Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia

Telephone +61 2 6163 1000
Facsimile +61 2 6162 0606
Email: info@moulislegal.com
www.moulislegal.com

11 March 2013

Ms Joanne Reid
Director, Operations
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

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By email

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11 March 2013

Dear Ms Reid

Ministry of Commerce of the Government of the People's Republic of China Countervailing and anti-dumping investigations re coated steel BlueScope submissions concerning European Commission findings

As you know, we are the lawyers for the Government of China ("GOC") in relation to the countervailing investigations concerning aluminium zinc coated steel and galvanised steel from China, and the anti-dumping investigations concerning the same products from China and other countries.

A Introduction

We refer to submissions recently placed on the public record of these investigations by the applicant, BlueScope Limited, in the form of letters dated 25 and 26 February 2013.

The submissions refer to a European Council regulation which imposed provisional anti-dumping duties in an investigation concerning certain organic coated steel from China,[1] and a proposed regulation in a countervailing investigation concerning the same products.[2] They do so in an attempt to give substance to claims by BlueScope that a "particular market situation" existed in relation to the markets for the coated steel products in China during the period of investigation, and that subsidies have been provided in the form of sales of hot-rolled coil ("HRC") at "less than adequate remuneration" by "public bodies" in China to producers of the products.

We will refer to these regulations as the provisional AD regulation and the proposed CVD regulation, respectively.

B Particular market situation contention

BlueScope does not articulate its claim in relation to the relevance of the provisional AD regulation to any finding required to be made by Customs under Section 269TAC(2)(a)(ii) of the *Customs Act 1901* ("the

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1 Commission Regulation (EU) No 845/2012 (OJ L 252, 19.9.2010, p.33) ("the provisional AD regulation")

2 *Proposal for a Council Implementing Regulation imposing a countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China* - 2013/0052 (NLE) ("the proposed CVD regulation")

Act"). The heading to the letter dated 26 February refers to *"market situation"*, a concept that is addressed by the Section to which we have referred. The third paragraph of the letter then refers to the quantum of the provisional anti-dumping measures imposed on exports of organic coated steel from China. The implication one would naturally draw from this is that BlueScope is attempting to assert that there was a *"particular market situation"* finding in the European Commission investigation which led to the making of the provisional AD regulation.

That assertion is incorrect.

Under the *Protocol on the Accession of the People's Republic of China to the World Trade Organisation*, a WTO Member may reserve to itself the ability to apply *"a methodology that is not based on a strict comparison with domestic prices or costs in China"* for determining price comparability in anti-dumping investigations concerning Chinese exporters. This may be done *"if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale"* of the product concerned.[3] The Protocol refers to these as *"non-market economy provisions"*.[4]

The Protocol also states that:

> *Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated…*

Australian law has no *"non-market economy provisions"* which are allowed to be applied against Chinese exporters.[5] Under Australian law, there is no ability to apply *"a methodology that is not based on a strict comparison with domestic prices or costs in China"*. The only leeway to use *"relevant information"* to determine price comparability under Australian law instead of domestic prices and costs arises under Section 269TAC(5D) of the Act. This applies where the Minister believes that *"market conditions do not prevail in [the country of export] in respect of the domestic selling price of [the] like goods"*. However, Regulation 182 of the Customs Regulations mandates that Section 269TAC(5D) cannot be applied to the list of excluded countries in Schedule 1B of the Act. China – being a fellow WTO member of Australia's, and a country which Australia acknowledges is a full market economy - is one of those excluded countries.

Accordingly, it can be observed that the provisional AD regulation:

- is not based on the provisions of the WTO *Anti-Dumping Agreement*;
- is not related to the concept of *"particular market situation"* as those words are used in Article 2.2 of the WTO *Anti-Dumping Agreement*; and
- is not related to the concept of a *"situation in the market of the country of export… such that sales in that market are not suitable for use in determining a price"* under Section 269TAC(2)(a)(ii) of the Act.

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3 *Protocol on Accession of the People's Republic of China*, WT/L/432 (23 November 2001), Article 15(a)

4 *Ibid.*, Article 15(d)

5 Market economy conditions clearly prevail in China in respect of the domestic selling price of coated steel, and the GOC's submissions regarding the non-availability of an Article 15-type discrimination against Chinese exporters under Australian law are not intended to detract from this reality. The imposition of the provisional AD regulation on Chinese exporters of organic coated steel in the EU is an improper application of the relied-upon provision of China's Accession Protocol. The conditions for the application of that provision – from a treaty which is now over 12 years old - no longer exist.

It can also be observed that China has established, under Australian law, that it is a market economy, because it cannot be found to be a non-market economy.

It is for these reasons that we say that the assertion being made by BlueScope in its submission – that the provisional AD regulation is related to *"market situation"* considerations in these Customs investigations - is legally incorrect.

C Subsidy contention

The contention that the findings underlying the proposed CVD regulation are relevant to the present Customs investigations is also incorrect.

After mentioning certain adverse findings made against Chinese producers of rolled steel made by the European Commission in the proposed CVD regulation, BlueScope's submission states:

> *On the basis that the countervailing provisions applicable to WTO members under the WTO Agreement on Subsidies and Countervailing Measures are applied consistently across jurisdictions, it is BlueScope's view that Customs and Border Protection will likely assess similar subsidy findings for aluminium zinc coated steel and galvanized steel as was determined for [organic coated steel] exports from China by the Commission.*

As a matter of semantics, if all WTO Members applied the countervailing provisions like the European Commission ("Commission") does, then all WTO Members would make the same findings as the European Union ("EU"). However that begs the question as to whether that application is correct.

The fact that State-invested steel-making enterprises in China are not public bodies is precisely because Australia *does not* apply the countervailing provisions in the way that is signalled in the Commission's proposed CVD regulation.

The concept that State-invested commercial enterprises are public bodies has now been rejected in Australia by the Trade Measures Review Officer on three occasions.

In *Certain Aluminium Extrusions exported from The People's Republic of China – review of a decision to publish a dumping and countervailing duty notice*[6] the TMRO overturned a finding by Customs that State-invested aluminium-producing enterprises were "public bodies". On that occasion he said:

> *The test for what is a 'public body' under international law seems to focus more on whether a body possesses, exercises, or is vested with governmental authority. However, Customs and Border Protection states in the Report that it adopted a broader interpretation, focusing primarily on majority ownership as a prima facie indicator of a 'public body'. The Appellate Body expressly rejected such a broad interpretation in the passage cited above. Accordingly, I recommend that Customs and Border Protection reinvestigate whether the producers and suppliers of primary aluminium that it determined were 'public bodies' for the purposes of Program 15 are actually 'public bodies'. In particular, I recommend that Customs and Border Protection reinvestigate whether those producers and suppliers were in fact in possession of, exercising, or vested with governmental authority, as opposed to merely being majority-owned by the Government of China.*

The same thinking that the TMRO rejected, and which the WTO Appellate Body has rejected – that State-invested enterprises are "public bodies" by reason of their government shareholding - pervades the proposed CVD regulation. It states:

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[6] 11/2372, 18 April 2011.

> *In view of the lack of cooperation from the GOC, the scope of those entities which are considered "public bodies" was not defined to the full extent. In any event, any SOE in which the government is the majority or the largest shareholder is a public body. Entities in which the government has no shareholding are private bodies. Having that said, there is no need to draw a bright line between public and private bodies here, since in recitals (85) to (98) below, it is demonstrated that all private bodies in the steel sector are entrusted and directed by the State and so, for all relevant purposes, behave in the same way as public bodies.*[7] [underlining supplied]

After the TMRO's recommendations in his review of the certain aluminium extrusions finding, Customs replaced its reliance on government investment as a sufficient indicator of whether an entity was a public body, with a new test resting on three "indicators", namely:

- the existence of a "statute or other legal instrument" which "expressly vests government authority in the entity concerned";
- evidence that an entity is, in fact, exercising governmental functions (which may serve as evidence that it possesses or has been vested with governmental authority); and
- evidence that a government exercises meaningful control over an entity and its conduct (which may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions).

The TMRO has now had two opportunities to review this formulation of a public body "test" and its application by Customs. One of the reviews was conducted in relation to an investigation also involving State-invested steel-making enterprises - the same State-invested enterprises against which BlueScope has levelled its "public body" accusation in these investigations. The other TMRO review involved a re-run of the allegation that State-invested aluminium-producing enterprises were public bodies.

In both of these reviews, *Hollow Structural Sections – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice*,[8] and *Aluminium Road Wheels - Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice,*[9] the TMRO endorsed this statement from *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*:[10]

> *…for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command. Similarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. If a public body did not itself dispose of the relevant authority or responsibility, it could not effectively control or govern the actions of a private body or delegate such responsibility to a private body. This, in turn, suggests that the requisite attributes to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.*

After reviewing all of the evidence that was before Customs, the TMRO stated, in both of his review reports:

> *244. As noted above, the Appellate Body meaning comprised three alternative tests. Customs, rightly in my view, acknowledged that there was no evidence of any legal instrument expressly vesting government functions and authority in any Chinese HRC producer. The real question is*

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7 See para 73

8 14 December 2012

9 "December" 2012

10 WT/DS379/AB/R, 11 March 2011 ("DS379")

therefore whether Customs has properly applied either the second or third tests propounded by the Appellate Body.

245. The Appellate Body in decision DS379 described government functions and authority as being concerned with the power to control, compel, direct or command private bodies and persons. In my view, this aptly summarises the nature of government authority. The evidence analysed by Customs indicates that certain producers of HRC are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.

246. Customs substantially relied on s 36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies. But in my view this section requires no more than compliance with the policies of the Government of China. It falls short of establishing that State-Invested HRC producers are invested with the power to control, compel, direct or command private bodies and persons.

247. Accordingly I consider that Customs had no basis to conclude that the second limb of the Appellate Body test was met.

248. Moreover, even if it were accepted that the Government of China exercises meaningful control over State-Invested HRC-producers, the third test drawn from DS379 would again not be met in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority.[11]

The TMRO said that this legal interpretation of the "public body" requirement was a meaning that accords with:

- the meaning attributed to that term by the Appellate Body in decision DS379;
- the meaning that accords with the ordinary English usage of the term as understood in Australia; and
- the meaning of that term that a court would likely settle upon if the issue came before it.

He ruled that none of the evidence before Customs in either case established that State-invested enterprises were "public bodies".

We do not intend to undertake a "blow-by-blow" analysis of every statement made by the Commission in the proposed CVD regulation. That is not necessary. The GOC views many of the Commission's interpretations of Chinese laws and of policies impacting on the Chinese steel-making industry, and of the commercial activities of Chinese enterprises, as bordering on the absurd.

In the context of the Appellate Body's ruling in DS379, no law is cited in the proposed CVD regulation which expressly vests government authority in any of the entities referred to. The Commission's "in fact" analysis suffers from the same circularity and unsubstantiated suspicion as the TMRO has laid bare in his review reports on the topic of "public bodies". Nowhere in the proposed CVD regulation is there any recognition of the need for evidence to be adduced of the authority of an alleged "public body" to exercise authority over a private body, or to have the ability to compel or command. These key factors, from the WTO Appellate Body report in DS379, and from the TMRO reviews of Customs'

[11] These paragraphs (save for para 248) are from the TMRO's report concerning hollow structural sections. The same paragraphs in the TMRO's report concerning aluminium road wheels are 287 to 290.

recommendations in its reports dealing with hollow structural sections and aluminium road wheels, are entirely missing from the proposed CVD regulation. The word “authority” - in the context of exercising authority over a private body - is not used in the proposed CVD regulation. The words “compel” or “command” are just not mentioned at all.

Therefore, the European Commission’s proposed CVD regulation simply does not comply with the legal principles which must be applied in this Australian investigation.

D Conclusion

We submit that BlueScope’s attempt to rely on non-market economy assumptions and WTO non-compliant findings of a different jurisdiction in this coated steel investigation is incorrect and misguided.

Customs should only pay attention to BlueScope’s submissions for the purpose of rejecting them.

Yours sincerely

Daniel Moulis
Principal