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The Director
Operations 5
Anti-Dumping Commission
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By email

Dear Director

Essar Steel India Ltd Response to Statement of Essential Facts and Preliminary Affirmative Determination No. 370

As you know we represent Essar Steel India Ltd (“Essar”) in this investigation.

Essar takes note of the Statement of Essential Facts 370 (“the SEF”) published by the Anti-Dumping Commission (“the Commission”) on 31 May 2017. The SEF preliminarily determines that the Australian industry for zinc coated (galvanised) steel (“the GUC”), being BlueScope Steel Limited (“BlueScope” or “the Applicant”), has suffered material injury caused by dumped exports from Vietnam and Malaysia, and by dumped and subsidised exports from India.

In this submission, we comment on a number of key issues relating to the preliminary finding.

A	Australian industry’s price trend	2
B	Imports from New Zealand	3
C	Imports from “other countries”	3
D	Attribution of employment and capital-raising injury	5
E	Lack of holistic analysis of the Australian industry as a whole	5
F	Immateriality of injury caused by dumped goods	6
G	Targeted “Import Parity Pricing” policy?	7
H	Exports from India should not be cumulated with exports from Vietnam and Malaysia	8

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A Australian industry's price trend

First of all, we note that previous submissions from both Essar¹ and the Hoa Sen Group ("HSG")² have commented on the Applicant's pricing behaviour in the period immediately after the investigation period ("POI").

Most relevantly, it was noted that BlueScope may have increased its price significantly since the end of the nominated POI. In Essar's previous submission to the Commission, we said:

The significance of this price movement – in an otherwise stable market – must not be brushed off simply because it occurred subsequent to the period of investigation. This price movement must be considered with great care by the Commission from a number of aspects:

- *the level of increase achieved within such a short period of time despite the Applicant's claims that it is forced to adopt "import parity pricing", and is experiencing price "suppression" from the import competition;*
- *the timing of the price movement – which occurred immediately after the period of investigation as designated by the Applicant itself – in the sense that Applicant is known to be a frequent and experienced user of the anti-dumping regime and has substantive control over how the period of investigation is to be set; and*
- *the Applicant's market power, which has allowed it to "set" the prices for the goods under consideration at the level it desires – even to the extent of imposing a 35% increase on the market which BlueScope evidently believes the market will absorb and accept.*

Surprisingly and disappointingly, the SEF states that the issue raised by Essar in this regard is to be disregarded completely, "due to the tight legislative time frames, it is beyond the scope of this investigation".³ With respect, we submit the refusal to investigate the issue means that the SEF's material injury and causation analysis is deficient and flawed, in a number of ways:

- It fails to complete the price suppression and depression analysis – especially in light of the Applicant's clear price influence on the market and its ability to significantly increase price as shown in the post-POI period, which is evidence of its ability to do so in the POI period.
- It fails to consider the strength of the Australian industry, and to what extent it could be said to have suffered "material injury" caused by dumped and subsidised imports from the countries under investigation.
- It fails to properly analyse whether any alleged price/profit related injury can be attributed to imports, or whether they are self-inflicted by the Applicant itself – as a tactic designed to eliminate targeted import competition.

As a separate and equally important matter, we submit that BlueScope's post-POI pricing behaviour is an essential consideration in determining whether any "material injury" purportedly caused by dumping and subsidisation will continue. In light of the price increase activated by BlueScope, we submit that the Commission's findings – as set out below - are not based on evidence and indeed are contradicted by the evidence:

The Commission considers that a continuation of price competition from dumped imports from India, Malaysia and Vietnam and subsidised imports from India are likely to have a continuing adverse impact on the Australian industry. The Commission considers that this impact may be particularly evident in price undercutting, reduced profits and profitability, reduced capital expenditure and reduced employment. [underlining supplied]

1 See public record document 074, submission by Essar Steel at page 3.

2 See public record document 064, submission by Hoa Sen Group at page 17.

3 See SEF at page 60.

The Commission's concern that it has limited ability to consider post-POI data due to the legislative timeframe is not a valid excuse. To the contrary, it represents a failure on the Commission's part to carry out its statutory duty. The Commission must consider the issue in order to properly consider the existence of material injury, whether such material injury was caused by any dumped or subsidised imports under investigation, and whether such injury will continue so as to justify the imposition of dumping or countervailing duty. This determination must be made within the legislative timeframe, being a timeframe that the Commission clearly has the ability and the mandate to extend in order that it can carry out its duty.

We note that the post-POI pricing issue was brought to the Commission's attention as early as February 2017. Since Essar's submission dated 3 April, and before issuing the SEF on 31 May, the Commission had a number of meetings with BlueScope, and extended the due date for the SEF twice.

B Imports from New Zealand

The SEF indicates that imports from India accounted for merely 1% within a market of around 700,000 tonnes, and that the dumped imports from India, Malaysia and Vietnam altogether accounted for only about 5% of the Australian market. As observed in our submission dated 13 February 2017, imports from New Zealand (from and by BlueScope subsidiaries) accounted for the same market share as imports from India.

In response, the SEF states:

The Commission has not included the imports of galvanised steel from New Zealand with other imports but notes that they account for a very small proportion of the market. Therefore, the Commission has decided not to include those imports from New Zealand.

This statement is unclear – if imports from New Zealand were not included in “other imports”, then did the Commission include those imports as part of the Australian industry's market share? Did the Commission consider the prices and profitability of New Zealand imports as being the prices and profitability of the Australian industry? Or did the Commission consider imports from New Zealand at all?

We submit that the imports from New Zealand must be carefully considered in determining BlueScope's injury claims. If imports from New Zealand can simply be disregarded because “they account for a very small proportion of the market”,⁴ then the same can be said about imports from India.

The imports of the GUC from New Zealand are of significant importance for the purpose of analysing material injury and causation. This is not just because the imports from New Zealand account for a similar market share as imports from India, but also because the New Zealand imports are directly controlled by BlueScope, and compete directly with other imports of the GUC, including those from India.

In particular, the Commission must consider whether imports from New Zealand are indication that the Applicant is unable to satisfy its substantial market share from its own production, and whether imports from New Zealand are used by the Applicant to suppress the price level of other imports, in order to create the appearance of “injury”.

C Imports from “other countries”

In addition to the imports from New Zealand, imports from countries not subject to the investigation make up approximately 75% of total imports, or approximately 20% of the total market. This is to be

⁴ Ibid, at page 64.

contrasted with the imports from India, which account for approximately 4% to 5% of total imports, and a little over 1% of the total market share.

In relation to imports from other countries, the SEF states:⁵

An assessment of the export price of goods from China and Korea indicates that galvanised steel were [sic.] priced at a similar level to those of the Australian industry.

Imports from Taiwan accounted for [sic.] majority of the exports from these three countries (Taiwan has been the single largest exporter of the goods during the investigation period), however only 50% of total imports from Taiwan were directly competing with BlueScope as other imports were exempt from import duties due to tariff concession orders (TCO's [sic.]) being in place. The Commission noted that the FIS price of the goods exported from Taiwan which were in direct competition with Australian industry were like goods to those produced by the Australian industry.

From the above analysis, the Commission found that galvanised steel exported from countries subject to current anti-dumping measures were not undercutting Australian industry's prices, although this analysis is less detailed than could be performed for the countries under investigation due to data limitations and the scope of the investigation.

Concerning Vietnam, the Commission noted that undumped galvanised steel from some exporters from Vietnam were [sic.] undercutting Australian industry's prices. The Commission assessed each market sector, comparing these undumped FIS prices during the investigation with Australian industry's prices. [footnote omitted]

The Commission then concluded that:

Based on the IPP model and the undercutting assessment, the Commission has found that undumped imports from Vietnam and imports from countries not subject to the investigation are also a cause of injury to the Australian industry. However, the Commission does not consider that this detracts from a finding that injury caused by dumped and subsidised imports are [sic.] not negligible. The Commission is of the view that due to the number of months in the investigation period in which dumped and subsidised imports influenced BlueScope's pricing, injury suffered by BlueScope from these imports is material. [underlining supplied]

With respect, we submit that the above conclusion lacks both proper reasoning and evidentiary support. We note the following:

- imports from Taiwan, Korea, China, which account for at least as much volume as the dumped imports from India, Malaysia and Vietnam, have been competing directly with BlueScope and the imports under investigation;
- undumped imports from Vietnam, which are likely to account for at least the same volume as total imports from India, were priced at a level which undercut BlueScope more than the dumped and subsidised imports under investigation;⁶
- the SEF does not indicate whether BlueScope's prices were undercut by imports from Taiwan, Korea and China as a whole, or separately;
- the imports from countries not subject to the investigation other than China, Korea, Malaysia and Taiwan, which accounted for more than half of all imports of the GUC, were apparently not considered by the Commission in its analysis.

⁵ Ibid, at pages 76 and 77.

⁶ See SEF, Figure 11 at page 75 which shows that undumped imports from Vietnam had the lowest price on average.

In light of the above, we submit that the Commission cannot make the finding that dumped imports from India, Malaysia, and Vietnam caused material injury to the Australian industry. If the Australian industry can be said to have suffered material injury, then such injury must have been caused by all the injurious factors, including competition from imports other than the dumped and subsidised imports from India, Malaysia and Vietnam, and the Applicant's own business decisions. The Commission is required to ensure that the injurious effect of any factors other than dumping and subsidisation are not attributed to the dumping and subsidisation of the GUC.

The fact that undumped imports from Vietnam were of the lowest price amongst the imports under investigation – and therefore must have been the “target” of BlueScope's own IPP policy – appears to have been disregarded, despite the fact that it was the single most important factor that caused the Commission not to attribute material injury to dumped imports in the previous investigation concerning the GUC, which was terminated. We find this inconsistent behaviour on the part of the Commission to be inexplicable.

D Attribution of employment and capital-raising injury

The SEF's failure to correctly apply the non-attribution principle is also highlighted in its analysis regarding the alleged injury in the form of “*reduced capital expenditure and reduced employment*”. Once again, it would appear that the analysis has done nothing but attribute all of the claimed injury of that nature to the dumped and subsidised imports under investigation. With respect, we wish to ask how it can be said that the minuscule market presence of the subject imports could have affected those indices?

It is well known that BlueScope's Australian operation has been profitable overall during the POI. Employment trends within a company such as BlueScope cannot be examined at the “galvanised steel” level in isolation. It is well known that BlueScope has entered into a number of arrangements concerning wages and employment since 2015, and that these arrangements substantially contributed to the AUD 60 million payroll tax deferral provided to it by the State government.

Further, and as mentioned in our previous submission, in recent times BlueScope has not had the capacity to fully supply all of its product lines to the market.⁷

BlueScope cannot have suffered material injury in the form of losses of employees and an inability to attract capital expenditure, caused by dumped and subsidised imports of the GUC alone or at all, when those imports accounted for only 5% of the market and were themselves undercut by other imports.

Indeed, we query how it is that employment and capital-raising injury can be said to have occurred at all, when BlueScope's financial performance has been at such a high level.

E Lack of holistic analysis of the Australian industry as a whole

We note the SEF's adoption of a market sector based analysis. It is understandable that two sectors – in this case the building and distribution sectors - should be given more focus, due to the fact that the imports under investigation mostly compete in those sectors. However, the Australian industry's performance in other market sectors, whether it has been suffering injury or performing well in those sectors, must still be given full consideration. Ultimately, it is the Australian industry producing like goods as a whole that must be the subject of the Commission's determination of material injury and causation. The analysis cannot be limited to the Australian industry's performance in a particular market sector.

⁷ As is evident from BlueScope's external sourcing of the GUC and other steel products. This is also obvious in light of its total despatch of 2.89 million tonnes of steel products, as compared to its 2.6 million tonnes of crude steel production capacity. See, for example - https://www.bluescope.com/media/2212/1-briefing-day-presentation_main-asp-final.pdf

Instead, the Commission must consider the Australian industry's performance in each sector and must form a holistic view as to whether the Australian industry as a whole has suffered material injury. If the Australian industry as a whole has suffered material injury, then the Commission must ask whether such material injury can be said to be caused by dumped and subsidised imports, and must ensure that any injury caused by factors other than dumped and subsidised imports under investigation are properly separated and not incorrectly attributed to the subject imports.

With respect, It is not enough to acknowledge that the Australian industry has performed well in some sectors,⁸ but has suffered injury in another sector or other sectors, and then not to combine the various considerations and factors to decide whether the injury overall could be considered to be material, and whether dumping and subsidisation caused material injury. Other factors and sources of injury are not mere "distractions" from the view that it is the dumped and subsidised imports that caused material injury to the Australian industry.

"Not negligible" injury to a particular sector into which the GUC are sold may be material in the minimalist terms that the Commission typically uses to assess materiality, but "not negligible" injury quickly subsides into immateriality when other factors are proven to have caused injury and where other sectors of the market for the GUC are not injured at all.

F Immateriality of injury caused by dumped and subsidised goods

The investigation must assess whether injury, at a material level, has been suffered by the Applicant directly as a consequence of the dumped and/or subsidised exports which are the subject of the investigation, and whether that material injury will continue.

Section 269TDA provides that the Commission must terminate an investigation if the dumped or subsidised imports were negligible in volume, or if there was no dumping or only *de minimis* dumping. The Commission must also terminate an investigation where any injury caused by dumped and/or subsidised imports is found to have been negligible

It would appear to us that the SEF has conflated the non-negligible volume of dumped and subsidised imports with the question of whether there has been non-negligible injury.

In this regard, may we again draw the Commission's attention to the following matters:

- the presence in the market of undumped imports from Vietnam;⁹
- the presence in the market of imports from other countries, including countries already subject to dumping measures;¹⁰
- the Australian industry's differing performances in each market sector;¹¹
- the Australian industry's own pricing behaviour and strategy;¹²
- the Australian industry increasing its volume by 25% since FY2013/14;¹³
- the Australian industry increasing its market share by 15% since FY2013/14;¹⁴
- the Australian industry improving its profitability substantially since FY2013/14;¹⁵
- the volume of imports under investigation having *decreased* by 30% since FY2013/14;¹⁶

8 See SEF at page 61.

9 *Ibid* at page 76.

10 *Ibid*.

11 *Ibid*, at page 77.

12 *Ibid*, at page 78.

13 *Ibid*, at page 63.

14 *Ibid*, at page 64.

15 *Ibid*, at page 61.

16 *Ibid*, at page 63.

- the market share of imports under investigation having *decreased* by 35% since FY2013/14;¹⁷
- the import volume and market share for India having *decreased* by 80% since FY2013/14;¹⁸
- the import volume from “other imports” being maintained at the same level since FY2013/14;¹⁹
- the determination that the Australian industry did not suffer material injury caused by dumped imports in relation to the FY2013/14 period, when the GUC also occupied between 4% to 5% of the total market (the same level as the dumped imports the subject of the current investigation).²⁰

Apart from the injurious factors which are unrelated to dumping and subsidisation, we highlight that the Australian industry’s stellar performances in terms of market share, volume and improved profitability are not simply indications that it did not suffer material injury in relation to those aspects. These factors must be considered as part of the “material injury” determination and are to be weighed against the other aspects in relation to which “injury” can be said to exist. Once again, it is the Australian industry, and its performances as a whole that is the only relevant question. It is incorrect to disregard “no-injury” and “other factors” in determining whether the Australian industry suffered material injury caused by dumping. To do so is to ignore relevant considerations rather than to genuinely take those considerations into account.

It is also relevant to note the *Ministerial Direction on Material Injury* which provides that

*an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping and subsidisation.*²¹

In Investigation No 249, concerning FY2013/14 as the investigation period, the Commission determined that the Australian industry did not suffer material injury caused by dumping. The Australian industry’s condition and financial performances have been ever improving since FY2013/14 - which is quite the contrary to being “weakened”. It follows that if the Australian industry was not materially adversely affected by dumping back then, then it is even less likely to have been adversely affected during the POI given what has happened since.

We urge the Commission to consider these factors in a holistic, progressive and consistent manner and to again find that the Australian industry has not suffered material injury caused by dumped and subsidised imports.

G Targeted “Import Parity Pricing” policy?

The SEF indicates that the only direct connection between the alleged injury and the dumped and subsidised imports under investigation is based on BlueScope’s claim that it identified the imports under investigation as a “threat” and target for Import Parity Pricing (“IPP”). Further, the SEF considers that this practice of BlueScope should be given significant weight in determining the causation of material injury, on the basis of the “*number of months in the investigation period in which dumped and subsidised imports influenced BlueScope’s pricing*”. That is, the number of months in which BlueScope claims to have implemented its IPP against the imports under investigation, rather than other sources of imports, is said to be the key consideration. In this regard, we would like to express a number of concerns.

17 Ibid, at page 64

18 Ibid, at pages 63 and 64.

19 Ibid, at page 63.

20 See Termination Report 249, at page 49.

21 See *Ministerial Direction on Material Injury 2012* at page 3.

Firstly, BlueScope does not appear to have come forward with its “effective threat” based IPP argument – a practice that apparently pinpoints certain imports (in this case, the GUC) and not others - until the very last stage of the investigation. This is certainly the first time that interested parties have heard of this surgically precise IPP practice since the global IPP practice was first introduced by BlueScope to anti-dumping investigations many years ago.

Secondly, this new IPP involves (apparently) the self-determination, by BlueScope, of what it considers to be the “effective threat” which it *“must seek to meet”*.²² BlueScope claims to have predominantly nominated the imports under investigation as the “effective threat”. BlueScope claims that it was open for it to do so because it anticipated that other sources of imports would become subject to anti-dumping measures following certain anti-circumvention inquiries and therefore would not pose an “effective threat”.

Surely the Commission is not going to give any weight to an IPP policy pursuant to which BlueScope decides for itself what import competition it wishes to “target” and to “defeat”, without reference to the import competition that is actually competing in the market place at the lowest price level?

The fact is that imports from India, Vietnam and Malaysia compete in the same market as other imports and BlueScope. The Applicant’s own finger-pointing at the price of a particular import source cannot make that price more powerful or more “injurious” than other prices on the market.

Prices are the results of a functioning market. The Applicant cannot simply decide to treat one price as an “effective threat”, respond only to that threat, and then claim to be quarantined from the influence of lower or similar price competition in the market. It is simply not possible for the Applicant to attribute the claimed “threat” or “injury” to only the source it nominates. Given, also, that the so called source of the “effective threat” – especially sales from India - accounted for an insignificant market share, and did not prevent BlueScope from gaining more and more market share and volume, Essar questions how BlueScope can legitimately attribute its claimed injury to the nominated “effective threat”. Any such threat apparently was not realised.

Thirdly, the SEF’s analysis of the so called targeted IPP does not indicate the specific source of imports being used by BlueScope, and whether they were the prices of the undumped imports from Vietnam – which were the lowest price on the market amongst the imports under investigation. One must have to assume they were.

BlueScope’s “targeted” IPP based pricing decisions are not representative of behaviour driven by price competition on the market. The development of a “targeted” IPP policy is a tactic directed towards securing protection against import competition regardless of the merits of an anti-dumping investigation, such as this one. Material injury and causation analysis calls for an objective examination of the economic circumstances involved.

The Commission must not let itself be manipulated by the Applicant for the purpose of ignoring lower or similarly priced import competition as a cause of injury – if there is any.

H Exports from India should not be cumulated with exports from Vietnam and Malaysia

It appears to us the SEF has paid only cursory attention to the issue of cumulation of exports from India, Malaysia and Vietnam. The SEF appears to suggest that exports from these three countries are appropriate for cumulation simply because the volumes and dumping margins (and the subsidy margin for India) are not negligible.²³

²² See SEF at page 72.

²³ Ibid, at page 71.

We refer to the legislative requirement to consider the conditions of competition between the imported goods subject to investigation, and between the imports under investigation and the Australian industry, before cumulation can be appropriately adopted.²⁴ Clearly, this is a more substantive and rigorous assessment than simply noting whether volumes and dumping margins are not negligible.

In this context, we refer to the following conditions of competition for the Commission's consideration:

- the volume of Indian imports is substantially lower than those of Malaysia and Vietnam;
- the volume of Indian imports has been decreasing sharply over the last three years, in contrast to increases in imports from Malaysia and Vietnam;
- the steady market share of all other imports;
- the level of price undercutting by Indian exports is notably lower (3% to 7%) than Malaysia (2% to 13%) and Vietnam (6% to 24%); and
- the Applicant itself imported the goods from India.

Consideration of these issues shows a clear distinction between imports from India, and imports from Malaysia and Vietnam. The inclusion of Indian imports in the investigation has bundled them together with imports that have a notably different effect on the market. Further investigation and assessment should ensure that imports from India are not inappropriately cumulated with those from Vietnam and Malaysia.

In conclusion, we submit that the analysis set out in the SEF lacks the required depth and rigour to support a finding that material injury has been suffered as a consequence of dumped and subsidised exports from India, Malaysia and Vietnam. The inappropriate cumulation of goods exported from India in particular has caused a material injury finding against imports which make up approximately 1% of the total market share, and that were found to have undercut BlueScope's prices to a lesser degree than *undumped* imports.

We respectfully request the Commission to revisit these issues, and to find that dumped and subsidised imports from India did not cause material injury to the Australian industry, and that no duty should be imposed in relation to exports from India.

Yours sincerely



Charles Zhan
Senior Associate

²⁴ See *Customs Act 1901*, Section 269TAE(2C).