

**PUBLIC RECORD**

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April 14, 2017

**BY E-MAIL**

Attention: Director, Operations 3  
Anti-Dumping Commission  
GPO Box 1632  
Melbourne VIC 3001  
Australia

Re: Anti-Dumping Review (Review No. 368) on Zinc Coated (Galvanized) Steel from Taiwan – comment to Statement of Essential Facts

Dear Sir:

On behalf of Yieh Phui Enterprise Co., Ltd. (“YPE”), an exporting producer of galvanized steel in Taiwan, we hereby submit our comment to the statement of essential facts (“SEF”) released by the Anti-Dumping Commission (the “Commission”) in the above-captioned proceeding. This submission is timely pursuant to the Commission’s instruction.

**I. INTRODUCTION**

During the review period, YPE exported galvanized steel to Australia from Taiwan through a related intermediary in Hong Kong. In determining the export price for the purpose of this review, the Commission in the SEF disregarded YPE’s actual export price (via its related intermediary) charged to the unrelated Australian importer. Instead, the Commission constructed the export price by using the unrelated Australian importer’s resale prices and deducted all the costs, expenses and profits, as well as the dumping duties. As detailed below, the Commission’s decision of using the constructed export price in

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April 14, 2017

Page 2

calculating the dumping margin for YPE is in violation of Article 2.3 the WTO Anti-Dumping Agreement<sup>1</sup> because there is no evidence which could give rise to the grounds of using the constructed export price instead of the actual export price. In addition, the Commission's deduction of the dumping duties which were incurred by the importer after the importer's resales is in violation of Article 2.4 of the AD Agreement.

## **II. THE USE OF CONSTRUCTED EXPORT PRICES RATHER THAN ACTUAL EXPORT PRICES**

In the SEF, the Commission used the prices constructed from the Australian importer's resale prices to unrelated customers as the export price in calculating the dumping margin for YPE. The Commission's choice of using the constructed export price rather than the actual export price charged by YPE to the Australian importer was based on the finding that the importer was selling at substantial losses and that those losses are not recoverable within a reasonable period of time.<sup>2</sup>

The Commission in the SEF did not explicitly explain how the finding of the importer's sales losses lead to the choice of constructed export prices. It is obvious that the Commission's decision of using the constructed export price was based on its interpretation and application of 269TAA(2) of the Customs Act 1901 of Australia. As stated in Commission's verification report of the Australian importer, the Commission "found that on a weighted average, the shipments selected for verification were sold at a loss. In these circumstances, it could be treated as indicating that the importer will directly or indirectly be reimbursed, be compensated or otherwise receive a benefit for whole or any part of the price".<sup>3</sup>

The Commission seems to take the view that the sales losses suffered by the Australian importer, even though unrelated to YPE<sup>4</sup>, automatically lead to a conclusion of a

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<sup>1</sup> The Agreement on Implementation of Article VI of GATT 1994 (the "AD Agreement").

<sup>2</sup> SEF, at 22.

<sup>3</sup> CITIC Verification Report, at page 6, citing 269TAA(2) of the Customs Act 1901.

<sup>4</sup> Id., at 6. The Commission did not find evidence to suggest the CITIC, the Australian importer, is related to its supplier of galvanized steel exported from Taiwan.

April 14, 2017

Page 3

compensatory arrangement existing between the importer and the exporter, which in turn automatically justifies the use of constructed export prices in calculating the dumping margin for YPE. Obviously the issue here is whether in the absence of evidence of actual compensatory agreement between an exporter and an unrelated importer selling at losses, the Commission may construct the export price based on the importer's resale prices.

The WTO AD agreement provides clear guidance on this issue. Article 2.3 of the AD agreement provides:

“In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.”

The plain language of Article 2.3 clearly indicates that for the Commission to be able to use constructed export prices, there must be actual association or a compensatory arrangement between the exporter and the importer.

In the present case, the Commission has correctly found that YPE is not associated with the importer and there is absolutely no evidence that the importer or the importer's associates in fact received or will receive reimbursement from YPE or any of YPE's associates. In the absence of evidence that there is an actual compensatory agreement or actual reimbursement between YPE (or YPE's associates) and its unrelated Australian importer (or the importer's associates), the Commission's decision of using the constructed export price rather than the actual export price in calculating the dumping margin for YPE, is in violation of the Article 2.3 of the AD Agreement.

### **III. THE DEDUCTION OF THE DUMPING DUTIES FROM THE CONSTRUCTED EXPORT PRICE**

The Commission should not use the constructed export price in calculating the dumping margin for YPE, as explained above, because it is not support by record evidence

April 14, 2017

Page 4

that there is an actual compensatory arrangement between YPE and its unrelated importer in Australia. However, regardless of whether the Commission's use of the constructed export price is justified, the deduction of the dumping duties which became effective far after the importation and resales of the goods during the review period is also WTO inconsistent.

Article 2.4 of the AD Agreement provides guidance on the scope of allowances which are permitted as deductions in constructing export price for the purpose Article 2.3. Article 2.4 provides:

“A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. *In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.* If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.”

The fourth sentence of Article 2.4 makes clear the allowances which are permitted to be made in constructing the export price. According to the WTO case law, the term “should” in the fourth sentence of Article 2.4 is not mandatory. Instead, the term “should” in that sentence is merely used to indicate what allowances the AD Agreement permits, but does not require that such allowances be made.<sup>5</sup> Furthermore, this sentence provides an authorization to make certain specific allowances, and therefore, allowances not within the scope of that authorization cannot be made.<sup>6</sup>

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<sup>5</sup> See *U.S. – Stainless Steel (Korea)*, Panel Report, WT/DS179/R, at 6.93.

<sup>6</sup> *Id.*, at 6.94.

April 14, 2017

Page 5

More importantly, the allowances which are permitted to be deducted are those “incurred between importation and resale”. According to the WTO Panel in *U.S. – Stainless Steel (Korea)*, the costs incurred after the date of importer’s resale, and which were unforeseen at the time of resale are not within the authorization scope of the permissible allowances in constructing the export price.

Now the issue present here is whether the dumping duties which became effective far after the importation of goods that were deducted by the Commission in constructing the export price are within the scope of authorization provided in the fourth sentence of Article 2.4.

We note that the Commission in this review considers both alloy and non-alloy galvanized steel as products falling within the scope of this review. However, the alloy galvanized steel was officially considered as a product within the scope of the antidumping notice for the first time in March 2016 as a result of the outcome of an anti-circumvention inquiry. These dumping duties which were retroactively imposed on importation of goods made prior to March 2016 were not only incurred by the importer far after most of the importer’s resales during the review period, but also were unforeseen with commercial certainty at the time of the importer’s resales.

Thus, the deduction of the dumping duties which became effective after the importer’s resales and were paid after the importer’s resales should not be considered as within the authorization scope of allowances permitted in the fourth sentence of Article 2.4. Deducting those impermissible dumping duties in constructing the export price, the Commission is in violation of Article 2.4 of the AD Agreement.

#### **IV. CONCLUSION**

In light of the above, we respectfully request the Commission to disregard the constructed export price and use the actual export price charged by YPE to the Australian importer for the purpose of dumping margin calculation. Alternatively, the Commission should at minimum, revise its methodology of constructing the export price by removing

April 14, 2017  
Page 6

dumping duties which were incurred by the importer after the importer's resales as deductions to the constructed export price.

Please let us know if you have any questions regarding this submission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jay Y. Nee", written in a cursive style.

Jay Y. Nee