

25 July 2017

Mr Paul O'Connor
Member
Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra ACT 2601

Public File

Dear Mr O'Connor

ADRP Review – Reviewable decisions published on 12 May 2017 (refer ADN 2017/48 and ADN 2017/49)

I. Introduction

I refer to the notice published on 7 July 2017 concerning the decisions of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the "Assistant Minister"), made on 10 May 2017 to publish a notice under subsection 269ZDB(1)(a)(iii) of the *Customs Act 1901* ("the Act") following a review of anti-dumping measures on Certain Aluminium Zinc Coated Steel exported from the People's Republic of China ("China") and the Republic of Korea ("Korea"), and Certain Zinc Coated ("Galvanised") Steel exported from China, Taiwan and Korea ("Reviewable Decisions").

The ADRP has received three applications for review of the reviewable decisions, including one by BlueScope Steel Limited ("BlueScope").

BlueScope provides the following additional comments concerning its application for review, along with comments concerning applications by CITIC Australia Steel Products Pty Ltd and Jiangyin Zongcheng Steel Co., Ltd.

II. Use of contemporary data

BlueScope's application for review contends that the Assistant Minister failed to consider contemporary prices that had altered substantially following the investigation period (due to significant increases in raw material prices for coking coal, iron ore, zinc and aluminium). The application further demonstrated that the Trade Measures Review Officer ("TMRO") had previously confirmed following Investigation No. 188 ("Invest 188") that the CEO was not precluded from considering contemporary prices from outside the investigation period when recommending what action the then Minister should take once dumping was found to have occurred during the investigation period.

A consideration in Invest 188 involved the WTO Anti-Dumping Agreement restriction on duty not exceeding the determined dumping margin from the investigation period. BlueScope, however, highlights the lack of symmetry apparent in upholding the WTO Agreement in favour of exporters (i.e. Invest 188 with reductions in variable factors post the investigation period), but not affording Australian industry adequate coverage (with

appropriate interim measures) when each of the variable factors increased immediately following the review investigation period.

In Invest 188, contemporary data was taken into account to protect exporters from 'punitive' measures (resulting from the over-collection of dumping duties). However, the reasoning in Invest 188 clearly encompasses the use of contemporary data where dumping would otherwise be 'under- or over-redressed' by the imposition of measures.¹ The TMRO highlighted that as 'the purpose of the Customs Act is to safeguard Australian industry from the adverse effects of future dumping (but not from adverse effects otherwise arising), it would seem to be inconsistent with that policy if the CEO were to be so constrained' from taking into account prices outside the investigation period in appropriate cases.² In other words, the TMRO's reasoning was not limited to circumstances in which the WTO Agreement would be infringed, but also where the Customs Act would not fulfil its intended purpose.

BlueScope contends that its position in the applicable reviews³ is a 'mirror image' of that of exporters in Invest 188, and that a failure to take account of contemporary data would lead to inadequate protection to the Australian industry from 'punitive' dumping (resulting from the under-collection of dumping duties). The Assistant Minister should not take into account contemporary prices where exporters may otherwise pay duties exceeding the dumping margin, while at the same time having failed to take this into account where the Australian industry does not receive adequate redress against dumping by exporters in volatile market conditions.

BlueScope's representations⁴ to the Assistant Minister detailed the exceptional market conditions that were experienced immediately following the review investigation period. Most raw material prices increased dramatically from decade-long lows that prevailed during the investigation period – with coking coal and iron ore increasing by approximately 62 per cent. The increase in price of these two primary inputs directly contributed to an approximate 20 per cent rise in Hot Rolled Coil ("HRC") prices (HRC is the intermediate good used in aluminium zinc coated steel and zinc coated galvanised steel).

Therefore, the contemporary prices for the goods the subject of this review application were – as a minimum – at least 20 per cent higher in the contemporary period (i.e. 1 July 2016 to 10 May 2017) than the export prices paid during the investigation period. Unquestionably, this increase in pricing represents a material disadvantage at which the Australian industry must compete, despite substantial raw material cost increases.

The variable factors determined by the Assistant Minister that are based upon the investigation period significantly under-redress the dumping that has occurred as a consequence of the dramatic rise in raw material input prices post the investigation period. BlueScope notes that under s.269ZZHA(1), the ADRP may hold a conference with parties that it considers appropriate for the purpose of obtaining further information in relation to the application for review. The ADRP may have regard to this further information in making a recommendation to the Assistant Minister '*to the extent that it relates to relevant information*'⁵. The change in raw material input prices and how the dramatic increases impact each of the variable factors is considered 'relevant information' for the purposes of the Assistant Minister's consideration(s).

¹ Invest 188 at [78] (emphasis added).

² Invest 188 at [74] and [79].

³ Review investigations 365, 366, 367, 368, 371, 372, 374, 375 & 376.

⁴ Letter dated 28 April 2017 to the Assistant Minister.

⁵ Subsection 269ZZHA(2) of the *Customs Act*.

III. Form of measures

BlueScope acknowledges that unlike in Invest 188, the Assistant Minister may consider alternate forms of measures (i.e. fixed, floor price and *ad valorem* measures) when imposing interim duties. Invest 188 involved interim duties based upon the combination method (i.e. a fixed and variable component). However, while new measures such as the *ad valorem* duty method are intended to provide greater flexibility in the imposition of measures in varying market conditions, BlueScope submits that the availability of different duty calculation methods has not redressed the effects of rapidly increasing prices as reflected in each of the variable factors in the relevant reviews. This is because the relevant exporters were given zero dumping margins based solely on the fact that they did not export to Australia during the review period.⁶

As a result of this factor (addressed further at V below), it is clear that the availability of new methods of duty calculation are not sufficient to overcome the injury to the Australian industry in circumstances such as the present. Therefore, contemporary data should have been taken into consideration by the Commission in exceptional cases such as those the subject of BlueScope's application.

IV. Market Intelligence Unit

BlueScope's application for review referred to the role of the Anti-Dumping Commission's 'Market intelligence Unit' that is tasked with trend analysis and modelling, to enable the initiation of investigations and reviews, and to monitor compliance with measures following imposition. This is a relevant consideration which also supports BlueScope's first ground of review as accepted by the ADRP in its 7 July 2017 notice.

The Commission's capability in the monitoring of measures, access to steel industry data via subscription service, and exposure to steel industry investigations⁷ – particularly via its Market Intelligence Unit – would have enabled it to be informed of the increasing price trends throughout the contemporary period. The Commission, therefore, would have been aware of the relevance of changes in raw material input prices in 2016/17, and the importance in maintaining appropriate levels of duty to reflect changes in market prices, prior to it forwarding recommendations for revised variable factors to the Assistant Minister.

V. Determination of export price equal to normal value

BlueScope's second ground of review, as accepted by the ADRP in its 7 July 2017 notice, seeks a review of the Assistant Minister's decision to set an exporter's export price equal to its ascertained normal value, despite an absence of actual exports having been made by those exporters, and corresponding actual export prices during the investigation period.

BlueScope has indicated that the Commissioner cannot 'assume' that the exporter has ceased exporting at dumped prices merely due to a temporary absence of exports in a given period. The Commission has provided no substantive reasons, precedent or any meaningful explanation as to why it is appropriate to set the exporter's export price equal to normal value (where there have been no exports during the investigation period by the exporter Jiangyin Zongcheng Steel Co., Ltd ("Zongcheng"), Angang Steel Company Limited ("Angang") and Yieh Phui Technomaterial Co., Ltd ("YP Technomaterial")). The effect of the Assistant Minister's decision is to afford the exporter a 'free run' in the Australian market (at the detriment of the Australian industry) with little regard to the past dumping practices of that exporter.

⁶ See ADC 365, 366, 368, 371, 374 and 376 – Zinc Coated (Galvanised) Steel from China and Taiwan; ADC 367, 372 and 375 – Aluminium Zinc Coated Steel from China; ADN 2017/48; ADN 2017/49.

⁷ Aluminium and steel industry investigations accounted for approximately 80% of the 156 anti-dumping investigations initiated by G-20 countries during the period July 2013 to July 2016.

BlueScope notes that the only precedent for this approach can be found in relation to 'accelerated reviews' undertaken by the Commission pursuant to Division 6 of the Customs Act. As the Commission is aware, the circumstances in which an accelerated review can be undertaken are strictly limited under s 269ZE to 'new' exporters. BlueScope accepts that it may be reasonable to seek to ascertain export prices for certain classes of 'new' exporters at a rate equal to their ascertained normal values where those exporters have not previously exported subject goods to Australia. These circumstances clearly do not apply in the context of Zongcheng, Angang and YP Technomaterial – exporters who have all previously exported the subject goods in significant commercial quantities at prices that have been verified by the Commission as dumped and injurious to the Australian industry.

The reality of the Assistant Minister's decision (to treat export price and normal value as equal) is to 'reward' exporters that abstain from exporting for a twelve-month period with a 'zero' interim duty impost following a review, despite that exporter's past history of exporting at dumped prices. This outcome could have been avoided if the Commissioner considered an alternative option – for example, by determining the applicant exporter's export price based upon the weighted average export price of other exporters from the same source country during the investigation period.

The Assistant Minister's decision has resulted in many varied and unequal interim duty outcomes between exporters that did and did not export the goods during the investigation period. The Assistant Minister's decision is not the correct or preferred decision as it under-compensates for dumping that has occurred post the investigation period by as much as 20 per cent, and exposes the Australian industry to injurious dumping that the measures were intended to prevent.

VI. CITIC Australia Steel Products Pty Ltd

It is argued on behalf of CITIC Australia Steel Products Pty Ltd ("CITIC") that the Commission's approach of rejecting CITIC's actual paid export price *"is contrary to the letter and spirit of Australia's anti-dumping legislation; would be inconsistent with the treatment of the same transactions under other parts of the legislation, including the duty assessment process and the duty absorption provisions of the anti-circumvention rules; is contrary to WTO Anti-Dumping Agreement ("ADA") provisions; and, finally would be commercially inconsistent with ADC's valid finding of a non-injurious price for YP Enterprise."*⁸

In the context of a Part V Review of Measures investigation, the Commissioner is tasked with examining the export prices of the exporter during the investigation period. In examining the arms-length nature of the export price, the Minister will have regard to the provisions of s.269TAA. Where the goods have been sold at a loss, the Minister has the discretion to infer that the importer will be reimbursed for the losses incurred (subsection 269TAA(1)(c)). The Commissioner has correctly determined – and exercised the available discretion accordingly – that the losses by the importer CITIC will be reimbursed, or compensated, by the exporter.

Had the Commissioner not taken the view as determined for exports of galvanised steel by Yieh Phui Enterprise Co., Ltd ("YP Enterprise") in Report No. 368, then the Commissioner would have ignored the distortive impact of injurious prices in the Australian market by the importer of goods the subject of measures. The Commissioner cannot overlook the injurious impact of dumped exports (i.e. sales at a loss) on the Australian industry – particularly those exports that are the subject of measures.

CITIC has further argued that the Non-Injurious Price ("NIP") for YP Enterprise should be set at a level that allows the exporter to compete. The Commission has determined that the NIP be set at the full margin of dumping as the Australian industry competes on an import parity basis. BlueScope does not consider there

⁸ CITIC Application for Review, at [12].

exists any sound basis for establishing YP Enterprise's NIP on any different methodology to that of all other exporters (i.e. at the full margin of dumping).

The Assistant Minister's decision to determine that the sales by the exporter YP Enterprise to the Australian importer CITIC were not arms-length under s.269TAA(1)(c) is, therefore, the correct and preferred decision.

VII. Jiangyin Zongcheng Steel Co., Ltd

Jiangyin Zongcheng Steel Co., Ltd ("Zongcheng") has argued that the Assistant Minister has incorrectly determined the level of profit applied to the exporter's normal value. It is argued that the Commissioner did not consider the level of profit on identical or most comparable goods to the exported goods.

The determination of a level of profit for inclusion in normal values is determined under subsection 269TAC(2)(c). Specifically, subsection 269TAC(2)(c)(ii) states:

- (ii) *on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale;*

The reference to "the goods" under subsection 269TAC refers to 'like goods' that possess the same or similar characteristics to the goods exported to Australia. In determining the level of the 'administrative, selling and general costs' and 'profit' to apply in a constructed normal value under subsection 269TAC(2)(c), the Commissioner has correctly considered the level of profit by reference to the 'like goods' and not a sub-category (i.e. on a narrower identical or comparable goods only basis) of the like goods.

The Commissioner has correctly determined the level of profit to be included in Zongcheng's normal value under subsection 269TAC(2)(c) based upon profit achieved by the exporter on its domestic sales of like goods. The Assistant Minister's decision in this regard is, therefore, the correct and preferred decision.

VIII. Conclusions

BlueScope submits to the ADRP that the Assistant Minister's decision is not the correct or preferred decision as it failed to consider 'relevant information' in determining the level of variable factors to be applied to exporters in each of the reviews, without having considered the exceptional market conditions that immediately followed the investigation period which has resulted in prices at least 20 per cent above the levels of the investigation period.

In respect of appeals by CITIC and Zongcheng, the Assistant Minister's decision is the correct and preferred decision that has been made in accordance with required legislative provisions (i.e. arms-length and normal value, respectively).

If you have any questions concerning this submission, please do not hesitate to contact me on (02) 4240 1214, or BlueScope's representative Mr John O'Connor on (07) 3342 1921.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'C Uphill', written in a cursive style.

Chad Uphill
Leader – Trade Affairs