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15 October 2024

The Director – Investigations
Investigations 4
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory
2601

By email

Dear Director

thyssenkrupp Materials Australia
Inquiry 643 re steel mesh from China – anti-circumvention

1 Is there an inquiry underway

On 17 May 2024 our client submitted Section A of its Importer Questionnaire to the Commission. One of the questions related to a visit to our client's premises to discuss the case and to verify the data submitted by our client.

On 9 July 2024 our client submitted the remaining Sections B, C and D of its Importer Questionnaire response to the Commission. We also provided the Commission with our client's submission dated 8 July 2024.

The Commission has not asked us any questions with respect to our client's information. No verification visit has been proposed. Indeed, the Commission has not initiated any communications with us in relation to our client's participation in this inquiry at all.

This inquiry was initiated on 9 May 2024. Had the statutory period for the Commissioner to decide to terminate the inquiry been complied with, the Commission would have had to terminate this inquiry before 27 August 2024.

On 20 August 2024 the Commission granted itself an extension of time.[1] The relevant Anti-Dumping

[1] We respectfully request a copy of the instrument by which the Minister delegated the power to grant such an extension to the Commissioner, for our future reference.

Notice advised that the *“new milestone date”* for *“the”* Statement of Essential Facts (“SEF”) to be placed on the public record was 24 January 2025. That extension amounts to five months, which is roughly the same amount of time that the Commission had to reach that stage of its inquiry in the first place.

The Commission is required to give the Minister reasons for a request to extend time. The Anti-Dumping Notice records that the extension was requested *“because of the commission’s changing business requirements”*. We have seen this explanation in one or two other such Notices. With respect, this is no explanation, or at least not a useful one. It is an obfuscation. We request the Commission to advise of the actual justification for extending-out the SEF date to 10 months after initiation, and its reasonableness. For example, what changed with respect to the Commission’s business requirements to justify the potential time to be taken-up by this inquiry to such a degree?

As to the reasonableness of the extension, we believe that the Commission has all the information it needs, and that therefore the extension is unreasonable. We are not cognisant of any new fact or legal interpretation that could spring rabbit-like out of a hat and magically cause the Commission to decide that steel mesh was a slightly modified version of rod-in-coil. As explained above, there is a legislative assumption that it should be possible for the Commission to decide to terminate an anti-circumvention inquiry based on any application within the first five months of the inquiry. That Infrabuild’s application is ill-founded made a correct termination of the inquiry before now even safer and easier. However, the Commission has not done so.

2 Has Commission forgotten that it can terminate this inquiry

The 20 August 2024 Anti-Dumping Notice categorically states that a recommendation will be made to the Minister *“in a final report now due on or before 10 March 2025”*.

That advice is a misconstruction of the statutory provisions applicable to an anti-circumvention inquiry such as this. No recommendations are made to the Minister, no final report is reached or published, and an SEF is not reached or published, in cases where the Commissioner becomes satisfied that no circumvention activity has occurred and terminates the inquiry before the SEF. It is only if the Commissioner does not terminate the inquiry before the SEF that the Commissioner must proceed to make recommendations to the Minister. The Anti-Dumping Notice’s positivism about the publication of the SEF and the making of its recommendation to the Minister passes-over the legal fact that termination before the SEF date obviates the need to publish an SEF or make any recommendations to the Minister at all. Saying that a recommendation <u>will be made</u> to the Minister ignores the fact that an SEF <u>is not reached</u>, and a recommendation <u>is not made</u> to the Minister, if the Commissioner terminates the inquiry.

The lack of attention to legal detail, and the mindset that is betrayed by this error, are of great concern to our client.

3 When procedure itself becomes an unwarranted trade measure

The threat to alter a dumping notice, communicated by an inquiry such as this, and weaponised by the punitive ability of the Minister to backdate the alteration to a date well in the past, achieves an outcome that an ill-founded application should not and cannot. Where the Commission initiates an inquiry with respect to what we might kindly refer to as a “curious” application such as Infrabuild’s, and then lacks decisiveness in realising that the application has no merit and that its inquiry should be terminated, and then even goes so far as to extend its inquiry, the fear of importers about the risk of punitive duties grows.

Simply "parking" an anti-circumvention inquiry for a long period of time is enough to slow down or stop trade activity in the products complained against. This starves important Australian industries (in this case, the construction, building, and housing industries) of needed products and forces prices up, without there being any proven legal justification to do so. Not only is such an outcome WTO-illegal, it is also contrary to the national interest.

4 Applicant's argumentation makes no sense

We are in no doubt that the proposition that the application is ill-founded has been established by the information and submissions that are already before the Commission. That steel mesh is not a "slightly modified" version of the goods the subject of the dumping notice, which is rod-in-coil, seems to us to be unarguable.

With respect, and to press home our point, the Australian industry's questionnaire response is ridiculous. Fundamental misconceptions and weasel words abound.

(a) *In the Australian market, the end use of the overwhelming majority of the goods, and the circumvention goods are identical, that is, as reinforcing material in concrete. In other words there is limited use for the goods other than as the circumvention goods.*[2]

This is bizarre. The applicant either does not understand or is consciously misrepresenting the concept of "end use". An end use of *rod-in-coil* is for it to be substantially transformed into *steel mesh*. The end use of *steel mesh* is for it to be embedded in *reinforced concrete*. The ultimate application for which rod-in-coil is designed is to be "manufactured" or "processed" or "fabricated" – which ever term or terms you prefer – into steel mesh. The ultimate application for which steel mesh is designed is to be encased in and become part of concrete slabs. Rod-in-coil cannot be encased in concrete.

The applicant admits all of this in the sentence *"[i]n other words there is limited use for the goods other than as the circumvention goods".* Precisely! The ultimate use for which rod-in-coil is designed – ***its end use*** - is for it to be processed into steel mesh. Then, the ultimate use for which steel mesh is designed – ***its end use*** - is to form reinforced concrete.[3] The Australian industry appears to be implausibly ignorant of the industrial definition of end use.

(b) *Yes, all InfraBuild's Australian (mesh manufacturing) customers of the goods can readily interchange between the goods and the circumvention goods. In other words, rather than purchasing rod in coil and manufacturing steel mesh sheets, the customer can purchase steel mesh sheets for supply into the Australian market.*[4]

Again, completely bizarre. A mesh manufacturer – ***the customer*** - buys rod-in-coil to manufacture mesh. They cannot use steel mesh to manufacture steel mesh. The applicant "mashes up" mesh and rod-in-coil references continually. For example, when Infrabuild says that *"…customers, without the ability to manufacture mesh, i.e. builders and pre-casters… can readily interchange between the goods processed into a mesh form or the circumvention goods"*, it is literally saying that such customers can readily interchange between steel mesh and… steel mesh.

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2 Anti-Circumvention Inquiry No. 643 Australian Industry Questionnaire, response to question 9(b).

3 Other end uses are the processing applications involved in the production of springs, nails, wire hangars, fences, and the like.

4 Anti-Circumvention Inquiry No. 643 Australian Industry Questionnaire, response to question 9(c).

It may be Infrabuild's aim to put all steel mesh manufacturers out of business, however that is not something the Commission should support nor can it be achieved in the way Infrabuild proposes.

(c) *The slight modification of the rod in coil results in the steel mesh sheets. There is no alteration of the carbon content or chemistry between the rod in coil and the steel mesh sheets.*[5]

The applicant confines the question of slight modification to *"the chemistry"* of rod-in-coil. Like us, the Commission will have seen hundreds of coils of wire rod. Does a coil of wire rod look anything like steel mesh? And how did the rod-in-coil become steel mesh? This came about because there was a substantial transformation of the rod-in-coil by way of the industrial processes of straightening, cutting, bending and welding the rod-in-coil into a different product.

(d) *The goods and the circumvention goods follow both the same channels of trade and distribution into the Australian market, but the circumvention goods have opened up a second, alternate channel of trade and distribution into the Australian market, that by-pass Australian based mesh manufacturers.*[6]

More mash-ups. Rod-in-coil follows a *"channel of trade"* from foreign exporter to steel mesh manufacturer. Steel mesh follows a *"channel of trade"* from foreign exporter to distributor or builder/caster. A steel mesh manufacturer that purchases steel mesh to on-sell to a builder caster is a distributor with respect to the steel mesh.

5 Distinguishing substantial transformation from slight modification

To determine if goods have been slightly modified for the purposes of Regulation 48(2) of the *Customs (International Obligations) Regulation 2015*, the Commission may have regard *"to any factor… consider[ed] relevant"*, including any of the factors listed in Regulation 48(3). Regardless of those factors, it is important to note that *"slightly modified"* is not defined other than by its literal meaning, and that consideration of any relevant factors could not reverse an objective conclusion that the goods concerned have been more than *"slightly modified"*. A definition of those words could alter their plain meaning, but factors that could speak to the degree of the modification cannot.

Amongst the factors listed in Regulation 48(3) is *"tariff classifications and statistical codes for each good"* (subparagraph (m)). In a contextual sense we would think this to be a particularly apt factor to take into account, given the relevance of the tariff system to trade, product difference, anti-dumping, and industry classification.

The Australian Harmonized Export Commodity Classification ("AHECC") is based on the World Customs Organization's Harmonized Commodity Description and Coding System ("Harmonized System, or HS"). The Harmonised System is a multipurpose international nomenclature used to describe and categorise goods. The first six-digits of each AHECC code correspond exactly to the most detailed level of the HS.[7]

The HS system is organised into a hierarchical structure that includes Sections, Chapters, headings, and subheadings. The first two digits of an HS code designate the HS chapter, which provides a high-level

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5 Ibid, response to question 9(d).

6 Ibid, response to question 9(h).

7 Australian Bureau of Statistics, *Australian Harmonized Export Commodity Classification (AHECC)* (Released 3/12/2021)

grouping that defines the nature of the products. The HS system includes 96 chapters (Chapters 1 to 97, with Chapter 77 reserved for future use), and more than 5,000 six-digit product categories.

According to the *Rules of Origin – Handbook* published by the World Customs Organization, a change in tariff classification in a *heading* or *subheading* level, i.e. the second or the third pair of the HS code, is considered the key indicator for identifying whether a *"substantial transformation"* of one product to another has occurred:

> *If it is assumed that the current rules of origin are predominantly based on the criteria of substantial transformation (especially, change in tariff classification), rules of origin prefer the stage of final production to that of intermediate production which essentially represents component production.*[8] [emphasis added]

Also:

> *A good is considered substantially transformed when the good is classified in a heading or subheading (depending on the exact rule) different from all non originating materials used.*[9]

The concept of *"substantial transformation"* as primarily applied in the context of rules of origin is also directly relevant to the notion of *"slight modification"* or *"minor alteration"*. Changes in the second or third pair of an HS code are considered sufficient to constitute a *"substantial transformation"* for rules of origin purposes. It therefore follows that a change in the first pair, being a change in Chapters that reclassifies the good into a different Chapter, represents a fundamental change between the upstream product and the downstream product. Such a change indicates the application of different industrial processes and significant change in the nature, purpose, characteristics, and end use of the downstream and upstream products.

The "goods" in the current case, (rod-in-coil) are classified under HS codes 7213.91.00-44 and 7227.90.90-02, which fall under *Chapter 72 Iron and Steel*. The "circumvention goods", however, are classified under HS code 7314.20.00-24, which falls under *Chapter 73 Articles of Iron and Steel*.[10] This change in classification is a Chapter shift.

We analysed anti-circumvention cases in Australia for the purposes of our earlier submission and concluded that the concept of slight modification as applied in those cases could not be applied to the facts of this one. In this submission we present an analysis of anti-circumvention cases from other jurisdictions (Canada, the EU and the US) from which we conclude that a shift in HS classification from one Chapter to another readily dictates an anti-circumvention conclusion that the downstream product has not been subjected to a merely slight modification.

6 Comparative anti-circumvention practices regarding slight modification

Iron and steel products under investigation for "slight modification" typically involve three types of modifications:

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8 World Customs Organization, *Rules of Origin – Handbook*, page 9.

9 Ibid.

10 *Consideration Report No. 643 - Application for an Anti-Circumvention Inquiry into the Slight Modification of Goods - Rod In Coil Exported from the People's Republic of China* (23 April 2024), page 15.

(a) the addition of elements to alter the chemical composition or form alloys;

(b) surface modifications like painting;

(c) slight expansion of dimensions.

Slight modification – changes in composition and coating

In many anti-circumvention cases for iron and steel products, minor changes in the chemical composition or coatings of products have constituted slight modification(s) that justified the findings against the "circumvention goods" concerned.

In EU case R705, regarding certain corrosion-resistant steel from China, the modification was a slight alteration of the chemical composition and coatings. The circumvention goods were easily produced on the same production lines and used for the same applications. Notably, the HS codes of the goods and the circumvention goods remained within the same first four digits, i.e. the same Chapter and the same headings.[11]

Similarly, in a US anti-circumvention case concerning cut-to-length carbon steel plates from China, the slight modification was the addition of alloying elements to classify the steel as alloy steel. Both the goods and the circumvention goods were classified to Chapter 72.[12]

There is also Australian administrative practice to the same effect, which we do not need to explain to the Commission.

Slight modification – expanding dimensions

Another common type of slight modification is expanding the dimensions of goods. In these cases, the circumvention goods had slightly larger diameters, but their essential use remained unchanged.

In EU case R252 regarding molybdenum wires from China, both the goods and circumvention goods shared the same HS code, with differences only in molybdenum content and wire diameter. The goods contained at least 99.5% molybdenum with a diameter of between 1.35 mm and 4.0 mm. The circumvention goods against which the finding was made contained 97.5% molybdenum and had a diameter of between 4 mm and 11 mm.[13]

In a US anti-circumvention case involving alloy steel wire rod from Mexico, the difference was in the diameter of the wire rods in circumstances where they still fell to be classified under the same first six digits of the HS code. The goods subject to measures were wire rod of approximately round cross-section 5.00 mm or more, but less than 19.00 mm. The circumvention goods were wire rod with actual diameters between 4.75 mm and 5.00 mm. The 0.25 mm difference did not *"alter the expectations of the ultimate users, the use of the merchandise, and the channels of marketing in any meaningful way"*.[14]

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11 *Commission Implementing Regulation (EU) 2018/186 of 7 February 2018* (C/2018/0599)

12 *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China* (FR Doc. E9-19339)

13 *Council Implementing Regulation (EU) No 14/2012 of 9 January 2012* (32012R0014)

14 *Carbon and Certain Alloy Steel Wire Rod From Mexico: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 2012-24110 (77 FR 59892)

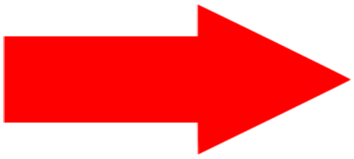
7 This circumvention allegation does not align at all with “slight modification”

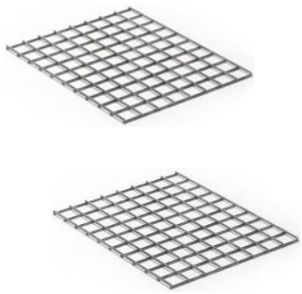
The transformation of rod-in-coil to steel mesh does not align with any of the above slight modification types:

(a) The process of transforming rod-in-coil into steel mesh does not involve merely adding elements or altering chemical composition to form alloys or coatings. The change is a structural and end use change which is to be contrasted to a change to the internal composition or external coating with no different end use.

(b) The substantial transformation of rod-in-coil into steel mesh is a reworking of the former to make it into the latter product, which is a different product suitable for a different end use. These are fundamental changes in the composition, structure and form, brought about by separate industrial processes beyond steelmaking that create a different product.

We have not identified a case in another jurisdiction where something as substantial as, or anything like, the conversion of:





a massive 1.5-2.0m diameter wire coil weighing around two tonnes

that is heated/pressure straightened, cut to measure, bent and welded, by a downstream industry using capital equipment that is completely different to the capital equipment involved in manufacturing rod-in-coil

into rectangular articles of steel mesh for reinforced concrete

has been said to represent a “circumvention” of a trade measure.

In conclusion, we submit that a Chapter-level HS code such as a change from rod-in-coil to steel mesh is recognised as a *“substantial transformation”* in trade and industry terms; and that such a transformation is well-distinguished from *“slight modification”* and is easily apparent on the facts of this case. In contextual terms, steel mesh is not produced by the industrial activity which established that dumping had caused it material injury. There can be no ability to “extend” anti-dumping measures to a downstream industry. In this case, that industry has not come forward with an anti-dumping application, and Infrabuild’s intentions to get that industry to shut down its machines and buy Infrabuild’s downstream steel mesh is as anti-competitive as one could imagine.

8 Request for termination of this inquiry

An available dictionary meaning of word “disingenuous” is:

> *not candid or sincere, typically by pretending that one knows less about something than one really does*

We do not fault the Commission for giving the applicant the benefit of some doubt by initiating the inquiry to take a better look at the accuracy and validity of the claims made. Arguably, the initiation threshold is quite low – *“that there appear to be reasonable grounds for asserting that one or more circumvention activities in relation to the original notice have occurred”* – being the grounds that are misrepresented in the application. The Head of Sustainability, Innovation and Trade at Infrabuild, who wished to remain incognito for the purposes of making the application but is openly identified in any online search of the relevant words, signed a declaration that, to the best of his knowledge and belief, *“the information contained in th[e] application… provides reasonable grounds for the conduct of an anti-circumvention inquiry… and… is complete and correct”*. We submit that this is not the case.

We ask the Commission, having now recognised that the information:

- is not correct;
- has been presented in an overly imaginative manner by the applicant; and
- cannot support an alteration to the dumping notice,

to terminate this inquiry as soon as practicable.[15]

Yours sincerely

Daniel Moulis
Partner Director

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15 If the Commission is reluctant to do so, and we are not clear why that might be the case, the Commission should place a File Note on the public record announcing that no alteration will be proposed to the notice with respect to the inclusion of steel mesh therein, whether the investigation is terminated or not. This trade-inhibiting anti-competitive charade with respect to steel mesh needs to be called-off now.