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JW:lf
18 December 2017

The Director, Investigations 1
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601
Via email: investigations1@adcommission.gov.au

Dear Sir/Madam

Submission concerning Continuation Inquiry into Anti-Dumping Measures initiated under Anti-Dumping Notice No. 2017/159 Zinc Coated (Galvanised) Steel Exported from the People's Republic of China, the Republic of Korea and Taiwan

I act for CITIC Australia Steel products Pty Ltd **('CITIC'),** importer of Zinc Coated (Galvanised) Steel (**'galvanised steel'**), exported from Taiwan by Yieh Phui Enterprise Co. Ltd. (**'Yieh Phui'**).

On 5 August 2013, anti-dumping measures (interim countervailing duties) were placed on galvanised steel exported from various countries, including by Yieh Phui and others from Taiwan.[1] These measures are due to expire on 5 August 2018.

In response to Anti-Dumping Notice 2017/159, we submit that the continuation of anti-dumping measures in respect of galvanised steel from Taiwan is not justified.

[1] Anti-Dumping Commission, 'Dumping Commodity Register for Zinc Coated (Galvanised) Steel, exported from the People's Republic of China, the Republic of Korea, Taiwan, Republic of India, Malaysia and Socialist Republic of Vietnam', available at http://www.adcommission.gov.au/measures/Documents/Zinc%20coated%20%28galvanised%29%20steel/DCR%20-%20zinc%20coated%20%28galvanised%29%20steel.pdf (**'Galvanised Steel Dumping Register'**), p 3; see also Final Report REP 290 and Anti-dumping Notice 2013/66.

Australian Legal Framework

Anti-dumping measures, if not revoked, must expire after 5 years.[2] "A measure (regardless of its form) cannot persist for longer than five years without being subject to a continuation inquiry."[3]

Applications for the continuation of anti-dumping measures must be examined, and must be rejected unless the Commissioner is satisfied that "there appear to be reasonable grounds for asserting that the expiration of the anti-dumping measures to which the application related **might lead, or be likely to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent**" (emphasis added).[4]

The Commissioner must report his or her findings in the continuation inquiry to the Minister, and recommend that: the dumping duty notice remains unaltered; or ceases to apply to a particular exporter or to a particular kind of goods; or that the notice have effect in relation to a particular export or to exporters generally, as if different variable factors have been ascertained; or that the notice expire on the specified expiry day.[5]

"The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures **would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent**" (emphasis added).[6]

The ultimate wording of section 269ZHF(2) is crucial. It sets up a high evidentiary burden, requiring a conclusion that dumping, plus injury "would" both occur if the duty was removed, or if that standard was not proven, that such dumping and injury would at least "be likely" to both reoccur, that is, the evidence must support this conclusion on the balance of probability. Stated differently, while reasonable possibility of re-occurence may allow an investigation, a continuation of the measure requires the Minister to be satisfied that the evidence before him makes it more likely than not that dumping will re-occur, that such dumping will be at more than de minimus levels, that such dumping will cause injury and that such injury will be material. If he is not so satisfied on each element, he cannot allow continuation of the measure.

We submit that the answer to each of these questions is 'no'. Hence there should be no continuation from Taiwan.

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[2] Customs Act (Cth) 1901, Section 269TM(1), (2).
[3] Anti-Dumping Commission, 'Dumping and Subsidy Manual', April 2017, available at http://www.adcommission.gov.au/accessadsystem/Documents/Dumping%20and%20Subsidy%20Manual%20-%20April%202017.pdf (**'Dumping and Subsidy Manual'**), p 169.
[4] Customs Act (Cth) 1901, Section 269ZHC(2)(b).
[5] Customs Act (Cth) 1901, Section 269ZHF(1)(a).
[6] Customs Act (Cth) 1901, Section 269ZHF(2).

WTO authority regarding the continuation of anti-dumping duties

According to the WTO Agreement on Implementation of Article VI of GATT 1994 (**'Anti-Dumping Agreement'** or **'ADA'**), duties shall remain in force only as long as necessary to counteract the injurious dumping.[7] As a result, all anti-dumping duties must be terminated at the end of five years, both under ADA and the Customs Act.[8] Under the ADA, like the Customs Act, the duties may only be continued if "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."[9] This is "an exception to the otherwise mandated expiry of [duties] after five years", according to the WTO Appellate Body.[10] According to WTO jurisprudence:

> *"...[m]embers are required to terminate an antidumping duty within five years of its imposition 'unless' the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping; and third, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury. If any one of these conditions is not satisfied, the duty must be terminated"*.[11]

As to the evidentiary standard, Art 11.4 ADA mandates that the Art 6 provisions regarding evidence shall apply to such continuation reviews. The elements of Art 6 dealing with the need for verification, transparency and an opportunity for interested parties to meet and engage, is particularly important for exporters found recently not to have been dumping (see ADRP Report No 58 and consequential Ministerial decision), where the current application for continuation must then be based on conjecture. While the applicant is naturally permitted to raise hypotheticals, it must meet the evidentiary burden of a likelihood test. Its hypothetical case must to that end be evidence based, with such evidence making injurious dumping more likely than not.

This is consistent with the policy to make a five-year maximum the norm, with duties more typically applying based on proven dumping and injury and not mere hypotheticals. Stated differently, it should not be easier to achieve a continuation than an initial duty, Necessity and positive evidence must be the determining factors regarding the application of measures such as anti-dumping duties. As the WTO Panel in US – Drams states:

> *"…we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and*

[7] Article 11.1.
[8] ADA, Article 11.3; Customs Act (Cth) 1901, Section 269TM.
[9] ADA, Article 11.3.
[10] *US - Oil Country Tubular Goods Sunset Reviews,* WT/DS268/AB/R: para. 178.
[11] *US — Corrosion-Resistant Steel Sunset Review* (WT/DS244/AB/R: para. 104).

therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced."[12]

WTO authority on commencing continuation inquiries

The ADA sets out the requirements for commencing continuation inquiries. It states that a domestic industry's application for a subsequent investigation must be "duly substantiated".[13] Here again there is a need for an evidence based assessment in determining whether the likelihood standard has been reached.

Likelihood

The Anti-Dumping Commission's Dumping and Subsidy Manual states:

> "when examining a revocation claim, the Commission conducts a prospective examination—the issue will be whether, if the anti-dumping measures were to be revoked, dumping or subsidisation causing injury to the industry would be likely to continue or recur. In examining the likelihood of injury as a result of any future dumping or subsidy, the Commission takes guidance from WTO jurisprudence (US Drams - WT/DS99/R 1999) where 'likely' has been taken to mean 'probable' and the evidence relied upon will be appropriate to circumstances of practical reasoning intrinsic to a review process."[14]

In WTO jurisprudence, the mere possibility of future dumping does not satisfy a likelihood requirement: "[i]n view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible."[15] This is a forecast of the future, based on a factual foundation taking into account both past and present.[16] As noted above, the likelihood must be as to material injury and causation, as well as more than de minimus dumping.

Based on Panel Report on US – DRAMS and Appellate Body Report on US – Lamb, the WTO opines that a sufficient factual basis must support a determination of likelihood.[17]

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[12] WTO Panel Report on US – DRAMS, para 6.42.
[13] ADA Article 11.3.
[14] Dumping and Subsidy Manual, p 163.
[15] US – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan – WT/DS244/AB/R, para 111, pages 39-40.
[16] US – Sunset Review on Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products, WT/DS244/R (14 August 2003) at para. 7.279.
[17] WTO Analytical Index, para 494.

The WTO warns that investigating authorities must act with an appropriate degree of diligence when considering the likelihood of continuation or recurrence of dumping.[18] The WTO Panel states that:

> *"Article 11.3 requires investigating authorities to terminate an anti-dumping duty not later than five years from its imposition unless they determine in a review initiated before then that dumping and injury are likely to continue or recur should the duty be revoked Article 11.3 does not, however, set out a specific methodology for making such determinations. In principle, therefore, investigating authorities are not restricted in the choice of methodology they will follow in making their sunset determinations. In their choice of methodology, however, the investigating authorities should have regard to both 'investigatory and adjudicatory aspects' of sunset reviews and make forward-looking determinations on the basis of evidence relating to the past. They must arrive at reasoned conclusions on the basis of positive evidence. In so doing, the investigating authorities may not remain passive. Rather, the authorities have to act with an 'appropriate degree of diligence'."*[19]

The WTO Appellate Body has further noted "that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions."[20] This position has been confirmed in the WTO's commentary to the ADA.[21]

In line with WTO jurisprudence, the Federal Court of Australia has found that the term "likely" at s 269ZHF(2) means "more probable than not."[22] This has subsequently been the test of likelihood applied by the Anti-Dumping Review Panel.[23]

The Dumping and Subsidy Manual details out the ambit of "likelihood" extensively:

> *"In assessing the likelihood of continuing or recurring dumping, the inquiry may gather facts as relevant on (the list is non-exhaustive):*
>
> - *pattern of exports since the measures were imposed*

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[18] WTO Analytical Index, para 769.

[19] Panel Report, US — Oil Country Tubular Goods Sunset Reviews (Article 21.5 — Argentina), para. 7.34.

[20] Appellate Body Report, US — Corrosion-Resistant Steel Sunset Review, para. 178.

[21] WTO Analytical Index, para 772.

[22] *Minister of State for Home Affairs v Siam Polyethylene Co. Ltd. (No 2)* (2009) 258 ALR 515, per Rares J at [48]. On appeal, this interpretation of "likely" was confirmed, although Rares J's factual analysis was overturned: *Minister of State for Home Affairs v Siam Polyethylene Co. Ltd.* (2010) 118 ALD 465, per Graham and Flick JJ at [90] (Bennett J concurring) (***'Siam Polyethylene'***). See also *Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees Union* (1979) 42 FLR 331, per Deane J at 346: "The word 'likely' can, in some contexts, mean 'probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a 50 per cent chance...."

[23] ADRP Report 50, 27 April 2017, p 8.

- *volumes and values of the imported goods*
- *effectiveness of the measures*[24]
- *whether exports are likely to continue or resume (such as volume of exports before and after measures were imposed, exporters' production capacity, exporters' supply chains, exporters' other markets, third country sales, and the world market for the goods)*
- *whether dumping will resume (such as exporters' margins, volume of exports before and after the measures were imposed, effect of the measures, the level of dumping compared with the level of measures i.e. NIP, any changes in the level of the measures as a result of review)*
- *exchange rate fluctuations*
- *changes in technology*
- *exporters' historic margins*
- *exporters' historic volume and value of exports*
- *duty absorption by the exporters (or other means of circumventing measures)*
- *exporters' volumes and values to third countries*
- *normal values in the exporting country*
- *export trends after the measures were imposed*
- *changes in distribution channels*
- *changes in transport costs*
- *demand in exporters' home markets*
- *evidence of sales below costs*
- *high dumping margins*
- *high tariffs in the exporting country*
- *exporters' dependence on export markets*
- *world capacity*
- *other possible sources of supply by importers*
- *end user preferences*
- *exporters' domestic profit on sales of like goods*
- *availability of other markets.*

"In assessing the likelihood of continuing or recurring injury, the inquiry may gather facts as relevant on (the list is non-exhaustive):

- *state of the Australian industry*
- *production capacity*
- *other causes of injury*
- *market size and share*
- *demand for the goods*
- *any changes in the structure and operation since the measures were imposed*
- *price of exports compared with NIP and USP*
- *measures relevance to selling prices*
- *the impact of imports of the goods not dumped from other sources*

[24] Dumping and Subsidy Manual, p 170.

- *changes in technology, product types, consumer preferences, demand and supply."*[25]

An applicant should address as many of these factors as would be within its reasonable investigatory power, otherwise it has not even complied with Art 11.3 ADA as to a "duly substantiated request." All of these potentially relevant factors must then be fed into an analysis that must test whether it is more likely than not, that each of more than de minimus dumping, material injury and a causal link, would re-occur if the measures ended as is normally intended to occur.

Likelihood of dumping

The applicant would need to demonstrate why Taiwanese exporters would be likely to dump. That could not be validly asserted. The recent Review, dealing with the most up to date data, found no dumping by any Taiwanese exporter.[26] As noted below, the application for continuation hardly mentions Taiwan, concerning itself instead with complaints about the market situation in China. That itself is telling. Assertions of actual dumping cannot be accurate as this would be based on knowledge of export pricing that Bluescope is simply not privy to. It must have mad assumptions that are not based in reality, perhaps wrongly assuming that export prices match current found normal values.

Material injury and causation

The meaning of the words "material injury" has been left open by the Federal Court of Australia.[27] The heading of section 269TAE is "material injury to industry". However, as the Court pointed out, subsections (1) and (2) are expressly confined to sections 269TG (considerations of the Minister in relation to dumping duties) and 269TJ (considerations of the Minister in relation to countervailing duties),[28] and sections 269TH (considerations of the Minister in relation to third country dumping duties) and 269TK (considerations of the Minister in relation to third country countervailing duties).[29] Therefore, the Court in *Siam Polyethylene* notes that, "[t]he application of s 269TAE(2A), (2B) or (2C) to the task being undertaken when discharging the functions conferred by sections 269ZHF and 269ZHG is thus not immediately self-evident."[30]

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[25] Dumping and Subsidies Manual, p 171.

[26] Anti-Dumping Commission in Report No. 365, 366, 367, 368, 371, 372, 374, 375 and 376, 12 May 2017.

[27] "…it is…unnecessary to express any more concluded view as to the relevance of s 269TAE when exercising the functions conferred by ss 269ZHF or 269ZHG", *Siam Polyethylene* (2010) 118 ALD 465 [108].

[28] Customs Act (Cth) 1901, Section 269TAE(1).

[29] Customs Act (Cth) 1901, Section 269TAE(2).The other subparagraphs to section 269TAE all refer back to subparagraphs 1 and 2. *Siam Polythylene* (2010) 118 ALD 465 [105].

[30] (2010) 118 ALD 465 [105].

On 1 June 2012, a Ministerial Direction on Material Injury was issued.[31] The Minister directed that:

- *"It is not enough to assert that because there is dumping or subsidisation injury automatically follows";*[32]
- *"I direct that identification of material injury be based on facts and not assertions unsupported by facts";*[33]
- *"[c]onsistent with Australia's international trade obligations under the World Trade Organization's Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures, I would expect it to be shown that the industry is suffering injury, and that the injury is caused by dumping or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business";*[34]
- *"I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant. I direct that there is no threshold amount that is capable of general application";*[35]
- *"Rather, identifying material injury will depend upon the circumstances of each case and will differ from industry to industry from time to time";*[36]
- *A material assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance."*[37]

The Dumping and Subsidy Manual refers to the Ministerial Direction on Material Injury.[38]

In terms of a continuation enquiry, a proper establishment of likely material injury must in turn, be based on a showing of a likely significant dumping margin, the likely price trends for all exports to Australia, the industry's likely costs and hence pricing, and the likely impact of such hypothesised dumping on such pricing and profitability. While other injury factors may be considered, such as employment levels, it would be harder again to meet the evidentiary burden if the industry could not show likely price effects.

Dumping and Subsidy Manual, p 23 makes comments as to threat of injury that could also inform the hypothetical exercise in a continuation enquiry:

> *Threat of material injury*
> *Articles 3.4 and 3.7 of the ADA and Article 15 of the SCM Agreement set out the factors to be considered in a determination of threat of material injury.*

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[31] Australian Customs Dumping Notice No. 2012/24, 'New Ministerial Direction on Material Injury', 1 June 2012, available at http://www.adcommission.gov.au/adsystem/referencematerial/Documents/ACDN2012-24.pdf (**'Ministerial Direction on Material Injury'**).
[32] Ministerial Direction on Material Injury, p 2.
[33] Ministerial Direction on Material Injury, p 2.
[34] Ministerial Direction on Material Injury, p 2.
[35] Ministerial Direction on Material Injury, p 2
[36] Ministerial Direction on Material Injury, p 2, 3.
[37] Ministerial Direction on Material Injury, p 3.
[38] Dumping and Subsidy Manual, p 124.

The Agreements give a non-exhaustive list of factors that should be considered in totality when making a determination of threat of material injury.

- *A significant rate of increase of dumped/subsidised imports into the domestic market indicating the likelihood of substantially increased importation.*
- *Sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped/subsidised exports to the market, taking into account the availability of any other export markets to absorb any additional exports.*
- *Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.*
- *Inventories of the product being investigated.*
- *In subsidy cases only, the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom.*

Bluescope Steel Ltd's ('Bluescope') application

As noted above, the hypothetical exercise must be evidence based, must lead to on balance conclusions on each key element and must satisfy the evidentiary standards and processes of Art 6 ADA. Arts 6.1, 6.2 and 6.4 are particularly relevant to this current submission. The only thing that parties opposed to the continuation request can do, is seek to meet the hypothetical scenario painted by the applicant from the outset, together with the evidence it has presented to satisfy its requirement to make a "duly substantiated" request. Stated differently, unlike a normal primary application, an interested party cannot simply point to the absence of dumping, as recently found by the Minister on Review. It must deal with whatever theory Bluescope has presented. An analysis of the application shows an inadequate theory both in content and supporting evidence.

The application states:

> *"BlueScope contends that exports of zinc coated (galvanized) steel from China, Korea and Taiwan have continued following the imposition of anti-dumping and countervailing measures and that the exports have caused injury that is material to the Australian industry".*[39]

Bluescope fails to highlight that such Reviews found no dumping from exporters from Taiwan that were investigated. Hence any material injury cannot have been caused by such exports absent new and compelling evidence of recent dumping and is then necessarily caused by other factors. As noted above, allegations of current actual dumping would not be based on real export prices and cannot be accurate. An admission of injury from sources other than Taiwan, should not allow for a continuation of measures against Taiwan. Stated differently, this cannot support the likelihood standard vis a vis Taiwanese producers.

[39] Bluescope, Application for Continuation of Anti-Dumping Measures, 10 November 2017 (**'Continuation Application'**) p 4.

The application then simply asserts that certain exporters have supplied into the Australian market at dumped (and subsidized) prices."[40]

No suggestion is made that Taiwanese exporters fit within this assertion, although that is implied later in the submission, albeit with no evidence, confidential or otherwise, at least as to real export prices. In any event the assertion is contrary to the outcome of the recent Review and ADRP determination. Stated differently, this cannot support the likelihood standard vis a vis Taiwanese producers absent evidence of sufficient weight supporting a different conclusion to those Reviews, which themselves applied a probability standard.

The application then simply notes that "certain other administrations have applied anti-dumping measures to exports of coated steel variously from China, Korea and Taiwan."[41] That cannot possibly be a sufficient or even relevant factor, given the recent finding of no dumping in Australia by Taiwanese exporters. An applicant cannot have duties imposed initially, simply by stating that measures have been applied elsewhere. They certainly should not be entitled to make such an argument on a continuation enquiry. If this applied in each WTO member's forum, it would mean that all duties would roll-over. One duty would lead to a continuation and then that would lead to further continuations etc.

Even then, its own data clearly undermines its right to try and drag Taiwan into an analysis that is clearly China focused. At pages 5-6, it outlines anti-dumping and countervailing measures in a range of other countries. It is not even clear that the goods under consideration were identical. Leaving that aside, the data shows that of the 7 measures mentioned, (hardly an overwhelming number), only 3 even relate to Taiwan, with one having just started, thus with no cogent evidence, one finding zero duty, undermining the application and one finding a mere 3.77%. A single finding of such a low margin elsewhere is hardly a substantiated allegation of an intent to dump in the future in Australia. As noted above, such an evidentiary finding must deal with the market circumstances in each country – why entities are pricing as they do, who is the market leader etc. The applicant has not even begun to do so with the single instance against Taiwan.

The applicant again refers to the recent review, without acknowledging negative or zero findings of dumping vis a vis Taiwan. It states: "recurrence of injury is evident in the twelve months to September 2017 following reviews of measures outcomes (from May 2017) that have culminated in selling prices in the Australian market that are being undercut by a resurgence in exports at dumped prices from some exporters the subject of the review investigations."[42]

Once again, it cannot be allowed to ascribe alleged injurious dumping from other sources, to Taiwanese exporters, or make unsubstantiated allegations of new dumping by Taiwanese exporters. Furthermore, it is unlikely that Bluescope has actual evidence of undercutting, given the way it prices in the marketplace.

[40] Continuation Application, p 5.
[41] Continuation Application, p 5.
[42] Continuation Application, p 5.

The application then states:

> *"Please refer to Confidential Attachment 2 for supporting information for Korea and Taiwan normal values and calculated dumping margins for the period October 2016 to July 2017 (August and September 2017 export prices not available to BlueScope at time of application)."*[43]

It alleges average dumping margins of 10% from Taiwan, even while duties existed. No attempt was made to provide a non-confidential summary as required under Art 6.5.1 ADA. This should be called for by ADC, otherwise interested parties cannot refute the allegations. To the extent that the supposedly confidential data is that of my clients, which must be the case for some of the data at least, being their normal values and export prices alleged, this should be shown to me to allow me to respond. The allegations cannot be accurate in any event. They are not consistent with completed and pending assessment application findings.

The application provides further data showing that Taiwan should not be included, demonstrating strong growth in exports from China and Korea over a four-year period, at the same time as a significant drop from Taiwan. It comments selectively at page 9 to the effect that exports from Taiwan nearly doubled in the last year of analysis, ignoring that this simply brought it back to the previous year's level and well below the first of the four years analysed. Yet it asserts as supposedly relevant evidence of exports, its own market intelligence and the fact that persons sought reviews before ADRP. In my clients' case, the latter flowed in the main from the inappropriate application of law by ADC, a contention with which ADRP and ultimately the Minister agreed.

The applicant then purports to assert overcapacity in each country targeted. Even as to China, it merely states that over-capacity is "evident," but with Taiwan it does not make even an unsubstantiated allegation to that effect, merely listing capacity confidentially, with no comparison to sales to show over-capacity. Even if that were shown, it would need to demonstrate co-relating dumping behaviour when over-capacity rises. That cannot be demonstrated for Taiwan. The only "evidence" it relies upon is an ADC Report and then only quotes reference to China. General over-capacity cannot be a sufficient basis for positive continuation findings, or again dumping duties would last forever in a competitive world. Stated differently, over-capacity might motivate some to dump, but that is not likely without other evidence. Indeed, Chinese over-capacity is being dealt with by governmental directions to remove low-quality capacity, not to dump.

The applicant concludes that overcapacity "may be directed toward increased exports to Australia in the absence of measures".[44] Assertions that something may happen without evidence or logic, does not meet the required probability standard.

It then refers to "financial viability concerns of steelmakers…"[45] This has no relevance to the Taiwanese exporters targeted. That would be known to Bluescope and its consultants.

[43] Continuation Application, p 7.
[44] Continuation Application, p 13.
[45] Continuation Application, p 9.

The next comment is as follows:

"The growth in exports of the goods to Australia from China, Korea and Taiwan can be attributed to the favourable outcomes in recent review investigations (Numbers 365, 366, 368, 371, 374, 376 and 386) that have resulted in applicable variable factors that are well below prevailing global prices for zinc coated (galvanized) steel."[46]

It is not clear what is meant to flow from this. Is the applicant asserting that the Review findings were wrong? If it is not so asserting, then those findings set up accurate variable factors. That Bluescope does not like them is not to the point. If it is asserting that they were wrong, the burden is on Bluescope. It provides nothing to this effect and in any event, a continuation application is not the place to appeal against Review findings. Presumably it thinks that the factors have now changed. Tellingly, Bluescope has also initiated a new Review, no doubt trying to revise these variable factors. That exercise will look at real figures and will determine if these unsubstantiated allegations can be supported in any way. In the absence of evidence, the allegation here is just that, a mere allegation, and cannot support a requirement that the application be "duly substantiated."

As to injury, Bluescope seems to allege that the current variable factors are based on historically low HRC prices and that Bluescope cannot now price to capture its own rising HRC prices. That makes little sense as the export competitors face the same HRC price movements. In many cases they are worse off than Bluescope as the latter manufactures HRC. Hence the injury logic is fundamentally flawed.

It is also somewhat meaningless to simply say that variable factors are below current prices. Does this mean normal values are now below found amounts? That cannot be so as Bluescope asserts that HRC has risen, so is it alleging normal value sales at losses if they are below reality? It provides no such evidence. Does it mean found export prices are below current levels? What evidence has it provided to this effect? The onus is on the applicant. Even that is not enough. Unless current real export prices are below current real normal values, there is no real dumping. The applicant has not begun to address this.

Bluescope then refers to persons who it says obtained favourable benchmarks through not exporting. That has no relevance to leading Tawainese exporters and in any event, Bluescope has lobbied for the law to change in such circumstances. It has the remedy sought.

It provides no evidence of likely dumping save to assert as follows:

"The recent pricing levels of exporters the subject of the revised measures support the well-founded view that should the anti-dumping measures be allowed to expire, it is likely that exporters will again dump into the Australian market and cause further material injury to the Australian industry manufacturing like goods."[47]

[46] Continuation Application, p 9.
[47] Continuation Application, p 11.

This makes little sense and certainly does not meet the evidentiary burden. Is Bluescope saying that the current prices are dumped if one revises normal values for current world circumstances? Again, that can only be determined under the new Review exercise it has initiated. Is it saying these prices are not dumped but will be lowered to a dumped level if the duty is removed? If so, it provides no reasoning to that effect.

The applicant then refers to the anti-circumvention activities and asserts:
"The prevalence and inclination of exporters to engage in this type of circumvention activity indicates that they will, "absent effective trade measures, seek to trade at dumped prices and cause material injury."[48]

Such an assertion borders on the defamatory. As the applicant knows, importing alloy steel was fully permitted until it sought and obtained a retroactive change to the law. It is also aware that the application of that law depended on findings of fact as to utility etc as to which there were disputes. Where my clients were concerned, even after such interim duties were imposed, there have been no findings of actual dumping. Making a legal change in composition without dumping, is hardly probable evidence of future dumping.

It then states:

> *"BlueScope attributes this continued injury to reductions in the applicable variable factors to exporters in China, Korea and Malaysia the subject of Review investigations 365, 366, 368, 371, 374, 376 and 386 applicable from May 2017."*[49]

Here it does not even mention Taiwan and certainly does not seek to identify the relative impact of each country targeted. It certainly cannot assume away the need to justify cumulation on a continuation enquiry, both in law and in fact. Measures should not be allowed to continue against countries not found to dump in any event. Cumulation is as to injury.

It then states:

> *"The impact of the revised variable factors for the exporters in China, Korea and Taiwan has led to:*
>
> - *the re-emergence of Chinese exporters previously the subject of measures (e.g. [confidential exporter]);*
> - *an upsurge in export volumes from China, Korea and Taiwan;*
> - *a decline in exports from other countries, including those countries the subject of Investigation No. 370);…"*[50]

Here again the applicant concentrates on countries other than Taiwan, expressly so in the first two points made and indirectly in the third, as the drop in other sources over the four year period is attributed in the main to China and Korea's growing share and not Taiwan, when the whole four years is examined.

[48] Continuation Application, p 12.
[49] Continuation Application, p 12.
[50] Continuation Application, p 12.

Taiwan is only mentioned as to price undercutting, with no evidence provided or least no non-confidential summary to that effect, including details that would be necessary as to the relative pricing of different products from different countries. Even if current undercutting is shown, it must go hand in hand with current dumping, which has simply not been demonstrated. Undercutting is also unlikely.

It also refers to maintenance of distribution links.[51] ADC is well aware that Bluescope itself has distribution networks that compete with these. That competition and the unwillingness of Bluescope to sell to other distributors at prices it sells to its own, is a crucial factor impacting on its profit and market share and has nothing to do with dumping.

Commissioner's decision to accept Bluescope's application

Concern as to China is shown by comments in the Commission acceptance of Bluescope's application:

> "In the absence of the anti-dumping measures, it is reasonable to expect that further reduction in prices would be likely to lead to increased volumes of galvanised steel being supplied from the subject exporters and that both price and volume injury would be caused to the Australian industry."[52]

The Commission stated that the Australian Border Force import database confirmed that Chinese exporters continue to export galvanised steel to Australia.[53]

The Commission referred to its previous findings regarding the Chinese steel industry's over production and excess capacity, conceding China's targets set for reducing steel capacity and yet citing ongoing global concern.[54]

The Commission cited the price sensitivity in galvanised steel identified in its Reports 190 and 193, alongside Bluescope's increased losses in 2016/17.[55]

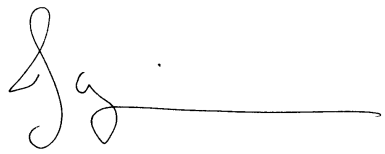
Conclusion

The onus is on the applicant to "duly substantiate" the probability of more than de minimus dumping from each targeted country, plus probable material injury caused by that hypothesised dumping. Its application is clearly targeted against China and has not begun to

[51] Continuation Application, p 13.
[52] Anti-Dumping Commission, Consideration Report, 10 November 2017 (**'Consideration Report'**), p 5.
[53] Consideration Report, p 4.
[54] Consideration Report, p 4; Anti-Dumping Commission, 'Analysis of Steel and Aluminium Markets', April 2016; Capacity Developments in the World Steel Industry (OECD, August 2017).
[55] Consideration Report, p 4.

implicate Taiwan by any cogent evidence. The applicant has also started another Review after effectively losing the recently concluded one. The application for continuation should be rejected forthwith because of the paucity of evidence. If ADC is not willing to do so, greater transparency is required, beginning with non-confidential summaries of the confidential parts of the application and access provided as to the data alleged to relate to my clients.

Yours faithfully



Jeff Waincymer