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JW:lf
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Anti-Dumping Commission

NON-CONFIDENTIAL VERSION

Bluescope Ltd - Application for an Anti-Circumvention Inquiry into Zinc Coated (Galvanised) Steel Exported from the Republic of Korea and Taiwan

1. I act on behalf of Wright Steel Sales Pty Ltd, a company that has been identified in the abovementioned application by Bluescope Limited ("Bluescope") and also act for CITIC Australia Commodity Trading Pty Ltd. This submission is in response to the Statement of Essential Facts ("SEF") Nos 290 and 298 of 5 November 2015.

2. The following submission responds to the SEF in the order as presented.

Inquiry process

3. The SEF suggests that "(t)he Commission has conducted reasonable inquiries with interested parties following the initiation of Inquiry 290 and 298."

4. The inquiries were not reasonable for two primary reasons, which undermines the conclusions and the recommendations you propose to make. In particular, the inquiry was inadequate in view of the erroneous determination that, (confidential material provided- ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material) was somehow irrelevant to this inquiry. This is discussed further below.

5. The second key reason why the inquiries have been unreasonable, is in relation to your predominant conclusion that the end use of the goods did not change. It is clear from the public record that you have made no objective inquiries as to end use of these goods, but have instead, relied primarily on either advice from Bluescope, or import statistics, or a combination of both. This is contrary to what you know to be the case, where my clients sell to stockists, who sell to multiple clients for a range of end uses, some which have particular concern for strain hardening, particularly stockists in depressed times. It is inappropriate to ignore this reality and consider import statistics alone, as these are a separate factor to end use under the relevant Regulation. To conflate two relevant factors, would be to erroneously ignore the distinction that Parliament sought to make and fail to make sufficient and independent evaluations of each.

6. Concentrating on Bluescope's own assertions as to end use is also erroneous, as it does not have direct knowledge of the end use of the imported products both before and after the application of the dumping duty notice. By definition, it cannot know the use to which these goods are put by customers of my clients. Once again, there are indeed numerous end users who purchase from numerous stockists, the latter being particularly concerned with strain hardening.

7. A conclusion of fact based on end use, without any direct investigation of end use, must be a fatally flawed inquiry process.

(Confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material)

8. As noted above, ADC has failed to properly investigate (confidential material provided - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material). In a private communication, an ADC representative states that it "is not relevant to these inquiries."

9. (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material)

10. (confidential- ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material)

11. The Commission has ignored (confidential material - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material). For that reason, the Commission would not have made any investigations in relation to the data.

12. To fail to consider this fact is a breach of the Commission's obligations under Regulation 48(3). To fail to even deal with this in the SEF and in due course, perhaps fail to deal with this in the advice to the Parliamentary Secretary, would place her in violation of that regulation, should positive findings be recommended and accepted.

13. It is easy to demonstrate the relevance of this data (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material).

14. (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material).

15. (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material).

16. The confidential submission naturally led to three mutually exclusive hypotheses, two clearly relevant to this enquiry, and the third, at least debatable in that regard. A confidential fact underpinning these hypotheses must be a relevant one for this investigation. Hence, to ignore it entirely, must be a breach of Regulation 48(3). Once again, a failure to even allow the Parliamentary Secretary to make her own determination on this issue, would render her in breach and would mean that your advice to her is inadequate.

17. (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material).

18. While it is open to debate as to the conclusions that might be drawn in that regard (as to the third confidential hypothesis - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material), one can only consider such conclusions after considering the question. More importantly, one can only consider this more debateable question, if one is able to exclude the other two possible responses (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material) discussed above, both of which are clearly relevant. One cannot exclude two relevant and equal hypotheses if there is no investigation of this, by reason that ADC presumes wrongly ab initio, that it is irrelevant.

19. For the above reasons, the confidential material, if not further investigated, shows on balance that Bluescope's allegations should not be accepted.

20. If the Commission does not support that immediate conclusion, it must further investigate and ask Australian manufacturers, including Bluescope, the simple question as to whether they or any subsidiary or affiliate, has ever traded in boron-added products during the investigation period. If they admit to doing so, they should then be asked for what end uses such trading occurred, whether it was limited to the highest automotive grades that it has intimated are different, or whether they traded in such goods for other end uses, such as in relation to the building industry.

21. (confidential - ADC has previously confirmed that it is not possible to provide a non-confidential summary of this material).

Inconsistency with the findings in Investigation 249

22. The following comments are in response to Part 5.1 of the SEF. In response to the comments in previous submissions of mine to the effect that Bluescope has lodged inconsistent applications with the Commission, the Commission in the SEF has neither presented a finding of fact in that regard, nor refuted the assertions. Instead, it is simply concluded that this "is not fulsome evidence that the anti-dumping measures are no longer necessary …" (p 24). If the submission is that the applications are inconsistent, that is not an assertion that either one is fulsome evidence. It is an assertion that the inconsistency is a matter for further investigation by the Commission.

23. Furthermore, you have accepted that admission in Investigation 249. Once you have accepted that admission in an investigation where you accepted that Taiwanese goods were not dumped and were at low prices causing the bulk of any injury, it is simply inconsistent with the hypothesis behind the anti-circumvention application that you are now proceeding under.

24. While the Commission is correct to say that the assessment of variable factors in Investigation 249 related to India and Vietnam and not Taiwan, it misunderstands my earlier submission. The point I made was not that your own findings of variable factors in different countries must necessarily apply to Taiwan, but simply, that you must take note of Bluescope's own assertion that

the Taiwanese exports were not dumped. It is their admission and not your finding that I say is at least a relevant factor, but one that you have ignored as irrelevant.

25. Once again, it was not suggested that this was unassailable evidence, but instead, a matter for you to take into account. Clearly you have not taken that into account and have hence failed to take into account a further relevant factor.

26. Your response raises a systemic issue. It appears that you take the view that you can select the factors that you see as relevant. A proper reading of subsection 48(3) of the relevant Regulation requires you to have "regard to any factor that the Commissioner considers relevant …". While reference is made to your consideration, that is not an open-ended invitation to do as you wish, but instead, must be read as an obligation to consider all reasonable and relevant factors, at least those brought to your attention.

27. The SEF goes on to say that in any event, such an admission by Bluescope that non-alloyed galvanised steel was exported at non-dumped prices, cannot lead to conclusions about alloyed products. This makes no sense in the context of the data that you have relied upon in your SEF. Part of your conclusion is based on your assertion that alloyed imports have largely replaced non-alloyed imports. If Investigation 249 only considered a minor amount of non-alloyed imports from Taiwan, that is unlikely to have caused material injury. In any event, you are also well aware of the cost differences of incorporating boron. You are aware of the cost factors and the pricing of both non-alloy and alloy products. Once again, an admission by Bluescope that even non-alloyed product was not dumped, must at least raise a strong hypothesis that this may be so with the alloyed products as well.

28. A further reason why the findings in investigation 249 would be clearly relevant is that ADC has found that the alloyed goods are more highly priced than the non-alloyed, with the cost of boron being passed on to the end user. If the non-alloy exports at lower prices were not being dumped, then it is highly unlikely that alloy goods would be dumped.

29. That is further impacted upon by the fact that ADC has purported to find that Yieh Phui (confidential reference to degree of local and third party sales of like products). Whether that is true or not, it supports the hypothesis that there would not be dumping of alloy at a time that there would not be dumping of non-alloy.

30. To conclude as you have that the Commission cannot be satisfied that non-alloyed galvanised steel is no longer dumped without conducting a review of the variable factors, ignores the quite proper adjudicatory approach to accept an admission of fact against the interests of the applicant. To do so would perhaps not be enough to overturn the original dumping decision, but could easily be enough to show that on balance, the applicant has not made out a sufficient case on circumvention.

31. In any event, the Commission has treated this as an irrelevant fact and has engaged in an erroneous logical process as a result. In a private communication, a representative of ADC confirms the view that "(t)he findings in Investigation 249 are not relevant." If that is truly the view of ADC, it is

inconsistent with the comments in the SEF that at least suggest that it may be a relevant factor in some cases, but was not considered to be so on this occasion.

32. If ADC's view is actually that the presence of dumping can never be relevant, and hence the admissions by Bluescope cannot be relevant, then it should explain the reason for that conclusion. Conversely, if it believes that this can at times be relevant, but is not on this occasion, it should state the reasons for that distinct conclusion, in each case so that interested parties can make meaningful submissions. Interested parties should not have to guess at ADC's reasoning.

33. You would be required in due course to provide reasons if requested under ADJRA, and it only makes sense that we all try and avoid unnecessary litigation by articulating and addressing the reasons at the earliest possible opportunity. That will also allow the Parliamentary Secretary to form a truly independent view after being made aware of the range of concerns that have been raised.

34. Finally, the failure to consider the findings in Investigation 249, where Yieh Phui has at all times been a co-operative exporter, even places it at a disadvantage to the way the Commission has dealt with Angang HK which did not respond to inquiries in this investigation. Yet the Commission notes (p 45) that it considered information on the file gathered from and verified with Angang HK and its affiliates during Investigation 190a and 193a.

Anti-circumvention law and the Anti-Dumping Agreement

35. Previous submissions pointed to the fact that any anti-circumvention law could indeed be a violation of Australia's international obligations under the Anti-Dumping Agreement ("ADA"), given that the history of the negotiation of that Agreement saw certain countries propose inclusion of anti-circumvention rules, without that proposal being accepted.

36. I fully accept that the Commission would be going beyond its mandate to so conclude, even if it agreed with the principle as a matter of law. However, I do not agree with the Commission's logic that a circumvention determination does not need to reconsider variable factors, simply by reason of the Commission's asserted view that Article 5 of ADA only relates "to an application for the publication of a dumping duty notice (i.e. an original investigation) and not to an application for an anti-circumvention inquiry (which no provisions in the ADA specifically address)."

37. That ignores other fundamental parts of ADA, in particular Article 18.1, which as you would be aware, stipulates that no anti-dumping action can be taken other than under some provision of GATT 1994 as interpreted by ADA. The findings of the Appellate Body in *US-Bird Amendment* showed how a policy not envisaged in ADA, can naturally be held in violation. The very fact that the Commission notes that no provision in the ADA specifically addresses anti-circumvention, cannot validate government rules that are unsupported by any provision found anywhere within ADA.

38. Once again, while I accept that the Commission cannot hold that the entire circumvention regime is in violation of ADA given its express mandate under

the relevant Regulation, the Commission still must take a view as to whether the "relevant" factors referred to in Regulation 48(3), include the question of whether dumping still exists or not. If you consider that may be a relevant factor, you may explore it. If you do not consider that is a relevant factor and you are correct, well and good. If you are not correct, your determination makes Australia in violation of its international obligations and would allow China and Taiwan to challenge the Parliamentary Secretary's determination for that reason alone. Hence my urging in previous submissions that you take advice from DFAT and AG as a matter of urgency, as I accept that it is not for the Commission in isolation to consider what position the government wishes to take on these questions of legal validity. You would be aware that a previous Review Tribunal decision held against my contention, but only did so by asserting differences between Australian laws and not after considering the argument based on Article 18 ADA and the decision in *US-Bird Amendment.*

39. Most troubling is your comment (p 25) as to your conclusion that there is no requirement to consider variable factors, but that "it may be possible to include an assessment of the current level of variable factors in the context of an anti-circumvention inquiry … (but) in the case of this inquiry, it was determined this assessment would not be undertaken." Given the Bluescope admission in Investigation 249, why was it determined that this assessment would not even be undertaken, given your admission that it would be possible to do so in an anti-circumvention investigation?

40. It is also not clear what, (confidential reference to internal consultations). I agree that it may be said that Australia's obligations are generally a matter for the government to consider, but that only obviates ADC responsibility to consider that fact if it is subject to clear regulations mandating certain conduct. If instead, as is the case here, the regulations call for "relevant" factors to be considered, then consistency with international obligations either is or is not a relevant factor. While internal consultations may be confidential and for that reason need not be divulged, there is no reason not to divulge the reasoning that ADC has adopted as a result. If ADC, whether based on its own analysis or based on advice from DFAT or elsewhere, has formed a particular view for a particular reason, that should be articulated, otherwise interested parties have no meaningful opportunity to present their case as best they can, a requirement under ADA in any event.

The uncertain ambit of the original application

41. The SEF completely misunderstands my submission of 11 September 2015 when the SEF asserts that I somehow suggested that "it would be inappropriate to identify a cut-off level as that would encourage exporters to increase levels of alloy to circumvent the notice and therefore this would be problematic." (p 26) My point was far more fundamental and hopefully simple. It was that it is the applicant that should indicate the cut-off level it proposed. As you know, the initial application sought to cover alloys at any level. From the very first consideration of the application, the Commission noted that it may be necessary to modify that in a final determination. Indeed the SEF seeks to modify that, albeit in ways that are somewhat difficult to understand, a matter discussed further below.

42. The point to my submission was primarily that a party that asserts that certain imports only display a minor change, should at least indicate what in their

view constitutes the differentiating factor between minor and major changes for products of this nature. What kinds of alloys at what degrees of concentration are minor and what are more significant?

43. The Bluescope submission of 11 September 2015 purports to speak to this, albeit for no discernible reason, via redacted references to figures, where the figures are not about anybody's commercially confidential data, but simply are an assertion on a general level about the role of boron in galvanised steel. Whatever figures were contained under the redactions should have been part of the original application. If Bluescope was able to justify those figures, so be it. If respondents such as my clients were able to convince you to the contrary, then the application would fail.

44. My point from the outset was that if:

    (a) Bluescope simply asserted that all alloy of any configuration is simply minor;

    (b) you must have been aware that this could not possibly be so from the very outset;

    (c) hence, you should have rejected the application and asked it to simply indicate, as it did in the 11 September submission, what distinction it wanted you to test.

45. The point to my submissions was not that it is impossible to set up a cut-off point, but instead, that it is fundamentally different when the applicant does so, as opposed to you inviting the Parliamentary Secretary to do so. When the applicant does this, you are simply sitting in judgment on the quality of its argument as against its opponents. The better argument should win, even if the cut-off itself is not the optimal one from a scientific point of view.

46. If instead, you take an application that you must know from the outset cannot be correct, given that it asserted that all alloys are merely minor, and take it upon yourself to make some form of positive recommendation to the Parliamentary Secretary, when you have not investigated the science, you will either ignore a cut-off (as you have done), concentrating instead on other factors, or will set up an arbitrary cut-off that you cannot possibly justify in a court.

47. This is supported by the fact that at SEF p 26, you quote the original request for the variation of the notice to cover flat-rolled iron or steel products "whether or not containing alloys". Yet that is not the ultimate recommendation you are proposing to make to the Parliamentary Secretary.

48. Hence, it is not to the point to say as you do at p 26 that there is no ambiguity in that Bluescope's application intended to cover all types of alloyed galvanised steel. I agree that that is what it says on its face. I have said in previous submissions that this cannot be right, a point accepted as likely to be true by the Commission when adopting the decision to investigate.

49. The SEF suggests that you considered the information provided by Bluescope to be reasonable given the nature of the import data available to it, which does not specify which alloy is included. That should be coupled with your

comment at p 26 that there is no requirement that the applicant provide a full description of allegedly dumped goods as you say was asserted by me. No such assertion was made. Once again, this completely misconstrues the submissions that have been made. I was never suggesting that Bluescope has to investigate or hypothesise as to the chemical make-up of imported goods that it has no control over. That would be a nonsensical proposition. My proposition was a quite distinct one. An applicant who thinks certain kinds of alloys are minor and certain kinds of alloys are not, should say what is the basis for their conclusions. That is the very kind of discussion, albeit redacted, contained in Bluescope's submission of 11 September. I have simply been suggesting throughout that this is the kind of stipulation that should have been indicated in the application, that then frames their request and that should have been the very assertion that you tested as against the submissions from opposing parties.

50. The SEF also asserts (at p 26) that the Commissioner found that the application satisfied the requirements of s 269ZDBE. To simply state that the Commissioner was so satisfied, does not state the findings of essential facts in relation to my previous submissions as to why this should be so. Once again, if a party asserts that all alloy at any level is simply a minor change, that was known to be false by the Commissioner from the outset. Hence, it is not clear by what facts the Commissioner found the application to be sufficient.

51. A more fundamental comment is the suggestion (p 27) that there is no requirement for an applicant to an anti-circumvention inquiry to specify a "cut-off point" for the extent of the alleged modification of those goods (noting that the modification must be established as being slight)."

52. In a strict literalistic sense, there is of course no express statement in the Regulation that a cut-off must be indicated. Nevertheless, an application that defines certain kinds of goods as constituting a slight modification must give reasons for that assertion. If for example, the applicant had said that boron up to x ppm is only a minor change, it sets the parameters for the inquiry. You would then be testing, within the four walls of the application, whether the assertion is true or not.

53. In this application, there was no cut-off suggested and instead, an allegation that any alloy combination at any level was no more than a minor change. If that is the way the applicant framed its request, it is demonstrably wrong, both from its own understanding at the outset, from your own understanding when accepting the application and from your investigation that showed you that certain automotive products at least, involve alloy additives that made the product more than a minor change. The ultimate point is not that a cut-off must be made, but instead, that the applicant must justify whatever ambit of goods they seek to challenge. If they say there is no cut-off and alloy of unlimited proportions is merely minor, they should justify the assertion or fail for that reason alone.

54. As noted above, if instead you see your role as converting an erroneous application into some kind of justifiable one, you take upon yourself (and in due course the Parliamentary Secretary), the point to justify the difference.

55. Stated differently, you either do or do not accept that alloy at any level is still minor. If the answer is yes, that would be easily challenged on scientific grounds. If the answer is no, but no cut-off was suggested by Bluescope, you will either impose your own cut-off (which you have not recommended), or you will recommend an open-ended notice as you have done, that you know cannot be justified scientifically, for example where products for the automotive industry are concerned. Hence, you are making a recommendation as to the modification of the notice, inconsistent with your own factual findings.

56. If you then accept that you cannot possibly recommend an open-ended notice modification, you must then accept that you should either apply your own cut-off, or reject the application. For reasons articulated above and in various submissions, it makes no sense for you, (and ultimately the Parliamentary Secretary), to try and guess at a cut-off that Bluescope will not nominate.

57. Once again, the redacted submission of 11 September last, finally proposes some kind of a cut-off, albeit a cut-off I am not allowed to see. While we almost certainly would disagree with any cut-off proposed by Bluescope, nevertheless, it makes no sense for you to propose a notice that includes even more alloy than the cut-off that it proposes in that submission. Yet this is what you have done. If instead, you wish to consider Bluescope's proposed cut-off, as noted above, that should not be redacted as it could not possibly be confidential material as it does not relate to anybody's own commercial behaviour, but was instead a hypothesis as to general scientific validity.

58. It is also difficult to understand what the SEF means (p 27) when it states that the Commission's recommendations have been limited to boron-added galvanised steel. Do you mean to suggest that your proposed wording intended to only cover the relevant product with boron added and not any other alloy? If that was the intention, it simply does not say that. A plain meaning reading of your proposal would cover product with boron and any other alloy. For that reason, it would be identical to your proposal in relation to Company A.

59. If instead, you meant that you only wished the notice relating to my clients to cover the addition of boron alone, then a word such as "only" or "alone", or words to similar effect, would have been needed to be added to your recommendation.

60. That the Commission may wish to be limiting its recommendations vis-à-vis Yieh Phui to boron added steel alone, might be supported by the reference at p 31 SEF to the effect that Yieh Phui's questionnaire indicated that all alloyed galvanised steel exported to Australia during the inquiry period was boron added steel and not an alloy of a different alloying element.

61. A private response from an ADC representative does not attempt to clarify whether the notice aims to cover my clients' goods with any amount of boron, whether with or without any amount of other additives, or is intended to cover goods with boron only, given that this was the case with the circumvention goods analysed. If it is the latter, all of the questions in (my private and confidential communication) remain apposite. If it is the former, then you are proposing that the Parliamentary Secretary revise the notice to cover any kind of alloy to any degree, no matter what physical characteristic benefits are

achieved, for no matter what customer, and for no matter what end use, regardless of how any past customer actually used the product or how any future customer would intend to use the product. Is that the position that you would invite the Parliamentary Secretary to adopt and defend?

62. Even if you made a modification to your recommendation, (which for the above reasons we say is not justifiable), it still does not address the inconsistency with your finding that alloy for the automotive industry is more than a minor modification. Even limiting it to boron, you are saying that my clients cannot respond to the needs of any customers with the highest levels of required boron, as this would offend your proposed notice. Yet there is nothing in your SEF that supports this conclusion and no indication of how you considered the assertions by Bluescope in its submission of 11 September as to its own redacted recommended figures.

63. It would seem that the better implication from your comment at p 27 is that the intention was only to cover boron added, but that if other alloys were also added, it would be up to the applicant to consider whether these also were simply minor modifications and subject to the anti-circumvention Regulation. This points to a further problem in you taking it upon yourself, (and in due course the Parliamentary Secretary), the task to decide what is or is not a minor modification, as opposed to demanding that of the applicant. The implication of your comment is that there would be nothing inherently improper in importing mixed alloy products outside of your recommendations, but that these could be looked at in terms of future applications. How would you propose to deal with a scenario where a relevant importer imported one tonne of boron added steel per month, each month with one extra ppm of any one of the designated alloy products, with some hundreds if not thousands of permutations of formulae of products? Would that be considered improper behaviour or valid behaviour? Would we all want to bring in thousands of anti-circumvention inquiries, that would need to deal with each as directed? If one thought for a moment as to the natural response of Bluescope to such an endeavour, it could either simply start a new case each month, or instead, finally indicate a cut-off that it is willing to justify. What would the Parliamentary Secretary envisage as a way to delineate permitted and impermissible product with such a flood of cases coming before her?

64. These problems all flow from the Commission's decision to allow an open-ended application, demonstrably false from the outset, to be resurrected without any subsequent requirement for a designated cut-off.

65. An ADC private response considers that I seem to be arguing that the Commission cannot take either course and should therefore do nothing. My submissions throughout have not been to that effect, save to say that the Commission should have rejected the application *ab initio* and should do so under the SEF for the reasons I have articulated.

66. The point I have made in all submissions, is that if Bluescope had purported to suggest the difference between minor and more than minor changes in the physical characteristics by reason of the addition of various amounts of boron, then ADC and PS could test the competing arguments and decide which view is most appropriate. That then sets a clear cut-off, still allowing Bluescope to bring new applications if alloy above the cut-off is thought by them to be a new circumvention activity for other reasons.

67. Your comment is also erroneous at p 27 where you suggest that "only goods that have been slightly modified and have the same end use before and after the slight modification can be captured." That cannot be the case, as you have not stipulated the same end use in your notice. Nor could you do so.

68. Furthermore, to refer to slight modification and the same end use as if they were two distinct concepts, when instead, the most important reason why you have concluded that there is only a slight modification, is your inadequately researched conclusion that there is the same end use, conflates the two entirely. Under your proposed notice, a customer that desperately wishes for 10 ppm, 20 ppm, 30 ppm etc of boron-added, is caught, regardless of the end use reason for the requirement.

69. To conclude as you do that "the Commissioner is satisfied that the ambit of the inquiry is clear and certain" is not itself erroneous, but misses the essential point. The ambit of the inquiry was open-ended to cover goods of any alloy. That is what you seem to have accepted with the way that you have proposed the notice be re-written.

70. It is impossible to understand your final comment at p 27 as to what parties can trade in with impunity. You simply highlight that trade in any slightly modified goods is a circumvention activity. That may be so, but the criterion you rely on is your hypothesis about similarity of end use and not any conclusions you draw about the scientific validity of boron, given that you in fact agree that boron-added does potentially have some benefits. Hence your comment is circular. Because you think that end use was the same, (without any real research to that end), you conclude that this is a circumvention activity, which in turn, tells traders what they can or cannot do. That does not tell a trader how to respond to different customers with different end use needs.

71. In the absence of Bluescope delineating a cut-off or being asked by you to do so, I have continually pointed out that it puts you and PS in an invidious position. You either do as you have suggested, and recommended a variation of the dumping duty notice against my client so that no amount of boron with no degree of variation of physical characteristics for no variation in end use, can be taken to be more than a minor modification. That clearly goes against the hypothesis in your Consideration report and all the subsequent evidence, including Bluescope's own acknowledgment of at least auto parts. Hence you conclude that something that may naturally be more than a minor modification will be deemed to be so by reason of your historical view, based on no direct investigation that end use has historically been identical.

72. My point was also that if ADC did not take the approach it took in the SEF, but instead purported to identify a cut-off point itself, it could not legitimately do so based on the scientific data at hand, including the Gleeble publication and publications presented on behalf of Yieh Phui. These present more cogent scientific evidence than the applicant. Conversely, if you picked a cut-off favourable to the applicant, it could not be justifiable on any scientific basis, as you undertook no scientific analysis in that regard.

73. Once again, it is important to reiterate that the view that you have taken, would invite the Parliamentary Secretary to defend the conclusion that you are

unsure as to what the cut-off would be as to the degree of boron that would make the physical characteristics more than a minor modification, but wished to ignore the relevance of the answer to that question by reason of your assumptions about end use that were never based on direct knowledge of what the actual end use was. It would have been obvious to you from a discussion of the distribution (confidential).

74. You have also been pointed to discussions in relation to strain hardening where there is documentary evidence in support of this and documentary evidence from Yieh Phui as to testing they undertook in that regard.

75. In these circumstances, it is not appropriate to try and suggest that my clients should help you identify how to draft a notice that covers some things and not others. Our position is that no notice whatever is valid and it is your job to identify one and justify your decision should you choose to still advocate a notice revision. If as you do, you choose not to adopt the notice recommended by Bluescope and adopt a different one, you should have a valid reason for doing so. Once again, I cannot understand what is the difference between your proposal in relation to Yieh Phui and Bluescope's, unless your proposal is intended to include the words such as "alone" or "only" in relation to boron.

76. Nevertheless, in light of your invitation to make such suggestion, the notice should indicate that the addition of boron at or above 20 ppm should be excluded from the ambit of the notice when utilised in production processes such as continuous annealing, that are proven to allow for established benefits. That is the conclusion drawn by US authorities in a similar case, which would have been known to both Bluescope and yourselves. That was also alluded to in my earlier submissions. That is not a binding precedent but does indicate a line of scientific inquiry that you should have adopted.

77. Finally, the Commission notes (p 59) that Bluescope's proposed changes would have the impact of extending the original notices to all alloyed galvanised steel, regardless of country of export, exporter supplier/supply or alloyed content. It notes further that Bluescope's proposed alterations extend the original notices in a manner broader than the circumvention activity that the Commission has found has occurred. That implies that the Commission must have found that something less than unlimited alloy content is only such as can be described as a minor change.

78. The Commission considered that it should only take action required to remedy the activity found to be circumvention. Yet without imposing a cut-off based on a proper scientific analysis, it has concluded that boron at any level and in any combination with any other alloy, is unacceptable.

The application does not address each of the designated factors

79. The Commission's response deals with my submissions as to the need to consider all relevant factors. I would accept the two propositions in SEF p 28 that the list of thirteen factors is non-exhaustive and that you are not required necessarily to consider all of those factors or to limit your consideration to them. I would also accept the broad proposition that an application could be valid even though it does not address all of the relevant factors. What I do not accept is that this flows automatically in all cases.

80. As you would be aware and as noted above, the key provision is the opening paragraph of Regulation 48(3), which you quote at p 28. Once again, it is mandatory that you compare the circumvention goods and the goods the subject of the notice, and that you must do so "having regard to any factor that the Commissioner considers relevant …". Once again, you either do or do not agree with my assertion that the reference to "considers" does not give you an unrestrained discretion, but instead, has to be read as obligating you to consider anything that is truly relevant. If you fail to consider a factor that is relevant or consider a factor that is irrelevant, you would surely agree that you have not followed the mandate in Regulation 48(3).

81. WTO jurisprudence also makes clear that administrators should address each and every relevant factor in considering anti-dumping determinations. While I understand your contention that circumvention legislation does not fit within ADA and note the inclusive reference to the thirteen factors, nevertheless, I am sure that any independent advice you obtained from DFAT and AG would confirm my view that if the Australian Government purports to implement circumvention regulations that are not mandated by ADA, where the Australian Government promises to only impose anti-dumping duties consistent with ADA, then a comprehensive analysis of stipulated factors would be the least that the WTO Appellate Body would expect in the circumstances.

82. On this basis, you should only ignore one of the 13 factors if you consider that it is not relevant. The same is the case with an application and the applicant's obligations to address and provide sufficient evidence of each relevant factor. It is entirely reasonable to consider the physical limits of an applicant's ability in determining whether it has done enough at the application stage. An applicant knows little about the import transactions, their costing, their customers and the like. Hence, it is perfectly reasonable to be lenient with an applicant in relation to those of the thirteen factors that are ones it cannot truly attest to. For all of the rest, unless the Commission thinks that they are irrelevant to a particular application, they ought to be addressed with sufficient reasoning and evidence.

83. I also do not understand the comment in SEF (p 28) that Bluescope's application addresses each of the thirteen factors commencing at p 11. Merely listing the thirteen factors is not providing evidence of them to allow you to consider whether the application is valid or not. At the top of p 11 of the application, it merely states "Bluescope has undertaken this comparison, and can demonstrate …". To assert what it thinks it can demonstrate is not a presentation of evidence for the Commissioner in considering an application. One must then look at what is contained on p 11 that may purport to be allegations of fact, to allow you to decide whether the application has merit or not.

84. Where the first factor is concerned, it is remarkable that the application only refers to eight parts per million, referencing approximately 80 grams of boron in one tonne of steel, yet the reviewer of this application would have known that Bluescope was alleging that any boron at any level was a minor change. The reviewer of that application would immediately have needed to ask, was the application contending that this specific level was minor or that any level

was minor? If it was any level, why is there a reference to approximately 80 grams?

85. The second factor, end use, was simply presented as an allegation without any reasoning or evidence. The allegation is simply that there are no new end use applications. How would Bluescope have known and how would the Commissioner have decided whether their allegation was sufficient to establish an investigation? If you were lenient at that stage because Bluescope could not know, then you could not validly rely on their assertions as you have appeared to do in the SEF.

86. The same problem arises with the mere assertion that they can be used interchangeably.

87. The fourth factor is the not unreasonable assertion that the difference is the inclusion of boron, although again, the application merely references the inclusion of 8 ppm of boron, hence surely pointing out to the reviewer of this application, the inconsistency between the overall assertion that any level of boron is problematic and the statement that there was merely an inclusion of 8 ppm.

88. The next factor, dealing with the differences in cost, was a rare example where Bluescope actually provided an assertion of fact to justify their view of this element. Nevertheless, even then, their evidence was simply provided on the premise that close to 8 ppm would be included. Given that their application covered any kind of alloy (which indeed you apply to Company A and probably my clients as well), no evidence was given as to the cost of other alloys. If the application applies to any alloy and only provides the cost of one of many different elements, the application is obviously inadequate on its face.

89. The same flaws arise with the reference to the cost of modification.

90. Where customer preferences are concerned, once again there is merely an allegation and no evidence or reasoning.

91. The same can be said for the manner of marketing and the channels of trade and distribution, although where the latter is concerned there is at least a reference to a confidential attachment. At no stage have we seen a non-confidential summary of what that attachment was and how that attests to identical channels of trade and distribution.

92. The next reference to patterns of trade does assert as a fact what has occurred before and after the imposition of measures. This is at least an assertion of some relevant evidence that can then be tested.

93. The assertion that there is no price difference between the circumvention goods and the goods subject to the notice is erroneous, albeit a matter that may not have been known to Bluescope at the time. If it was known, then they are simply not being truthful in the allegation. If it was not known, they should have said so and not made a bold assertion.

94. The reference to the increase in export volume is an assertion of fact, which I accept can be demonstrated.

95. The concession as to tariff classification is correct.

96. In considering the above analysis, it is clear that there were numerous mere assertions without any evidence, coupled with inadequate and ambiguous evidence. That does not constitute a valid application.

Confidential information

97. At p 29, the SEF states that it is unclear what my submission alludes to regarding confidentiality in the application.

98. The reference to the submission of 7 August 2015 was not as to claimed confidentiality, but was instead, a claim as to the lack of any evidence whatever in relation to most of the relevant thirteen factors as outlined above.

99. As noted above, however, Bluescope's submission of 11 September has redactions that cannot possibly be seen by the Commission as confidential. That submission seems to assert what level of boron is important for certain features of any particular goods. Such a statement as to scientific composition cannot on any view be confidential. Assertions as to composition can only be confidential if they relate to the particular compositions of certain corporations who do not wish their compositions to be known. That is not what Bluescope purported to assert in its submission of 11 September.

Were the goods slightly modified?

100. At p 31, the Commission seems to suggest that it considered twelve of the thirteen factors listed in Regulation 43 and indeed notes the thirteenth factor being the different tariff classification. Hence, taken at face value, it suggests that the Commission has considered all thirteen of the relevant factors.

101. At p 33, the Commission concludes that as a result of analysing patterns of trade, the relevant goods are "likely to be substantially interchangeable, have the same end use and each fulfils similar customer preferences and expectations."

102. Once again, the Commission has looked to one factor alone, namely patterns of trade and used that to conclude about other distinct factors that it asserts that it examined, namely end use, customer preferences and expectations. It is palpably obvious on the face of the public record and the SEF, that the Commission has made no effort to directly investigate end use, customer preferences or expectations, and has not made conclusions as to physical characteristics. These matters are addressed individually below.

Physical differences

103. The Commission notes that Bluescope's application submitted that the physical characteristics of non-alloyed and alloyed galvanised steel would not differ (p 33). Yet the Commission has clearly found that physical characteristics may vary if sufficient alloy is added, given its findings as to automotive industry needs.

104. The SEF goes on to say that Bluescope submitted that alloyed galvanised steel with small amounts of boron would appear and behave in the same manner as non-alloyed galvanised steel. Yet the Commission has noted that Bluescope's application did not seek to limit itself to "small amounts of boron", but instead, asserted that any amount of any kind of alloy was simply a minor variation.

105. For the SEF to state in that context that the end user would not know of the addition without testing or observing a mill certificate is frankly stating the obvious. How can anyone look at a piece of steel and know its chemical make-up? The reference to a mill certificate is crucial, as Yieh Phui's exported products always have mill certificates that clearly delineate the amount of boron, which in virtually all cases, is (confidential level of boron addressed).

106. The Commission goes on to say that Bluescope presented assertions about the impact of larger quantities of boron (p 33). It is telling that the SEF states that "(i)t is not clear to the Commission what this 'large quantity of boron' would be at or above."

107. This again should have reminded the Commission of the problem with an application that erroneously alleges that any level of alloy is problematic, and then admits that some degree of alloy will make a meaningful change to the product's characteristics. If the applicant does not provide a delineation and the delineation is not clear to the Commission, there is no justification for the Commission recommending an open-ended change to the original dumping notice.

108. Most disconcerting is the observation at p 34 that some of the exports from Yieh Phui were marginally above 8 ppm, others were substantially higher, but none were at levels of a different supplier specialising in steel for automotive components, as if the latter category undermined the mid-category. No conclusion is drawn as to what percentage of Yieh Phui's exports were well above 8 ppm. Any reasonable investigation would have shown that the vast majority of Yieh Phui's exports were significantly above that level, in most cases (confidential level of boron addressed).

109. The SEF then suggests that Yieh Phui's exporter questionnaire response did not address claims as to the physical differences between its alloyed and non-alloyed galvanised steel. That is addressed in subsequent submissions that ADC promises to look at in due course.

110. While there is nothing clearly in error as to the Commission's reference to the similarities in production processes (at p 34), that would also be so for the steel used for automotive purposes. If one simply wishes for a different additive in the steel process, in turn considering this is more than a minor change, there is little difference in the process, but significant differences in the characteristics of the goods concerned.

111. It is also not clear what the Commission is considering at p 35 when it notes no difference in Yieh Phui's production process between alloyed and non-alloyed galvanised steel. The difference is not at the stage of manufacture by Yieh Phui, but instead, at the stage of manufacture of the hot rolled coil. Yieh Phui buys either alloyed hot rolled coil or non-alloyed hot rolled coil. An

analysis of the differences in production processes, cost and the like, must be undertaken at that upstream stage.

112. In any event, Yieh Phui noted other beneficial differences in production processes with alloyed HRC, such as thinner scale, easier trimming, fewer defects and ease of cold rolling. In view of the above, it is not clear how the SEF concludes that the physical characteristics are similar.

113. This misunderstands the nature of a "characteristic" as opposed to a component. The physical difference is the addition of boron at whatever level that occurs. The difference in characteristics is a separate question, which must consider the impact of the additive, and not simply its chemical nature and volume.

114. It is troubling that the SEF concludes (p 35) that the Commission has compared the relevant goods and considers that the physical characteristics of both goods are similar, the main difference being the presence of boron at levels at or above 8 ppm (but not at levels of specialised automotive steel). No-one has ever suggested that the physical composition is different, other than the addition of boron. Once again, characteristics are different to composition. A characteristic is a quality, not a component.

115. To properly analyse the quality, the Commission should consider what the quality difference if any would be at a mere 8 ppm, what it presumes was a difference for specialised automotive steel and what would be the situation where something in the order of (confidential level of boron addressed) was the norm for Yieh Phui's exports.

116. The confusion between physical differences and characteristics is evidenced by the comment at p 40, where under the heading of physical differences, reference is made to characteristics. No indication is given as to how the Commission came to the conclusion as a result of competing assertions of Yieh Phui, Wright Steel and CITIC on the one hand and Bluescope on the other, that the alloyed galvanised steel did impact on the physical characteristics of the relevant product. The Commission concludes that it has had little to no impact after only consulting Bluescope. No tests were made and no reference in the SEF is made to the independent literature provided to it.

117. To also make the comment that it is not at levels seen in specialised automotive steel, implies that such levels may be appropriate characteristic differences. That being the case, there is surely a need to consider whether a lesser level can still have sufficiently distinct physical characteristics. Without analysing the qualitative differences, the Commission cannot make a scientifically meaningful conclusion either way.

Gleeble evidence

118. It is not clear what evidence the Commission has considered in relation to the scientific disagreement about the characteristics of the goods.

119. The SEF gives no indication of any other scientific inquiry. The SEF does not even mention findings of the University of Wollongong as evidenced in the Gleeble newsletter provided to ADC. The SEF does not indicate what view it

took about the article reported there, or about the numerous other articles that one can readily find on the Internet extolling the virtues of boron and other alloy additives.

120. If the Commission did not engage in that analysis, it could not possibly conclude that all alloy goods are merely minor additions. While a reading of the SEF suggests that this is not the view that the Commission took, nevertheless, that is the recommendation it makes as to changes to the notice, given that these have no cut-off point between acceptable and non-acceptable levels of alloy.

121. More alarming again is the reference to relevant evidence in a private response from a representative of ADC. In terms of the Gleeble newsletter he states "(t)he Commission has been provided with no evidence indicating any relationship between the research centre and Bluescope. The only evidence provided has been one edition of the Gleeble newsletter which visited the Bluescope Steel metallurgy centre." Whether one questioned Bluescope, the Gleeble newsletter editors, the University of Wollongong or engaged in simple Internet searches, one would readily find that the research is a joint venture between the University, Bluescope (and other steel manufacturers) and the Australian Research Council and now called SteelHub. At the very least, a simple question to Bluescope about the article's validity would have uncovered the relationship.

122. In any event, it is the evidence and not simply the relationship that is crucial. The point to the relationship is that Bluescope could be expected to receive and review the newsletters of a research centre that it in part funds. If it does so and states to you that no amount of boron alone has any value, contradicted by its own independent research centre, on what basis does it suggest the contrary to you?

123. If on simple investigation you found that the people speaking to you were in ignorance of the findings reported in Gleeble, that undermines the quality of their assertions. If they were aware of that information and hid it from you, that undermines their veracity. In either event, you then have before you an independent scientific assertion in an article to compare to any other evidence presented. You know that there are numerous articles extolling the benefits of alloys. You would then compare that to the evidence provided by Bluescope itself, ideally not limiting yourself to their mere assertions from their internal staff. At the end of the day, you need some objectively justifiable means to distinguish between conflicting scientific assertions between Yieh Phui's internal staff and Bluescope's internal staff. Independent studies placed under your nose ought to be a clear mechanism to do so.

124. It is also disconcerting that the ADC representative intimates that the Gleeble material was not considered of significance. To say as he did, that the Commission considered Bluescope's submissions on the public record, is no answer to the question of whether the Gleeble material should have been seen as relevant and either accepted on its face, or accepted as the basis for a simply inquiry to Bluescope. To ignore a relevant fact and ignore a relevant line of inquiry, cannot be saved by simply saying one looked at other things, particularly when those things were only submissions of the applicant.

125. In that context, the representative does assert that the Bluescope submissions were only one piece of evidence relied upon "with each exporter and their activities examined independently." In the context of the distinct question as to the composition, characteristics and importance of the alloy used, such an investigation has never occurred on a scientific basis or if it has occurred, has simply not been referenced in the SEF. Instead, the Commission has effectively ignored the question of scientific properties, concerning itself with import data about relative trade patterns, a factor it is entitled to consider, and Bluescope's allegations about end use, which is itself a failure to undertake proper investigation of that criterion.

Manufacturing cost and selling price

126. It is also not clear how the Commission concludes after verifying the extra cost to add boron, that it is not only a small percentage of the total selling price, but is also one that has "negligible impact on Yieh Phui's cost to produce …".

127. There is no basis for the conclusion that the addition of boron "has a small to negligible impact on Yieh Phui's cost to produce" and further that "Yieh Phui charges a small to negligible extra premium on the selling price …" (p 40). It was clearly demonstrated to the Commission that approximately (confidential dollar amount) per tonne is added to the cost to produce, which in turn is passed on to customers all down the chain. One cannot describe that as negligible.

Trade channel/distribution

128. The SEF notes at p 36 that Bluescope alleged that channels of marketing, trade and distribution are the same and there are no differences in price offered to the Australian market. The latter is demonstrably untrue but was not mentioned in the SEF. An SEF should identify all relevant facts, both those supportive of its ultimate conclusion and those that suggest the contrary.

129. More disconcerting is the fact that the SEF concentrates in terms of channels of marketing, trade and distribution on Yieh Phui. If (confidential outline of business relationship), then concentrating on that part of the chain will always be the same, whether the product is inside or outside of this application. The real question is marketing, trade and distribution to ultimate end users, particularly as end-use seems to be the matter of greatest significance to the Commission's ultimate findings. The failure to properly investigate this is a clear failure of the investigation process.

130. It is thus not clear what is the relevance in this context of the reference to Yieh Phui's response that its own sales process remained the same. Once again, that has to be so as it exports to (confidential description of my clients) in Australia. End use is not determined by these companies, but instead, by the end customers.

Interchangeability, end-use, customer preference and expectations

131. As noted above, end-use conclusions are the lynch-pin of the SEF conclusions. The process of reaching those conclusions is fundamentally flawed.

132. The SEF notes Bluescope's assertion that there are no new end-use applications, whereas it also notes Yieh Phui's indication that it was in the main responding to concerns about strain aging. The SEF also notes Yieh Phui's submission that boron at levels significantly higher than 8 ppm are required to deal with this.

133. The SEF notes that CITIC's importer questionnaire indicates that the end-use is more than for purlin and that not all goods are interchangeable.

134. Bluescope responded in a submission of 11 September 2015 to the assertions as to strain aging. It asserted that it does not add boron and supplies two-thirds of the Australian market, a factor that cannot be relevant to the argument as to the scientific benefit of added boron and the possible needs of end users of the importers.

135. It asserts that it supplies steel to the same customers and end users as Yieh Phui, although it is not clear how it can justify such information about commercial in confidence data.

136. It asserts that there were no changes in customers buying galvanised steel, no changes in downstream processing and no change in ultimate end use, without any evidence in support.

137. It asserts that Bluescope has not seen a market request to supply galvanised steel free from, or minimising the strain aging effect, yet it admits that adding boron to minimise strain aging is technically correct. It argues, however, that this is incomplete, because the levels of boron in Yieh Phui's product is metallurgically insufficient to achieve the intent of controlling stress or strain. That conclusion cannot be supported by any evidence before the Commission.

138. In addition, the fact that Bluescope has not seen a market request to supply steel free of any strain aging effect is an irrelevant factor for the Commission's mandate, which is to compare the alleged circumvention goods with the goods otherwise subject to the anti-dumping notice. Bluescope's own goods did not fit either category.

139. Bluescope's submission required the Commission to consider the competing allegations in relation to strain hardening. The first proposition from Bluescope is that the levels of boron in Yieh Phui's steel are metallurgically insufficient to achieve the intent of controlling stress or strain. The Commission must have some meaningful means to determine whether boron at (confidential level) and above will or will not achieve that end.

140. In a related assertion, Bluescope suggests that boron impacts upon nitrogen but not carbon. Even if that is so, this says nothing about the overall effect on stress or strain from the addition of boron.

141. Bluescope's assertion that strain aging is "essentially a visual blemish" is a complete misrepresentation. Stress or strain adversely affects the ability to form the steel without cracking.

142. Bluescope admits that some grades of galvanised steel have boron as a beneficial additive, but suggest that this is for specific applications "mostly automotive and … in relatively low volumes." What other applications would Bluescope concede besides the "mostly" automotive and will it concede that the final notice should allow exporters to compete for such market segments? If that is the case, why does the Commission's final recommendation not cover this potentiality?

143. Most importantly, it is clear from the SEF that the Commission's conclusion (p 40) that the goods are substantially interchangeable, have the same end use and each fulfils similar customer preferences and expectations, can only have resulted from reliance on Bluescope's submissions. The SEF makes no reference to independent testing or investigation of actual end use. No indication is given as to why Bluescope's assertions were deemed to be true.

144. Importantly, the Commission has accepted (p 41) that "customers have requested goods which minimise the strain aging effect due to longer shelf life resulting in the non-alloyed galvanised steel being more difficult to process." It notes conflicting views as to whether the addition of boron in the levels seen is beneficial in minimising strain aging and whether this is a market issue requiring addressing, although the latter query is contradicted by its findings that customers have indeed requested minimising the strain aging.

145. Most alarmingly, the Commission makes a statement that it "considers that it is not in a position to comment whether:

- "there is a market need to minimise the strain aging effect of steel; or
- the addition of boron at levels seen in Yieh Phui's exported goods minimises that effect."

146. These must be relevant factors as required to be considered under Regulation 48(3). It must have been possible for the Commission in its investigation process, to do more than simply speak to Bluescope as to this issue. It simply needed to take a view based on the available evidence provided by each party on the balance of probabilities. To state that it cannot comment, is simply a refusal to make a ruling on a relevant factor.

147. It seeks to overcome this inadequacy in its own investigative process, by suggesting that "while there may be some benefit to the addition of boron", "no evidence has been provided that demonstrates that non-alloyed galvanised steel cannot be used in these circumstances, though it may not be as easy to process." Stated in this way, it effectively asks my clients to prove why there should not be an anti-circumvention decision, rather than requiring the applicant to demonstrate on balance that one is appropriate.

148. Furthermore, if one hypothesises, as the Commission does, that there may be "some" benefit, to merely indicate that less beneficial goods can be used with certain consequential problems of processing, does not help resolve the

question of whether the change in physical characteristics is more than minor or not.

149. Instead of dealing with the essential scientific question, the Commission seems to go back to one of the other factors, the variations in import levels, and asserts that the problem is unlikely to have only emerged in the final quarter of calendar year 2013 (p 41). If a local manufacturer was importing the relevant steel to make purlin in Australia and decided after the dumping duty to import fully made purlins, the dumping duty may in part have motivated the change in commercial activity, but this is irrelevant to determine whether a finally made up purlin is more than a minor change to a flat sheet of galvanised steel, which must unassailably be true.

150. It is also remarkable to conclude as the Commission does (p 41) that Bluescope and importers of non-alloyed galvanised steel are likely to be supplying the same end users over the same periods. The Commission has ignored the different distribution chains and the important role of stockists as customers from my clients, who would face the biggest problem with long held inventory in times of depressed demand. The Commission seems to be asserting that if Bluescope says it does not have a problem or a need with its customers, one can therefore conclude that Yieh Phui does not either. That is not a reasonable investigative process where Regulation 48 requires the Commission to consider the imported goods and not Bluescope's business model.

151. In that sense, the representative of ADC in a private communication, states "(t)his question of end use is the key determinant (subsection 48(2)(c) of the Regulations) in finding whether a circumvention activity has occurred." As you would be aware, the Regulations do not stipulate that one of the thirteen factors is in fact the key. It would be an improper fettering of the Commission's duties and discretions to presume that in all cases, end use is the key determinant, ignoring other relevant factors or downplaying their significance.

152. If instead, the Commission took the view that end use is the key determinant on this occasion, it would need to have a reason for that and articulate it in the SEF so that parties may respond and so that the Parliamentary Secretary can form her own view whether to accept the recommendation or not.

153. Even if you were entitled to consider end use as the key determinant, that should suggest a wholly different method of investigation in that you could not simply rely on Bluescope's assertions that end use by customers who did <u>not</u> buy their product from Bluescope was all the same, whether alloy or not.

154. You have thus made a conclusion of fact without investigating that fact. You invite the Parliamentary Secretary to support that conclusion of fact without providing her with the benefit of the results of any investigation.

155. In that circumstance you should not recommend a duty, or at the very least, if you choose to do so, should warn her of the challenges to your methodology, so she can form an independent view as to whether your investigatory process is one she wishes to take responsibility for or not.

156. Where Amsteel is concerned, the Commission also finds the same end use, simply by reference to export data (p 50).

157. A failure to properly consider end use is further highlighted when considering the way the Commission dealt with Company A. The Commission's comments point to the importers as general traders and refers to the end users of those traders as general fabricators or distribution channels (p 56). There is simply no reason to engage in that downstream analysis with Company A but not with Yieh Phui, the latter being a co-operative exporter.

158. It is further disconcerting that the Commission finds (p 57) that it was aware that certain specialised alloyed galvanised steel did have different end uses. It simply states that this includes specialised automotive galvanised steel and only refers to the record of meeting with Bluescope on 27 May 2015 as the basis for that conclusion.

159. It is also interesting to compare the findings of the Commission in relation to Bao Australia. The Commission made adverse findings on all aspects, save its acceptance of particular customer preferences and expectations. Yet the Commission relied on the adverse findings for other exporters to reach a contrary conclusion.

Date of effect

160. Retrospective duty should only be applied in extreme circumstances. That would appear to be the normal practice of the Commission. Yet the Commission has concluded that to be an effective remedy, it is necessary to alter the original notice so that the changes are applied both retrospectively and prospectively.

161. (confidential – private discussions about ADC policy on retrospectivity).

162. In a private communication, an ADC representative suggested that "(t)he Commission has found that, in some circumstances, there has been a deliberate change in behaviour in order to circumvent the duty that ought to have been paid in relation to goods that have been previously found to have been dumped …". It is reasonable to assume that the representative is suggesting that the exceptional circumstances are a finding of a deliberate change in order to circumvent, a conclusion as to the mental state of the persons involved. (confidential) No such investigation occurred. ADC seems to have simply relied on the same import patterns and Bluescope assertions known to it at the time of (confidential).

163. Retrospective duties are an extremely serious matter, causing major hardship and disruption to the importing parties concerned and may be a further reason why the legislation and the decision in this case would be in violation of WTO norms. At the very least, if retrospectivity can ever be justified, it must be justified on the basis of a proper investigation of the very criterion that the representative asserts to be determinative on that issue. A finding of fact as to the mental state of particular entities, should be based on a proper investigation of that mental state. That has simply not occurred.

164. Once again, the recommendation to the Parliamentary Secretary should explain the basis of the Commission's investigation, the basis upon which

positive findings will be challenged in due course, and allow her to decide whether she wishes to take responsibility for what I assert to be a finding of fact without any investigation of it.

165. If instead, the Commission believes it can draw conclusions about mental state from import figures and Bluescope's own allegations, that would apply in virtually all circumvention cases and retrospectivity would not be exceptional. If that is your reasoning, it should at least be articulated.

166. It is also important to consider how a recommendation of retrospectivity would fit within interested parties' rights to seek a duty assessment. If the Parliamentary Secretary accepted your recommendation of a retrospective duty to cover a period longer than six months prior to her determination, that would create an impossible mismatch with the assessment regime. That would make Australia's prepayment regime in clear violation of WTO norms. The SEF did not address the terms of Article 10.6 ADA. Without understanding the reason why ADC believes retrospective duty would be appropriate, it is difficult to make submissions in response. If your view is that you did not and need not turn you mind to ADA provisions, while I would disagree, I at least know that is your position and can respond and challenge accordingly.

167. Once again, if you have any doubt on this issue, it is recommended that you seek independent advice from DFAT and AGs, to allow the Parliamentary Secretary to form her own view whether she wishes to place Australia in jeopardy of a WTO challenge. While I concede that the overall invalidity of anti-circumvention regimes under WTO law is not a matter for your determination, you would be aware that Australia's legislation intends to be in compliance and indeed, the relevant regulations are described as "international obligation" regulations. You would be further aware that any bureaucrat knowing that they are dealing with a government law intending to comply with international obligations, should take these into account as relevant factors.

168. If you do not wish to form your own view on these matters and advise the Parliamentary Secretary of your reasoning, you should at least alert her in your final recommendations, should they remain in favour of any duty and certainly in favour of a retrospective duty.

Competitive disadvantage

169. It has been suggested that if I believe that the current proposed form of notice will have unreasonable or impractical effects, I may make submissions accordingly. That has already occurred in the sense that I have pointed out that your proposal denies my clients the ability to compete for any alloyed product at any level and for any end use. That makes it demonstrably unreasonable. You will either take the view that you agree or not. If you agree, it is incumbent upon you to find a reasonable cut-off if you do not wish to adopt the cut-off recommended by me above.

(confidential)

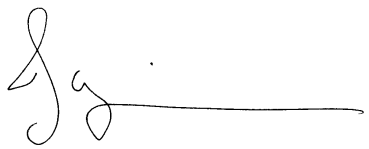
170. (confidential reference to possible meeting which had been sought).

Conclusion

171. For all of the above reasons, the Commission should not recommend that the Parliamentary Secretary adopt the views in the SEF. To do so would place the Parliamentary Secretary in an invidious position where she would have adopted a recommendation based on an inadequate investigation, a complete failure to investigate key matters, an erroneous view that certain material is irrelevant, an investigation based on undue acceptance of Bluescope's information, where the SEF simply ignores contrary data and most importantly, where the Commission has effectively purported to take an erroneous and inadequate application and validate it through a more limited finding. The Commission and the Parliamentary Secretary should act as independent adjudicators of a clearly delineated application. They should not compromise themselves by effectively recreating the application in a more reasonable form than that in which it was originally presented. The Commission should have also undertaken reasonable investigation of each relevant factor, which has not occurred.

172. To adopt the approach taken in the SEF can only lead to both court challenges and a likely challenge against Australia at the WTO.

Yours faithfully



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