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2 October 2017

Ms Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
c/- Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
Australian Capital Territory 2601

By email

Dear Panel Member

Galvanised steel and aluminium zinc coated steel exported from Korea Interested party submission of Dongbu Steel Co., Ltd

We act on behalf of Dongbu Steel Co., Ltd (“Dongbu”) in relation to this matter. In accordance with its rights as an interested party under Section 269ZZJ of the *Customs Act 1901* (“the Act”) Dongbu wishes to respond to the application by way of the comments contained in this submission.

Dongbu notes that BlueScope Steel Limited (“BlueScope”) has raised two grounds of review that are currently being considered by the Anti-Dumping Review Panel (“ADRP”), being (as per the notice under Section 269ZZI of the Act as published by the ADRP):

- Ground 1 – *“in establishing revised variable factors for the nominated exporters, the Assistant Minister failed to consider the significant increases in raw material prices in the period subsequent to the review period (and up to the date of the decision)”*; and
- Ground 2 – *“the Assistant Minister should not have set Dongbu’s export price equal to its normal value in the absence of any exports by that exporter during the review period”*.¹

Neither of these grounds are properly supported by legal or factual evidence and neither establishes a correct and/or preferable decision different to that which is currently under review.

Ground 1 Changing the variable factors from those worked out for nominated exporters

BlueScope’s contention under the first ground of appeal is that the Assistant Minister should have taken into account what BlueScope characterises as sustained movements in raw material costs in order to ensure that the revised measures not under-address injury to the Australian industry. BlueScope submits that the correct and preferable decision is that Dongbu’s normal value be adjusted for changes in hot-rolled coil (“HRC”) prices in the period following the review period.

¹ Dongbu notes that a third ground of appeal was also included in the application, but understands that the review has not been initiated with regard to that ground of appeal, as it technically fell outside the ADRP’s jurisdiction.

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At the outset, Dongbu notes that BlueScope's suggestion that it has been suffering injury, or is suffering injury, is not supported by any evidence or analysis and should not be given any weight. Moreover, the subject review was a review of the variable factors pertaining to Dongbu's exports. It was not and is not a rehearing or a new hearing of BlueScope's injury claims.

Secondly, we note that in making recommendations to the Assistant Minister in accordance with Section 269ZDA(1)(a) of the Act, the Anti-Dumping Commission ("the Commission") did consider the merits of BlueScope's claim and determined that there was not sufficient evidentiary basis to accept it, concluding that:

...although raw material prices are currently higher than those during the review period, having regard to the long term trends of HRC prices there is no evidence to establish that the current raw material prices are sustained, or more representative, than the prices verified in the review period.²

Dongbu concurs with the Commission's factual analysis. Ultimately however, Dongbu does not consider there is an appropriate legal basis to adjust variable factors by amounts reflecting movements in non-review period raw material costs. BlueScope's suggestion is based solely around a finding of the Trade Measure Review Officer ("TMRO") in a previous review of a decision to publish a dumping duty notice with regard to hot rolled coil steel. However BlueScope has not properly understood this decision, nor has it attempted to explain why that decision can be applied to the circumstances of Dongbu's variable factors review.

The relevant portion of the TMRO report is set out below:

71. The question is thus whether the CEO is precluded from having regard to information concerning prices outside the investigation period in relation to the separate issue of recommending what action the Minister should take once dumping is found to have occurred during the investigation period.

72. The Customs Act does require that a report be made to the Minister "on the basis of the examination of exportations to Australia of goods the subject of the application during a period specified in the notice [issued by the CEO as required by section 269TC(4)] as the investigation period in relation to the application" (section 269TC(4)(bf)).

73. However, the Customs Act also requires that that report must recommend "whether any such notice should be published and the extent of any duties that are, or should be, payable under the Dumping Duty Act because of that notice" (section 269TEA(1)(c)) and allows the CEO, in making such recommendations, to "have regard to any other matters that the CEO considers to be relevant" (section 269TEA(3)(b)).

74. I do not consider that the Customs Act provides any express or implied prohibition on the CEO having regard to information concerning prices outside the investigation period when formulating recommendations to the Minister on the separate issue of what measures should be put in place as a result of dumping having occurred during the investigation period. Indeed, 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.³ [our emphasis]

² REP 385 and 386, page 21.

³ *Decision of the Trade Measures Review Officer – Hot Rolled Coil Steel – Review of Decision to Publish a Dumping Duty Notice*, page 15. We also note that TMRO's comments regarding the policy intent behind

There are two things of note here:

- (a) Firstly, the TMRO's decision is focussed upon the consideration under Section 269TEA(1)(c), being "*whether any such notice should be published and the extent of any duties that are, or should be, payable under the Dumping Duty Act because of that notice*". The TMRO is economic in his explanation, however we respectfully submit that his decision was driven by the value judgement implicit in the requirement that the Commissioner recommend (1) *whether* dumping measures should be imposed and if so (2) *the extent of any duties* payable in accordance with those measures. This consideration is not relevant to the reviewable decision.

The key question before the Commissioner in the circumstance of Dongbu's review was, in accordance with Section 269ZDA(1), whether the notice should remain unaltered, be revoked, or have effect as if different variable factors had been ascertained. This is an entirely different consideration to that required by Section 269TEA(1)(c). BlueScope has not explained why it considers that HRC cost information from outside the review period is relevant to the consideration under Section 269ZDA(1) nor how it can be used to "adjust" variable factors. As we will now discuss, this is because BlueScope's proposed correct and preferable decision is not one that can lawfully be made.

In accordance with Section 269ZDA(1)(a)(iii) of the Act, the Commission recommended that the variable factors applicable to Dongbu have effect as if different variable factors had been fixed relevant to the determination of duty. In doing so, the Commission calculated new variable factors, being the normal value, export price and non-injurious price.⁴ The way in which each of these variable factors are to be ascertained is prescribed by the Act. In this case, the Assistant Minister calculated the normal value under Section 269TAC(1), which provides as follows:

Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

BlueScope has not attempted to argue that it was incorrect to use Section 269TAC(1) of the Act to ascertain the normal value. Indeed it was the entirely correct decision in the circumstances of the review.

Having properly calculated the normal value under Section 269TAC(1), BlueScope is suggesting that the Assistant Minister should now amend that normal value to reflect cost variations that occurred after the review period. There is no basis in the Act for such an adjustment to be made. Any adjustment to a Section 269TAC(1) normal value must be made in accordance with Section 269TAC(8). Such adjustments are made to ensure that any differences between the export price and the normal value do not affect the comparison between the two. Fluctuations in raw material costs are not a recognised basis for any such

Australian anti-dumping law has been expressly rejected by the Federal Court. In *PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, Nicholas J explained:

Further, I do not agree with Capral that the purpose of Part XVB of the Act is "to protect Australian industry". The purpose of Part XVB is far more complicated. It is apparent from the scheme of Part XVB that the legislature has sought to strike a balance, as the relevant international agreements no doubt seek to do, between various interests including not only those of Australian industries but also other WTO members and their own domestic industries, Australian consumers (in the broadest sense of that word) who may have an interest in acquiring imported goods at the lowest available prices and Australian exporters that supply their goods to other countries that are also members of the WTO.³

⁴ Section 269T(4E)

adjustment. BlueScope's proposed decision simply is not one that is open to be made by the Assistant Minister.

- (b) Secondly, the TMRO decision to which BlueScope refers does not represent a broad finding that any information at all may be taken into consideration by the Assistant Minister in determining variable factors. The TMRO clearly only referred to "*information concerning prices outside of the period of investigation*", in that case being prices of HRC. BlueScope's position in this review is that the normal value calculated using *prices* of aluminium zinc coated steel and zinc coated (galvanised) steel should be indexed to changes in the *cost* of HRC. While HRC is a raw material used in the production of the goods under consideration, it is not and does not reflect the prices for those goods, nor is it information concerning the prices of those goods. We respectfully submit that the TMRO decision, even if it were applicable to a variable factors review (which it is not), does not contemplate what is now being suggested by BlueScope.

Accordingly, Dongbu submits that BlueScope's application fails to establish that the reviewable decision was not the correct and preferable decision, and also fails to provide a legally valid alternate decision. The ground of appeal should be dismissed accordingly.

Ground 2 Determining the ascertained export price as equal to the normal value

BlueScope submits that the Assistant Minister should not have accepted the Commissioner's recommendation to set Dongbu's export prices equal to its normal values because of an absence of any exports during the review period. Dongbu has a number of comments in relation to this submission.

As an initial point, we note that it is a requirement of an application that it include a "*statement setting out the decision (the proposed decision) that the applicant considers the Minister should have made*".⁵ Dongbu notes that in seeking to comply with this requirement, BlueScope has simply provided a proposed decision that "*the determination of Dongbu's AEP's [sic] for aluminium zinc coated steel and galvanised steel at levels not equal to normal values due to absence of exports during review period*". Respectfully, we fail to see how this is a "decision" in any practical sense of the word. It is essentially just a restatement of the issue BlueScope complains of. It does not offer an alternative outcome. Dongbu respectfully suggests that BlueScope has not met the requirements of the application form itself.

Further, from a technical perspective, BlueScope has not established why the use of Section 269TAB(3) of the Act was not the correct or preferable decision, nor has it explained why, using this broad power, it was neither correct nor preferable for the Assistant Minister to set the ascertained export price at the ascertained normal value. Again, for these reasons, the application should be rejected.

Rather, BlueScope's application is based upon unfounded assertion and a skewed understanding of the operation of Australia's anti-dumping law. For example:

- BlueScope's application is primarily based around the idea that the Commission is assuming that the exporter will no longer export goods to Australia at dumped prices. It is not apparent that the Commission made this assumption in determining the ascertained export price. Indeed, the opposite would seem to be the case. Dumping will be found to occur when the export price is less than the normal value. As a result of the fact that the Commission has found the AEP and ANV to be equal, the Commission has elected to collect interim dumping duty using the "floor price" method under Section 5(4) of the *Customs Tariff (Anti-Dumping) Regulation 2013*. The floor price is the ascertained normal value which, as discussed above, has been correctly ascertained by the Commission. Under this collection method, an

⁵ Section 269ZZE(2)(c).

importer of Dongbu product will be required to pay interim duty if the export price on a given transaction falls below the ANV. This will counteract any dumping. BlueScope's admonition that the Commission is "rewarding" Dongbu with a 12 month period with a zero interim dumping duty is entirely incorrect.

- BlueScope considers that setting the AEP to the ANV is "rewarding" an exporter with a "past history of exporting at dumped prices". One could point out that BlueScope itself has been found to be dumping by significant margins in investigations undertaken by other jurisdictions. However, it suffices for current circumstances to focus on the fact that Dongbu completed another review of measures in relation to the same goods on 3 August 2015.⁶ In that case, Dongbu did have exports to Australia, and the Commission determined that they had not been dumped.⁷
- BlueScope alleges that the decision sets a "dangerous precedent". The Commission has used this practice repeatedly since at least 2013. Indeed, it was adopted at the close of Dongbu's last review on 3 August 2015. How it can set a dangerous precedent in circumstances where it has been used repeatedly in the past is unclear.⁸ Nor is it apparent why it is "dangerous". Post the reviewable decision, importers are required to pay interim dumping duty on imports from Dongbu if they are dumped, ie if they are exported at an export price which is less than the ascertained normal value. This is an example of the fair and objective application of anti-dumping law and principle.
- Finally, BlueScope argues that exporters are "gaming" measures by abstaining from importing for a 12 month period to seek a zero interim duty. As noted, the contention that zero interim duty is payable is entirely incorrect. Furthermore, the suggestion that Dongbu chose to abstain from importing goods to Australia is ludicrous. At the close of that review the Commission set an AEP which acted as a floor price for all consequent imports. However, due to the vicissitudes of the market and the fact that global prices subsequently fell, the AEP was at a high level.⁹ This prevented Dongbu from being able to sell to Australia, because the market price in Australia (in which BlueScope is the majority source, and therefore dictates prices) over the following twelve months was below this floor price. Dongbu did not "game" the system, it was denied the ability to participate in the market for over twelve months "despite being found not to have dumped goods into the Australian market".

Ultimately, the allegations made by BlueScope are incorrect and inaccurate, and border on being slanderous. BlueScope provides no technical reason why the decision made by the Assistant Minister was not the correct or preferable decision, nor does it provide an alternate decision which it considers to be correct and/or preferable. The complaint should be rejected in total.

⁶ Anti-Dumping Notice No. 2015/83 and Anti-Dumping Notice No.2015/84.

⁷ "The weighted average dumping margin for aluminium zinc coated steel exported to Australia by Dongbu in the review period was less than zero", *Report 272 & 273 Aluminium Zinc Coated Steel & Zinc Coated Galvanised Steel*, page 16.

⁸ *Report 272 & 273 Aluminium Zinc Coated Steel & Zinc Coated Galvanised Steel*, page 20.

⁹ This was noted in both applications for review, for example the application for the aluminium zinc coated steel review provides as follows:

In the previous review, Dongbu achieved a zero dumping margin. As a result, Dongbu's AEP and ANV are the same value. Nonetheless Dongbu has been unable to sell aluminium zinc coated steel to Australian customers, because of the use of a fixed/variable duty collection method. The AEP acts as a floor price. The AEP does not reflect current market trends.

Conclusion

Dongbu submits that none of the grounds raised by BlueScope are reasonable grounds on which to assert that the reviewable decisions are not correct or preferable. The Minister's decisions with respect to Dongbu were both correct and preferable, and the application by BlueScope should not be considered further.

Yours sincerely



Alistair Bridges
Associate