUTY NOTICES APPLYING TO HOT ROLLED PLATE STEEL FROM THE PEOPLE'S REPUBLIC OF CHINA

Introduction

1. We act for the Bisalloy Steel Group Limited (**Bisalloy**) which is an interested party that uses Hot Rolled Plate Steel (**GUC**) in the production or manufacture of other goods in Australia. We make this submission pursuant to section 269ZZJ of the *Customs Act 1901 (Cth)* (**Act**).
2. Bisalloy is the sole Australian customer for non-heat treated alloyed Quenched and Tempered Greenfeed Steel Plate (**Q&T Greenfeed**) exported from the People's Republic of China (**PRC**) by Shandong Iron & Steel Company Limited (**JIGANG**) during the countervailing investigation period and also the sole Australian customer for the same product manufactured by the Applicant, BlueScope Steel Limited (**BlueScope**). Bisalloy uses Q&T Greenfeed in the manufacture of high-tensile, abrasion-resistant and armour grade quenched and tempered steel plate, marketed under the brand name "Bisplate®".
3. Q&T Greenfeed is purely an intermediate alloyed product used in the manufacture of quenched and tempered alloy steel plate and is unsaleable for any typical Q&T application without further specific heat treatment. Production costs and selling prices are at a substantial premium to non-alloyed steel plate and in the case of the finished product there is a significant increment to this premium resulting from the cost of the substantial manufacturing process of heat treatment involving shot blasting, hardening, quenching, tempering and levelling.

Issues

4. BlueScope contends that the decision of the Minister published on 19 December 2013 (**decision**) in respect of countervailing measures on exports from the PRC of the GUC is not the correct or preferable decision. The two elements of the decision contested by BlueScope are:
- (i) the finding that subsidised exports from the PRC of Q&T Greenfeed had not caused material injury to the Australian industry;
 - (ii) the finding in relation to the correct or preferred benchmark for determining whether producers of coking coal in the PRC were selling at less than adequate remuneration.
5. Bisalloy agrees that the decision is not the correct or preferable decision but does not agree with the applicant's proposals on the terms of a new substituted decision. Our client submits that the Minister should revoke the decision and substitute a new decision that excludes exports from China of Q&T Greenfeed from any countervailing duty notice on the grounds that:
- (i) they have not caused material injury to the Australian industry; or
 - (ii) no countervailable subsidy has been received by JIGANG
6. In view of an opinion expressed by the Panel in paragraph 18 of the Report on *Food Service Industrial Pineapple exported from the Kingdom of Thailand* by Dole Thailand Limited, we request that the grounds raised in this submission be considered in the order set out in the previous paragraph.

MATERIAL INJURY

7. Alloyed Q&T steel plate in both its intermediate and finished form is a 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. These factors, together with the different cost and price profiles referred to above and the separate and distinct markets for alloyed Q&T Greenfeed and non-alloyed steel plate, result in a situation where, within the GUC nominated by the applicant pursuant to subsection 269TB(1) of the Act, there are two categories of goods of a particular kind.

8. While the Commission found, correctly, that BlueScope produced a like product to the Q&T Greenfeed exported from China, it also found, correctly, that the two categories of product were not substitutable¹ and involve different markets². The Commission did not address the specific issue of whether the two products were like goods but we submit that the existence of separate markets, non-substitutability and very different product profiles would be incompatible with any finding that the products had characteristics closely resembling each other. The inclusion within a GUC definition of more than one category of like product is permissible in terms of both the *Anti-Dumping Agreement*³ and the Act⁴ but it does have implications for the conduct of material injury and causation investigations.
9. The Commission, in its final report, undertook a separate injury assessment of the applicant's Q&T Greenfeed market and concluded that BlueScope had experienced injury in that market⁵ but found that such injury was not attributable to allegedly subsidised exports of Q&T Greenfeed from China⁶. In support of that finding the Commission cited the fact that BlueScope's loss of revenue from the market segment due to the modest rate of subsidisation was miniscule and that POSCO's exports from Korea of Q&T Greenfeed at undumped and unsubsidised levels were similarly priced. We agree with the Commission's finding but would observe it might have been more prudently expressed as a consideration in relation to any material injury.
10. From that point it is a challenge to follow the logic of the findings and recommendations of the Commission relating to this issue and the subsequent decision of the Minister that is stated to be based on those recommendations and material findings of fact. Having found that material injury could not be attributed to subsidised exports of Q&T Greenfeed and having observed that total exports of the product were about 1.2% of all imports⁷ and that BlueScope's loss of revenue due to those exports as a percentage of its total revenue was less than 1%,⁸ the Commission's final recommendation in the Report, consistent with that finding and those observations, is that the Minister declare:

¹ Report 198: p.52

² *ibid.*, p.24

³ WTO Panel Reports: *EC – Salmon (Norway)* para 7.68; *EC- Fasteners (China)* paras 27-28

⁴ Report of the Ant-Dumping Review Panel: *Aluminium Zinc Coated Steel from the Republic of Korea* - para 23

⁵ Report 198: p.60

⁶ *ibid.*, p.78

⁷ *ibid.*, p.57

⁸ *ibid.*, p.78

in accordance with s.269TJ(2), by public notice, that section 10 of the Dumping Duty Act applies to like goods that are exported to Australia by all exporters from China, except JIGANG after the date of publication of the notice. [emphasis added]

11. However, the Minister's subsequently published countervailing notice under subsection 269TJ(2) of the Act, while purporting to accept the recommendations of the Commission, specifies that a 2.6% subsidy margin has been established in relation to JIGANG's exports and that section 10 of the *Customs Tariff (Anti-Dumping) Act 1975 (Cth)* applies to all exporters from China (including JIGANG) of the GUC. The likely, but unconfirmed, explanation for the apparent conflict between the Commission's recommendations and the Minister's notice is that while the countervailing duty notice does apply to JIGANG's exports the rate of interim countervailing duty has been set at 0% due to the operation of the lesser duty rule.
12. The transition from concluding, correctly, that JIGANG's exports had not caused material injury to either BlueScope's Q&T Greenfeed business or its total production of steel plate to recommending, incorrectly, that the countervailing duty notice should apply to JIGANG appears to be embedded in sections 9.9.3 and 9.9.4 of the Report. The second of those sections contains two errors, the first of which is the introduction of a totally irrelevant consideration to the Report. In the penultimate paragraph of section 9.9.4 the Commission reverts to the issue of the termination of an investigation under section 269TDA(14). That was a matter that the CEO could have addressed in the Statement of Essential Facts (SEF) and could have been the subject of a decision by him after receiving responses to the SEF. It has no place in a report to a Minister who has no power to terminate investigations but is charged with determining, after considering a report by the Commission, whether a countervailing duty notice should be published and, if so, the scope of that notice. The proper issue that should have been brought to the attention of the Minister was whether, in view of the Commission's findings of no material injury caused by exports from China of Q&T Greenfeed, those exports should be excluded from the terms of the notice.
12. The origin of the second error can be found in the following statement in section 9.2 of the Report:

The Commission has assessed material injury and considered cumulatively the injurious effects of dumping and subsidisation from the nominated countries. The conditions are such that it is appropriate to consider the cumulative injurious effect of the dumped imports from China, Indonesia, Korea and Japan and subsidised imports from China to the Australian industry.⁹

13. The relevant cumulative consideration of the causes of material injury is revealed in section 9.9.4 of the Report where the Commission concludes that :

In the current investigation the goods are plate steel and while exports of Q&T green feed plate from JIGANG may not have caused injury, the Act requires that an assessment be made on the goods as a whole. The Commission has found that subsidised plate steel exported by non-cooperators from China has caused injury to the Australian industry that is not negligible.¹⁰

14. The implication appears to be that JIGANG is guilty by association of causing material injury to the applicant's total production of the GUC – an association that involves not the export of goods of the same kind but the same country of export. Although not specified, the reference to 'the Act' is presumably a reference to subsection 269TAE(2C) which in certain circumstances permits the Minister, in determining whether an Australian industry has suffered material injury, to consider the cumulative effect of the export of goods from different countries. In the present matter, however, allegedly subsidised exports of alloyed and non-alloyed plate steel have only been exported from one country and consequently, we submit, the subsection has no application.
15. In addition, even if the Commission argued by analogy that there were grounds to cumulate exports of alloyed and non-alloyed steel plate from China when considering whether BlueScope had suffered material injury due to allegedly subsidised exports, the circumstances implicit in paragraph 269TAE(2C)(e) of the Act cannot be satisfied. The Commission has already found that there are separate markets for Q&T Greenfeed and non-alloyed plate steel and that the products are not substitutable. Consequently there is no ...*competition between those goods* ...and cumulating them in a causation analysis would serve no rational purpose.
16. Based on the Commission's own findings of facts that JIGANG's exports have not caused material injury to Australian production of either Q&T Greenfeed or the GUC generally, we request the Panel to recommend that the Minister revoke the reviewable decision and

⁹ *ibid.*, p.63

¹⁰ *ibid.* p.79

substitute a new countervailing duty notice under subsection 269TJ(2) that excludes Q&T Greenfeed from the description of the goods that are the subject of the notice. The power of the Minister to exclude certain goods falling within the GUC from the operation of a duty notice has been adverted to by Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 at 145, is supported by the provisions of subparagraph 269ZDB(1)(a)(ii) relating to reviews of measures and has been accepted by the Panel and the Parliamentary Secretary in the recent review and reversal of the decision to impose dumping duties on Unchromated Aluminium Zinc Coated Steel exported from the Republic of Korea.

SUBSIDIES

Public Bodies

19. The issue of whether there was countervailable subsidisation of coking coal during the period of investigation was addressed in detail in paragraphs 6 – 29 of our submission to the Commission on behalf of Bisalloy dated 21 August 2013. We invite the Commission's attention to that submission which is document no. 160 on the public record. In responding to Bisalloy's submission in its final report the Commission does not provide any persuasive reasoning to support its continuing assertion that coking coal was being subsidised by the Government of China.
20. In relation to the issue of public bodies, the Commission has not produced any evidence related to the relevant investigation period and merely relies in the first instance on the findings of Report 203 concerning Hollow Structural Sections (HSS) that was itself a re-investigation of the findings in Report 177. Those findings concern the supply by State Invested Enterprises (SIEs) of hot rolled coil steel to exporters to Australia of HSS and deals with the period from 1 July 2010 to 30 June 2011. It then states that the Federal Court in *Panasia Aluminium(China) Limited v Attorney General of the Commonwealth* [2013] FCA 870 affirmed the CEO's findings. There is no such affirmation in that case which dealt with SIE's that supplied primary aluminium to exporters to Australia of certain aluminium extrusions.

- 21 The Commission has not identified any relevant information concerning whether any SIEs supplying coking coal to exporters to Australia of plate steel during the investigation period were public bodies. As the Appellate Body of the WTO has observed:

... the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.¹¹

22. By failing to conduct a proper evaluation of the circumstances surrounding the status and activities of SIEs supplying coking coal, the Commission's finding on public bodies is a mere presumption and provides no basis for a claim that coking coal supplied to producers of plate steel was subsidised. The Panel reached this same conclusion in its Review of Decisions regarding Countervailing Duties for Coated Steels exported from China¹² and the Parliamentary Secretary has accepted the Panel's findings in that matter¹³. We submit that on this ground the decision of the Minister is incorrect and that the correct and preferable decision would be that there is no countervailable subsidy provided to Chinese exporters to Australia of plate steel.

Adequate Remuneration

23. On the issue of adequate remuneration the Commission, while mentioning¹⁴ the key criterion of whether the prices charged by SIE's for coking coal provide them with an adequate return on investment, totally fails to gather the necessary evidence or undertake the appropriate analysis, to test the application of that criterion. Similarly the Commission's finding that JIGANG received a benefit when sourcing coking coal from SIE's is merely stated without accompanying analysis or persuasive explanation and without regard to the established relativities of coking coal pricing by SIE's and private entities respectively. For these reasons and the further arguments set out in our submission of 21 August 2013 we again submit that the decision of the Minister is incorrect and that the correct and preferable decision would be that there is no countervailable subsidy provided to Chinese exporters to Australia of plate steel.

¹¹ *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*: DS 379: paragraph 317

¹² Paragraphs 105 – 106.

¹³ Anti-Dumping Notice No. 2014/12

¹⁴ Report 198: pp.47-48

24. On the basis of the failure of the Commission to establish that SIEs have provided coking coal at less than adequate remuneration to Chinese exporters to Australia of plate steel, we submit that the correct and preferable decision would be for the Minister to revoke the countervailing duty notice.



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