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2 October 2018

Mr S Ellis
Panel Member
Anti-Dumping Review Panel
c/- Legal, Audit and Assurance Branch
Department of Industry Innovation and Science
G.P.O. Box 2013
Canberra City
Australian Capital Territory 2601

By email

Dear Panel Member

Review of ministerial decision Continuation of anti-dumping measures Galvanised steel exported by Dongbu Steel from Korea

As you know, we represent Dongbu Steel Co., Ltd (“Dongbu”) in this matter.

Dongbu’s application requests an objective examination of the evidence that was before the Assistant Minister when he made the continuation decision as it related to Dongbu. For the measures to be continued, that evidence had to establish that it was *probable* that there would be a continuation or recurrence of the dumping and of the material injury that the measures were intended to redress. Given the powers of the Assistant Minister to decide not to continue measures against particular exporters, and the administrative precedent that precedes this review, the question of that probability is to be considered with respect to circumstances that are specific to particular exporters. In other words, the inquiry is essentially behavioural (what an exporter’s behaviour says about the future likelihood) and situational (what is it about the surrounding circumstances which might assist in working out the future likelihood). The decision as to probability must be based on the facts that are evident to the Assistant Minister, and whether the facts demonstrate the probability required. Otherwise, the decision to continue measures would be nothing more than guesswork and uninformed assumption.

This requirement was succinctly explained by the Panel in *US – Corrosion-Resistant Steel Sunset Review*.¹

The requirement to make a ‘determination’ concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury.

¹ Panel Report, *US – Corrosion-Resistant Steel Sunset Review* (WT/DS244/R) at para 7.177.

An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence²

The standard of probability is higher than a “possibility” or “plausibility”. This underscores the fact that a decision to continue measures is not simply something that happens in due course, nor for the sake of expediency. It can only occur where there is an evidence-based probability that injurious dumping will occur absent the measures, by reason of an exporter’s, or the exporters’, likely behaviour. If the probability does not apply to one or another exporter, but does apply to others, then the first-mentioned exporter or exporters should not have the measures continued against it or them, while the measures could be continued against the others.

Report 449 was required to have set out, and must be taken to have set out, both the material findings of fact upon which the continuation decision was based, as well as providing particulars of evidence relied upon to support those facts. Dongbu’s application in this review highlighted the relevant facts; queried conclusions drawn from them; provided meaning to, and interpretation of, those facts; and highlighted additional record evidence that actively run counter to the conclusion that recurrences or a continuation of injurious dumping was probable should the measures be revoked. Dongbu’s submissions throughout the Commission’s inquiry provide further discussion pertinent to the continuation decision.

Dongbu maintains that there was insufficient evidence and therefore insufficient justification to continue the measures as they relate to Dongbu’s exports. We submit that Dongbu’s history of exporting the products to Australia does not demonstrate the behaviour that one would associate with any probability that it would be drawn to injurious dumping if the measures were to be discontinued against it. We highlight these facts:

- 1 Dongbu’s itself applied for a review of the level of its dumping measures (variable factors) covering the period 1 October 2013 – 30 September 2014. In this first variable factors review the Commission found that Dongbu was not dumping. Accordingly, the Commission set the AEP to ANV.³
- 2 However, that review took nine months to complete. By the end of that review, the price of HRC had fallen significantly from the levels it was during the review period concerned, by [CONFIDENTIAL INFORMATION DELETED – number]. This had a flow on effect in the Australian market, in which Dongbu considered that prices for the goods under consideration had fallen by at least [CONFIDENTIAL INFORMATION DELETED – number].⁴
- 3 Because of this, and as documented in the application, the AEP applied to Dongbu was significantly higher than the market price common in Australia. As the AEP effectively acted as a floor price, Dongbu’s product was not competitive compared to other sources of zinc coated galvanised steel, including that of the domestic industry, namely BlueScope Limited (“BSL”). As a result, Dongbu was unable to make any exports to Australia following the outcome of its first review.⁵
- 4 Accordingly, Dongbu applied for another review of the variable factors, as it was entitled to under Australian law, on 14 November 2016. The decision in this review, Dongbu’s second

² *Ibid*, para. 7.171. The Appellate Body supported this statement in *Appellate Body Report, US – Corrosion – Resistant Steel Sunset Review* (WT/DS244/AB/R) para. 114.

³ See EPR 273 Doc 013 – *Report 272 & 273 Aluminium Zinc Coated Steel & Zinc Coated Galvanised Steel*, at pages 16 and 21.

⁴ See EPR 386 Doc 001 – *Application for review of anti-dumping measures by Dongbu Steel Co Ltd*, at page 7.

⁵ *Ibid*.

review, was not made until 20 July 2017. But then Dongbu was required to defend the outcome of that second review in the ADRP.

- 5 A final decision arising from the ADRP process was not announced until 2 November 2017. This process confirmed the Commission's findings, to the effect that Dongbu had a 0% dumping margin.
- 6 Following clarity being achieved as to the variable factors in that review, a third review was initiated by the Commission in parallel with the continuation inquiry that is the subject of this ADRP review. But Dongbu had only exported [CONFIDENTIAL INFORMATION DELETED – number] to Australia over a [CONFIDENTIAL INFORMATION DELETED – period], and those were the only exports over the full 12 month period to which the third review could have regard. The outcome was a 2.4% margin, achieved with respect to sales of a *de minimis* volume of the goods over a [CONFIDENTIAL INFORMATION DELETED – period].

This margin is inconsistent with the Commission's findings regarding Dongbu throughout its participation in the dumping system. That participation, in the two variable factor reviews, was voluntary. We submit that Dongbu has shown, in its behaviour, a desire *not to dump*, and *to do the right thing*, by asking the Commission on two occasions to assess the variable factors with which it could then abide. The 2.4% margin in the third review is not a full year experience, and is within the bounds of variables that affect such calculations, such as currency variations, over which no exporter has control.

We note that no clarity has been provided regarding the process through which Dongbu's prices were compared with those of other exporters. Thus, to the extent that the decision was motivated by alleged price relativities between Dongbu and other exporters, we are not satisfied the decision is accurate. But even if it were, the consideration in the Report is itself deceptively simple when one considers the following:

- (a) The 2.4% dumping margin means that Dongbu's export price was 2.4% lower than the price on equivalent, *ordinary course of trade* domestic sales of like goods. If Dongbu does have one of the lowest export prices, this is reflective of the efficient, low cost nature of its production facilities. It is not indicative of any intent to buy market share in the Australian market as BSL's application for the continuation inquiry seems to assume.
- (b) Dongbu's sales were FOB sales to traders, who then on-sell the goods to Australian customers. By volume, [CONFIDENTIAL INFORMATION DELETED – number] of Dongbu's sales were to Korean based traders.⁶ So the AEP really does not reflect the price at which Dongbu's goods are available in the Australian market.
- (c) As far as Dongbu is aware, BlueScope does not sell or offer its products to traders, let alone those Korean-based traders that Dongbu services. So, whether the price is relatively low or not, there is no direct impact between Dongbu's sales to these traders and BlueScope.
- (d) Moreover, Dongbu does not compete directly with other exporters. [CONFIDENTIAL INFORMATION DELETED – Dongbu sales process].

We maintain our view that the continuation decision was opportunistic with respect to Dongbu, based on a finding of minor dumping over a sample number of sales that took place over [CONFIDENTIAL INFORMATION DELETED – period]. We submit that this is wholly insufficient to draw a conclusion that Dongbu would in the future dump and cause material injury to the Australian industry. The standard for deciding whether to continue measures is whether it is probable that dumping and material injury will continue or recur. Dongbu feels that the decision made by the Assistant Minister was simply "risk averse". Rather than being based on a probability standard, it was based on a

⁶ [CONFIDENTIAL INFORMATION DELETED – entities]

mathematical conclusion across a small number of sales alone, in circumstances in which Dongbu's other behaviour more strongly suggests good behaviour.

To recap, these behavioural facts are that Dongbu applied twice, during the life of the measures, to achieve variable factors that would allow it to participate in the market. But conditions changed such that its prices were pegged at a much higher level than those of the Australian market. No sooner had Dongbu re-started its exports, and had done so consistently with the Commission's determination, along comes a continuation inquiry and third variable factors review saddling its [CONFIDENTIAL INFORMATION DELETED – period] with a 2.4% margin.

Dongbu's respectful trading behaviour, its efficient and competitive production, its "apartness" from BSL in terms of its customer type, and doubts about both the relevance and the actuality of the "lowest price" finding that popped into the Commission's final Report,⁷ all suggest that it is improbable that Dongbu would engage in dumping causing material injury.

Accordingly, we respectfully request that you revoke the reviewable decision, and replace it with a decision that the measures, insofar as they pertain to Dongbu, should be allowed to expire.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alistair Bridges', with a long horizontal flourish extending to the right.

Alistair Bridges
Senior Associate

⁷ As per the application, we also note that Dongbu's capacity utilisation was at [CONFIDENTIAL INFORMATION DELETED – number]