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commercial + international

12 October 2021

**The Director**  
**Investigations 4**  
**Anti-Dumping Commission**  
**Level 6, 215 Spring Street**  
**Melbourne**  
**Victoria 3000**  
**Australia**

By email

Dear Director

## **Investigation 558 – Aluminium zinc coated steel ( $\geq 600\text{mm}$ )**

### **Comments of Dongkuk Steel concerning Statement of Essential Facts**

As you know we represent Dongkuk Steel Mill Co., Ltd. (“Dongkuk”) in this investigation.

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#### **A Introduction**

We refer to the Statement of Essential Facts for this investigation (“SEF”), published by the Anti-Dumping Commission (“the Commission”) on 22 September 2021.

Dongkuk takes this opportunity to provide its comments concerning the SEF, as invited by the Commission. We note that the Commissioner is required to have regard to the comments of interested parties both in the ordinary course of his investigation, in order to decide whether to terminate the investigation with respect to the exports from Dongkuk under Section 269TDA of the *Customs Act 1901* (“the Act”), or in finalising his recommendation to the Minister under Section 269TEA(3)(a)(iv) of the Act.

## B SEF confirms BlueScope is not injured

In Dongkuk’s submission to the Commission dated 6 September 2021 (hereinafter “the Dongkuk Injury Submission”) we observed, based on the Commission’s industry verification report (“the Industry Report”) concerning BlueScope Steel Limited (“BlueScope” or “the Applicant”), that BlueScope has not been and is not materially injured.<sup>1</sup>

In particular, we referred to:<sup>2</sup>

- 1 BlueScope’s strong performance as reflected in its FY2021 financial report, which tells of a period of strong growth that was sustained in the investigation period (“the POI”) and that accelerated thereafter into the subsequent financial year.
- 2 Improved conditions during the POI with respect to almost all of the key factors considered in the Industry Report, including:
  - a) sales volume;
  - b) market share;
  - c) price effects;
  - d) profit and profitability;
  - e) return on investment;
  - f) productivity; and
  - g) capital investment

In the SEF, the Commission states that it is preliminarily satisfied:

*that the Australian industry has, during the investigation period, experienced injury in the form of:*

- *reduced sales volume*
- *price depression*
- *reduced profit*
- *reduced profitability.*

However, the opposite conclusion should be reached. This is because the SEF’s analysis for each of these factors in fact re-affirmed Dongkuk’s view that the Australian industry did not experience injury during the investigation period.

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<sup>1</sup> See, EPR558/56, at Part B.

<sup>2</sup> Ibid, pages 3 to 6.

Regarding sales volume, the SEF finds:

*BlueScope's volumes of its like goods over the injury period have generally trended upwards having increased overall by approximately 4.8%.*<sup>3</sup> [underlining supplied]

and:

*BlueScope experienced:*

- *a reduction in sales volumes of approximately 1%, albeit in a market that contracted approximately 5%*
- *increased market share*<sup>4</sup>

Regarding price depression, the SEF finds:

*...BlueScope has experienced improving unit selling prices across the injury analysis period.*

...

*After assessing the analysis presented in respect of the injury analysis period, as well as the more granular analysis for the investigation period, the commission considers that:*

- *price depression is not evident across the injury analysis period, however appears to be emerging during the investigation period*
- *price suppression is evident throughout the injury analysis period into the early stages of the investigation period, however appears to have dissipated toward the latter stages of the investigation period.*<sup>5</sup> [underlining supplied]

Regarding profit and profitability, the SEF finds:

*BlueScope has experienced injury in the form of loss of profits and reduced profitability during the injury analysis period and an improvement in the period of investigation.*<sup>6</sup> [underlining supplied]

and:

*BlueScope experienced:*

...

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<sup>3</sup> SEF, at page 74

<sup>4</sup> SEF, at page 99

<sup>5</sup> SEF, at page 77

<sup>6</sup> SEF, at page 78

- *improved profit and profitability, such that a break-even point on sales had been achieved at the conclusion of the period* [underlining supplied]

In relation to the other factors of which BlueScope complains, namely productivity, capital investment, and return on investment, the SEF considered that *“the evidence does not support a finding of injury in respect of these factors during the investigation period”*.<sup>8</sup>

Accordingly, the SEF’s analysis suggests that there is no or insufficient evidence for the Commissioner - and accordingly not enough evidence for the Minister - to be satisfied that BlueScope has been materially injured or is being caused material injury, whether or not caused by effects of dumping.

We recall that the notion of “injury” under the Anti-Dumping Agreement refers to *“material injury”*.<sup>9</sup> The Act refers to “material injury” in a way that is consistent with that definition.<sup>10</sup> The Ministerial Direction on Material Injury (“the Material Injury Direction”) correctly reflects the fundamental requirement of materiality:<sup>11</sup>

*I direct that identification of material injury be based on facts and not on assertions unsupported by facts.*

*Consistent with Australia’s international trade obligations under the World Trade Organization’s Anti-Dumping Agreement and Agreement on Subsidies and Countervailing Measures, I would expect it to be shown that the industry is suffering injury, and that the injury caused by dumping or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.*

*Subject always to the law, I direct you to consider material injury to be injury that is not immaterial, insubstantial or insignificant. I direct that there is no threshold amount that is capable of general application. Rather, identifying material injury will depend upon the circumstances of each case and will differ from industry to industry and from time to time. A material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance.* [underlining omitted]

Thus, it would be insufficient, and indeed incorrect, to determine the existence of “injury” by identifying some form of injury that is *“immaterial, insubstantial or insignificant”*, and to give the word “material” a separate function, based on the degree of connection between dumping and that injury. Plainly, injury that is not material, substantial and significant is not material injury. If the economic condition of an

<sup>7</sup> SEF, at page 100.

<sup>8</sup> SEF, at page 80

<sup>9</sup> Anti-Dumping Agreement, Footnote 9:

*Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.*

<sup>10</sup> For example, Section 269TG (2)(b) refers to “material injury to an Australian industry” as a standalone notion to the notion of “dumping” under (a) and the causative effect of dumping, governed by the phrase “because of that”.

<sup>11</sup> Ministerial Direction on Material Injury, April 2012, ACDN No.2012/24.

industry does not reflect symptoms of injury, then there is simply no injury. An industry that is not injured cannot be materially injured because of the level of dumping.

We submit that in the present case BlueScope's performance during the investigation period does not support a finding of injury. Any injury it had experienced, if at all, appeared to be immaterial, insubstantial and insignificant. If there was injury, then it can only have been so slight as to be the kind of injury that was not or is no greater than injury "*likely to occur in the normal ebb and flow of business*".

As the SEF notes, the Material Injury Direction also provides that:

*In considering the circumstances of each case, the commission must consider whether an industry that at one point in time is healthy and could shrug off the effects of the presence of dumped products in the market, could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping.*

This direction relates to the determination of the causative effect of dumping on an already identified state of injury, or in the Ministerial direction's words, the "*materiality of injury caused by a given degree of dumping*". It does not relate to the determination of the existence of injury that is "*not immaterial, insubstantial or insignificant*". In any case, the SEF's analysis of BlueScope's economic condition demonstrates that the Ministerial direction question in relation to the investigation period must be answered in the negative. BlueScope experienced sharp growth and strong recovery in the investigation period, in comparison to the previous years, and has continued that cycle of recovery since then. As Dongkuk noted in its previous submission:<sup>12</sup>

*With the benefit of the latest financial report covering the post POI injury period, the Commission can now have confidence in the fact that BlueScope's performance during the POI was the start of a strong growth cycle. BlueScope has achieved a record level of financial success in the period immediately following the POI. This is not a sudden reversal of a materially injured economic condition. This is the continuation of an uninjured economic condition that shows no sign of abating.*

*We refer to the following statements by BlueScope concerning its investment and growth outlook:*

*In Australia, the business continues to pursue inter-material growth in value added products, such as COLORBOND® steel and TRUECORE® steel, with both product suites seeing continued growth in demand. To support further growth and address current operating constraints, BlueScope is in the initial phases of assessing additional coating capacity at Port Kembla.*

*Accordingly, we expect the Commission will find that BlueScope's economic condition, in so far as the POI is concerned, was not "materially injured". Rather, it was more likely to be part of the normal flow of its business, backed by strong and healthy Australian market conditions.*

*In this context it is also important to recognise that BlueScope achieved an EBIT of AUD305.1 million in FY2020 and AUD674.3 in FY2021. BlueScope's "metal coated" and "painted" products typically account for more than half of its ASP business unit sales volume each year.*

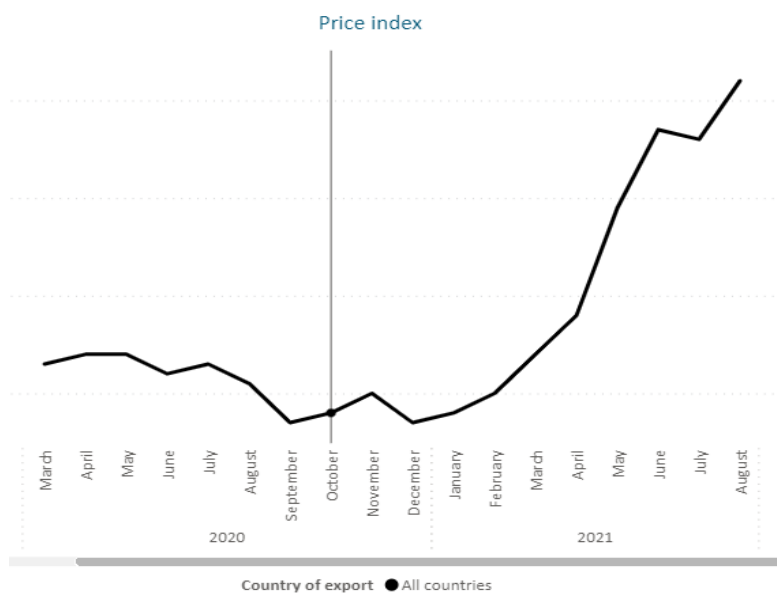
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<sup>12</sup> Dongkuk Injury Submission, at page 6

*As an integrated producer of like goods, and with the like goods also used as a feed for its premium painted product, it is only logical to have regard to the overall financial performance of the ASP business unit in order to gain a correct understanding of whether it is experiencing “material injury”. This is a relevant and important factor in considering BlueScope’s material injury assertion, but hardly addressed in either BlueScope’s application or the Industry Report. BlueScope has been operating at a significant profit level. We assume that a substantial part of that profit is attributed to products which uses the like goods as a feed, as well as products that are sold to customers who buys both the like goods and non-like goods from BlueScope in order to qualify for its rebate structure. This require the Commission to closely scrutinise BlueScope’s proposition that its sales of like goods, in insolation, were somehow unprofitable – this is further discussed below at Part C of this submission. [footnote omitted]*

The information referred to in Dongkuk’s submission above is directly relevant to the business sector of BlueScope with respect to the like goods, and is directly on point with respect to the question posed in the Ministerial Injury Direction to which the SEF refers. BlueScope’s own information shows that its condition was not “weakened” and that it was entirely capable of and did “shrug off the effects of the presence of dumped products in the market”. The fact is that BlueScope’s economic condition was more healthy in the investigation period as compared to the previous two years, and that its economic condition has become even more robust since then, to a level not experienced at any other time in the injury investigation period. All of this has been achieved by BlueScope without the need for any anti-dumping measures on the subject imports.

More specifically, BlueScope’s sales revenue and profitability since the investigation period dispel any speculation that a price depression situation “appears to be emerging”. It did not emerge. The fact is that the Australian market for the GUC and like goods has skyrocketed since the investigation period. This is as reflected in BlueScope’s financial report for FY2021. It is also evident from the Commission’s TRINDEX for the GUC pertaining to the post-POI period:<sup>13</sup>



<sup>13</sup> <https://www.industry.gov.au/data-and-publications/trade-remedy-index>

At the same time, BlueScope is likely to have at least maintained, if not further strengthened, its dominant position, which was at a level exceeding 85% market share during the investigation period.<sup>14</sup>

We respectfully submit that the positive evidence on the Commission's record, as summarised in the SEF itself, points to a finding that there is no or insufficient evidence supporting BlueScope's material injury claim. As such, the Commissioner should terminate the investigation in relation to exports from Korea under Section 269TDA(13) of the Act, on the basis of negligible injury by reason of the exports from Korea. Alternatively, the Commissioner may be of the view that injury may have been caused by dumping of exports from Korea, and that the injury is more than negligible, but not material. In that case the Commissioner would not have the power to terminate the investigation, and instead would recommend to the Minister that anti-dumping duty not be imposed with respect to Korean exports for the reason that the injury lacked materiality in the required sense.

### **C Effect of factors unrelated to Dongkuk's exports require further consideration**

In the Dongkuk Injury Submission, we drew the Commission's attention to two key aspects of BlueScope's business with respect to the like goods which had a significant effect on its performance, but are entirely unrelated to dumping from Dongkuk or Korea more generally. They are:

- 1 The multiple impacts of BlueScope's TRUECORE strategy, particularly:
  - a) BlueScope's positioning of TRUECORE in competition with non-GUC, including timber frame and slit product, which are not subject to competition from Dongkuk;
  - b) the cross-sectoral effect of BlueScope's TRUECORE pricing on BlueScope's other products; and
  - c) BlueScope's own direct evidence exclusively attributes price effects, if any, to imports from Vietnam.
- 2 The limited effect of any competition between Dongkuk's exports and BlueScope.

In this submission, we would like to provide further clarification on these issues to assist the Commission in undertaking an adequate and objective assessment of them.

Firstly, in relation to Dongkuk's comments concerning BlueScope's TRUECORE pricing, the SEF states:

*Dongkuk submitted that BlueScope's competition with timber framing and its commercial strategy for the like goods, not dumped goods from Korea, are injurious.*

*Dongkuk considers that BlueScope targets its TRUECORE® brand into the framing market, where it prices aggressively against its competition of lower priced timber framing. Therefore, there is a 'substantial loss-making position for the like goods' where price variation data available in the application evidences BlueScope seeking to suppress the prices of its TRUECORE® product at the expense of sales of its other products in the same business unit, in order to gain market share.*

<sup>14</sup> SEF, Figure 2. TRINDEX indicates import volume for "all countries" declined since the investigation period.

Subsequent to the application, the commission verified BlueScope's model-level price variation data. The verification process resulted in the amending of the price variation values. Table 34 summarises the revised and verified model-level price variation values.

...

The revised and verified data differs from the data presented in the application. Notably, the revenue of BlueScope's like goods now increases in the investigation period. In contrast, the trend in the application, which Dongkuk uses to evidence a loss making position for BlueScope's like goods in its submission, decreased. The commission considers that the verified price and variation data does not support the assertion that BlueScope positions itself into a loss making position on account of its marketing strategy. [footnote omitted]

We welcome the SEF's clarification that, based on corrected data provided by BlueScope, "revenue of BlueScope's like goods now increases in the investigation period". Thus, the revised data further confirms that BlueScope did not experience price depression during the investigation period.

On the other hand, the increasing price trend does not disprove Dongkuk's comment that, based on the feedback from its customers, BlueScope had been actively under-pricing its TRUECORE product in order to gain market share in a market dominated by timber frame. Of course the price variation data, by itself, cannot show whether BlueScope has or has not "position[ed] itself into a loss making position on account of its marketing strategy". However, the position can be tested, and should be tested, by examining BlueScope's actual price level per model, and the per model profitability. Dongkuk expects that such an analysis, if undertaken, will support Dongkuk's comments.

In this regard we note that BlueScope's application, even with its flaws and inaccuracies,<sup>15</sup> already indicated a strong bias towards low profit/profitability for TRUECORE product:<sup>16</sup>

*Index of profitability variations (model control code)*

Model Categories	2016/17	2017/18	2018/19	2019/20
TrueCore	100.00	5.83	4.22	15.82
G550 0.42mm x 940mm	100.00	3.54	-72.63	-50.38
G550 0.48mm x 940mm	100.00	30.00	-22.26	-7.69
Zincalume G300 0.55mm x 1200mm	100.00	109.79	44.46	259.80
Other	100.00	75.70	34.21	65.69
Total	100.00	-344.55	-838.08	-335.47

Accordingly, we respectfully request the Commission to revisit and reassess the issues identified at Part C.1(a) and (b) of the Dongkuk Injury Submission.

Secondly, in relation to the issue concerning competition from Vietnam, identified at Part C.1(c) of the Dongkuk Injury Submission, we reiterate our observation that all relevant positive evidence of price

<sup>15</sup> Inaccurate because, as the SEF notes, the data provided by BlueScope was incorrect, and that the verified information would show BlueScope's sales of like goods at an overall breakeven position for the POI, similar to the 2016/17 period, instead of showing significant loss-making position.

<sup>16</sup> BlueScope's Application, at page 28



competition as offered by BlueScope is directed at imports from Vietnam and China. There is no positive evidence that BlueScope had either lost sales orders or had to reduce its prices due to competition from Dongkuk or from Korea generally. The only plausible explanation for this lack of evidence is that BlueScope did not experience any direct competition from Dongkuk that could be considered as “injurious” during the investigation period. This is particularly likely when BlueScope’s customers are often practically “locked-in” by their rebate arrangements with BlueScope.

This leads us to the third issue, concerning the effect of BlueScope’s use of total demand-based buyer threshold rebate arrangements, which insulate BlueScope from the effect of competition. It appears that the SEF has not given adequate consideration to the full impact of BlueScope rebate arrangements. These were a key feature of the ACCC’s recent examination of the competitive landscape of the “*market for the supply of metal roofing and building products*” involving BlueScope and its customers.<sup>17</sup> The effect of BlueScope’s rebate scheme is not only to exclude smaller customer who are left without viable supply from BlueScope, but also to provide BlueScope with a significant level of security in both sales volume and pricing power, unaffected by imports from Dongkuk or Korea more generally. Smaller customers who do not qualify for the buyer threshold, and are left without supply from BlueScope, would have accounted for at least some market share supplied by the subject imports. For these customers, there is no competition between BlueScope and the subject imports at all. This is not acknowledged in the SEF. Instead, the SEF focusses on the existence of “common customers” of BlueScope and the subject imports, and observes that “[t]here does not appear to be evidence to suggest that customers of BlueScope that received rebates are customers exclusive to BlueScope”.<sup>18</sup>

In our view, this approach misses the point, because it fails to appreciate the effect of BlueScope’s rebate scheme. As noted in the Dongkuk Injury Submission:

*BlueScope adopts a “consumption commitment” rebate structure for its selected customers. Dongkuk understands that this is offered only to large scale customers. It requires customers to commit a very high portion of their total requirements of steel coil to BlueScope - almost the entire portion - in order to qualify for rebate. This volume commitment and rebate structure allows BlueScope to secure the demand of large scale customers. Depending on the range of products included, the rebate structure also gives BlueScope the flexibility to offer differentiated price and rebates to accommodate sectors where there is stronger competition and sectors where it enjoys clearer dominance and higher premium (such as COLORBOND) – a bundled pricing and rebate structure that allows cross-subsidisation between different product groups and maximise overall sales volume and profitability.*

As such, it would be entirely possible for BlueScope to secure, say, 90% to 95% total demand/ consumption from its selected customer as a condition of the rebate scheme. This 90% to 95% of the customer’s demand would therefore be essentially insulated from competition offered by imports from Dongkuk/Korea. The same customer, being a large customer to start with, may still seek to source the balance of demand from Dongkuk, either as a matter of supply-chain management to ensure a minimal level of alternative supply, or to supplement volumes that BlueScope was unable to supply due to its production constraints. However, such a “common customer” or “common customers” does not make imports from Dongkuk, whether at a dumped price or not, and whether an “undercutting” price or not,

<sup>17</sup> See, ACCC Final Determination, Authorisation number: AA1000520, at 2.11, 3.4-3.6, 4.18, 4.54-4.58, <https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20-%202021.20%20-%20PR%20-%20AA1000520%20Steeline.pdf>

<sup>18</sup> SEF, page 102.

injurious to the 90% to 95% of its supply already secured by the customer under its rebate agreement with BlueScope.

As the Commission is aware, BlueScope's sales of like goods commanded more than 85% of the total Australian market during the investigation period. We expect that this ratio would only be higher if its internal supply of like goods as a feed material for the production COLORBOND was also accounted for. Indeed, we say that this should be accounted for in the assessment of the economic condition of the Australian industry that *produces* like goods. In comparison, imports from Korea accounted for less than 7% of the total market volume during the investigation period. BlueScope's market share, and the lack of evidence from BlueScope that could demonstrate the direct effect of competition from imports from Dongkuk/Korea confirm Dongkuk's view that BlueScope's significant volume commitment based rebate scheme provided BlueScope with a protective shield against the effect of competition from Dongkuk/Korean imports. Such position is unaffected by the fact that Dongkuk's products may have been supplied to customers who have agreed to buy and did buy most, if not nearly all, of their supply of the goods from BlueScope during the investigation period under the rebate arrangements.

We respectfully request the Commission to reconsider Dongkuk's comments regarding the above issues. In our view, these factors, which are unrelated to the effect of dumping from Dongkuk/Korea, effectively undermine BlueScope's material injury claims. At the very least, Dongkuk's Injury Submission raises very significant doubt as to the extent to which BlueScope's material injury claims can be sustained by positive evidence.

It is the Commission's responsibility to base any finding of material injury caused by dumping on positive evidence. Ultimately, the obligation for providing that positive evidence lies with BlueScope, as the claimant of dumping and material injury. A deficiency in positive evidence does not reverse the burden on both BlueScope (as applicant) and the Commission (as investigator) and place it on Dongkuk. If BlueScope cannot supply the necessary positive evidence, then the deficiency must lead to a finding that the Commissioner cannot be satisfied that material injury caused by dumping has occurred.

We submit that the present investigation presents a clear case where the domestic industry is unable to establish a *prima facie* case of material injury in the investigation period. There is even less evidence for it to do so now, not because of the technical and pragmatic difficulties in gathering evidence, but because its financial performance has continued to excel.

\*\*\*\*\*

Yours sincerely



**Charles Zhan**  
Partner