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Anti-Dumping Review Panel
c/o ADRP Secretariat, Legal, Audit and Assurance Branch
Department of Industry and Science
GPO Box 9839
CANBERRA ACT 2601

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Public File

Dear Sir/Madam

Zinc Coated (Galvanised) Steel exported from The Republic of Korea, Taiwan and People's Republic of China – BlueScope Submission on CITIC Australia Steel Products Pty Ltd appeal to ADRP

I. Introduction

I refer to the notice published on 25 May 2016 announcing a commencement of a review of a decision concerning zinc coated (galvanised) steel (referred to hereafter as 'galvanised steel') exported from The Republic of Korea ("Korea") and Taiwan (Inquiry No. 290), and The People's Republic of China ("China") (Inquiry No. 298) following an appeal of a decision of the Parliamentary Secretary dated 17 March 2016.

Following investigation, the Parliamentary Secretary accepted the recommendations of the Anti-Dumping Commission to amend the wording of the description in the original notice as follows:

- the original notice under subsection 269TG(2) of the Act be altered by amending the goods description to:

*flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; **and***

flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from:

- ***China by Angang Steel Co., Ltd or Benxi Iron and Steel (Group) International Economic & Trading Co.; or***
- ***Taiwan by Yieh Phui Enterprise Co., Ltd.***

The text in **bold** outlines the changes in the notice.

- The original notice under subsection 269TJ(2) of the Act be altered by amending the goods description to:

*flat rolled products of iron and non-alloy steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc; **and***

flat rolled products of alloyed steel of a width less than 600mm and equal to or greater than 600mm, plated or coated with zinc exported from China by Benxi Iron and Steel (Group) International Economic & Trading Co.

The text in **bold** outlines the changes in the notice.

II. Grounds for Appeal

CITIC has sought to appeal the decisions of the Parliamentary Secretary to amend the notices. CITIC has raised the following grounds of appeal, including:

- (a) The Parliamentary Secretary wrongly revised the original notice as from 5 May 2015;
- (b) The Parliamentary Secretary has failed to consider the exercise of the discretion to address the variable factors;
- (c) There was a failure to consider findings in other investigations, particularly Investigation 249 and to consider whether current imports were being dumped;
- (d) The Parliamentary Secretary's decision is not the correct or preferable one as the Commissioner failed to address key scientific questions or failed to adequately evaluate the scientific evidence before the ADC;
- (e) The Parliamentary Secretary's decision was not the correct or preferable one as it wrongly determined that differences between the original goods and the circumvention goods were merely minor;
- (f) The ADC wrongly failed to address each of the designated factors;
- (g) The ADC wrongly dealt with confidentiality;
- (h) There was a wrong application of law as per Regulation 48(2)(b) of the *Customs (International Obligations) Regulation 2015*, as the relevant goods were never changed; and
- (i) The Parliamentary Secretary's decision fails to make the required analysis of normal value, export price, injury and causation and hence is not the correct or preferable decision consistent with Australia's international obligations and is not justifiable under a proper construction of the relevant legislation.

BlueScope Steel Limited ("BlueScope") seeks to comment on the grounds of appeal raised by CITIC (not necessarily as per each of the items identified) and requests the Member to take account of the following comments.

III. BlueScope's Comments re Appeal grounds

(a) *The Parliamentary Secretary wrongly revised the original notice*

Duty assessment

CITIC's representations in this regard suggest that the Parliamentary Secretary's decision to retrospectively apply measures for the circumvented goods to 5 May 2015 prevents CITIC from seeking a duty assessment on interim duties paid for the period 5 May 2015 to 5 August 2015.

The arguments put forward by CITIC are that any payments made in response to the demand for payment of interim duty dated 15 April 2016 cannot be subject to the duty assessment provisions as the six-month time frame post the relevant six month importation period have expired. CITIC claims it is aggrieved by the retrospective notice in relation to the period 5 May 2015 to 5 August 2015.

BlueScope rejects CITIC's claim(s). CITIC quite correctly identifies that the interim duties payable on non-alloy galvanised steel exports by Yieh Phui Enterprise Co., Ltd ("Yieh Phui") of Taiwan were levied at 2.6 percent on the FOB value (plus an amount by which the actual FOB values for the circumvention goods were priced below the ascertained export price for the period). CITIC also refers to the "concurrent formal notice" by the Anti-Dumping Commission ("the Commission") that required importers affected by the recommendations in Statement of Essential Facts ("SEF") No. 290 that they must lodge an application for duty assessment by 4 February 2016 (to cover the period 5 May 2015 to 5 August 2015.) to protect their assessment rights.

It would appear that CITIC did not heed the Commission's advice dated 16 December 2015 and elected not to pay any interim duties short-paid on the circumvention goods. CITIC was well aware of the 2.6 per cent duty liability on the circumvention goods, so it could not assert that it was unaware of the amounts to be paid as proposed in SEF No. 290. This inaction by CITIC is the issue at which it finds itself aggrieved – not the decision of the Parliamentary Secretary to revise the original notice.

The remaining comments (hypothesizing) in paragraphs 61 to 82 do not detract from the key issue that CITIC elected not to take notice of the Commission's recommendation to act on any duty liability that may fall due as a consequence of the proposed recommendations in SEF No. 290.

Insufficient policy grounds

CITIC seeks to challenge the justification for the Parliamentary Secretary's decision to apply interim duties on the circumvention goods retrospectively. However, it is argued that no consideration was afforded to a lesser duty amount than the dumping margin sufficient to obviate the injury.

Investigation No. 290 followed the original decision (Report No 190) to impose interim duties on the goods exported from Taiwan by Yieh Phui. In that Report it was confirmed that the lesser duty rule would not be applied as the normal value was below the non-injurious FOB price (hence the interim duty amount of 2.6 per cent was the interim duty amount).

The assertion that a retrospective measure cannot be applied because the Parliamentary Secretary was not informed of the 'benchmark' at which an effective measure should be determined is not a consideration in the current circumstances as the 2.6 interim duty amount was determined in Inquiry No. 290 taking full account of the Australian industry's non-injurious price.

Wrong to apply retrospective measures

It is CITIC's concern that the retrospective measures "*could not have been intended to apply excessive and unchallengeable duty*". BlueScope agrees with CITIC in this regard. However, had CITIC abided by the Commission's recommended advice of 16 December 2015, CITIC would not find itself in a position that it could not seek a duty assessment for the period 5 May 2015 to 5 August 2015..

Recommendation of retrospective duty

CITIC suggests that the Commission changed its position to recommend retrospective measures. It should be noted that the Parliamentary Secretary also recommended retrospective measures in a previous circumvention inquiry involving certain aluminium extrusions exported from China¹. In that inquiry, the retrospective measures were also applied with effect on the date at which the circumvention inquiry commenced.

¹ Report No. 241.

The Parliamentary Secretary is not barred from recommending retrospective measures where it is deemed appropriate to do so.

Retrospective measures should only apply on revised variable factors

The circumvention investigation is not a review of the variable factors. CITIC's claim that the measures applied retrospectively should be based upon contemporary variable factors is not a requirement within the Division 5A provisions.

The amended notice is too broad

CITIC contends that the amended notice is "too broad" as it extends to all alloys. CITIC, however, has failed to acknowledge BlueScope's representations² that the addition of boron was the lowest cost means of modifying the exported goods, with the next lowest cost alloy being chromium. BlueScope further detailed four examples where administrations in other jurisdictions had identified the range of circumvention strategies engaged by steel industry participants involving the alloying of steel products to circumvent anti-dumping measures.

In light of the prevalence of circumvention activity, the amended notice is appropriate to discourage the circumvention activities identified.

BlueScope does not consider that the Parliamentary Secretary has erred in amending the goods coverage to include alloy steel, plated or coated with zinc. CITIC has not demonstrated that the Parliamentary Secretary's decision is inconsistent with the Division 5A circumvention provisions. The decision of the Parliamentary Secretary is therefore the correct and preferred decision.

(b) Parliamentary Secretary's discretion on variable factors

It is CITIC's view that in the absence of an obligation in the provisions to establish contemporary variable factors in the conduct of a circumvention inquiry (which clearly does not exist), the Parliamentary Secretary purportedly has an obligation to consider the variable factors.

CITIC has pursued this line of argument on the basis that it could not seek a duty assessment due to it not acting upon the Commission's advice of 16 December 2015 to pay any potential interim duties that may become liable should interim duties apply.

The Parliamentary Secretary's decision to accept the recommendations of the Commissioner is discretionary. However, the Parliamentary Secretary is not required by the provisions of Section 5A to conduct a review of the variable factors in parallel with the circumvention inquiries.

The Parliamentary Secretary's decision in this instance is the correct decision as she was not required to review the variable factors during the circumvention inquiry.

(c) Impact of Investigation No. 249

The applicant has suggested that the Parliamentary Secretary has considered the findings in Investigation No. 249 as "irrelevant" to the findings in the inquiry the subject of review. This is certainly not the case. In referencing Investigation No. 249, CITIC is suggesting that "the variable factors are likely to be different" and that this imposes discretion for her to consider the appropriate variable factors.

² BlueScope submission, 15 November 2015, P1-2.

As indicated, no such requirement exists in Division 5A and hence the Parliamentary Secretary has not erred in her decision.

(d) Alleged failure to consider key scientific questions

Section II of CITIC's appeal relates to the alleged "science" associated with the goods incorporating boron and the Commission's further alleged failure to adequately consider this.

The Commission sought independent expert advice from Emeritus Professor Dunne of the University of Wollongong. The Commission did consider the findings of Emeritus Professor Dunne in its final report and recommendations to the Parliamentary Secretary. BlueScope noted Professor Dunne's findings in his study in its submission to the Commission of 8 February 2016 that³:

"The independent advice confirms that the addition of the boron in galvanised steels (and HSS) does little to enhance the strength qualities of the steel unless the steel is subjected to further QT heat treatment."

Additionally, it was identified in Emeritus Professor Dunne's analysis that the addition of boron on the galvanised steel has "no appreciable effect" on the steel unless it is further heat treated. It is noted that Galvanised steels are not subjected to very high temperature QT heat treatment process - due to the consequent damage such heat treatment would do to the galvanised (zinc) coating.

CITIC has pursued arguments in its appeal that the Commission (and hence the Parliamentary Secretary) failed to investigate scientific issues about the alleged benefits of boron in galvanised steel. In essence, CITIC is rejecting the independent expert advice as incorrect.

Report No. 290 indicates that the Commission has considered the study from the expert witness (Emeritus professor Dunne), along with submissions from interested parties (exporters and Australian industry). The Commission has taken full account of representations made. As such, it cannot be argued that the Commission has failed to consider the scientific evidence concerning alloyed galvanised steel.

CITIC was provided with ample opportunity throughout Inquiry No. 290 to provide supporting evidence as to any claimed scientific merits of alloyed galvanised coated steel. However, CITIC's appeal relies upon challenging the findings of the independent expert and criticising the questions asked of the expert by the Commission. The Commission has not erred in its efforts to seek an independent viewpoint, nor in its assessment of all of the available information sourced during the investigation.

The information on the public record does not support CITIC's allegations of a failure by the Commission to consider key scientific questions concerning alloyed galvanised steel.

(e) The Parliamentary Secretary's decision as to minor modification was not the correct or preferred decision

CITIC states that the Commissioner has erred in his assessment of the physical characteristics of the circumvention goods. It claims "that boron had been added to deal with the age and strain hardening effect that otherwise applied to non-alloyed galvanised steel". BlueScope submits that this is a performance consideration and not a "physical characteristic" attribute that can be identified by examining the goods under consideration (i.e. alloyed and non-alloyed galvanised steel).

³ BlueScope submission, 8 February 2016, P.2.

It is also alleged by CITIC that Report No 290 “fails to properly concentrate on the exporter’s submissions as to physical characteristics”. This claim is not supported following a review of Report No. 290. Section 6.5 details the Commission’s analysis of matters raised by the exporter Yieh Phui in response to SEF No. 290. The Commission has afforded due regard to Yieh Phui’s representations. After considering the matters addressed, on balance, the Commission has not agreed with Yieh Phui’s representations. The unfavourable outcome does not establish that the Commission has not adequately considered Yieh Phui’s claims.

The Commission’s assessment of the alleged performance characteristics of alloyed (i.e. incorporating boron) and non-alloyed galvanised steel have been adequately examined by the Commission in Report No. 290. CITIC’s assertions that in respect of the “key scientific benefits” the Commissioner never:

- sought such evidence in time;
- never gave other parties notice to allow them to seek such evidence in response to or contemporaneously with the Dunne Report;
- asked the wrong expert;
- asked the wrong questions; and
- failed to give sufficient weight to the favourable comments in the Dunne report,

are not supported by the correspondence (including that of Yieh Phui dated 16 February 2016) received from interested parties following the placement of the “Dunne Report” on the public file.

CITIC therefore should not simply reject the findings in Report No. 290 when they are unfavourable to the importer. In absence of any persuasive information from CITIC to challenge the Commission’s preliminary assessment as to minor modification in SEF No. 290, the Commission has relied upon further supportive evidence from Emeritus Professor Dunne’s Report.

CITIC’s request for review does not illicit clear and irrefutable grounds as to where the Parliamentary Secretary has not made the correct or preferred decision concerning minor modification of the circumvention goods. Rather, CITIC has sought to challenge each and every criteria associated with the minor modification assessment including, for example, the level of boron above the minimum 8ppm to qualify as “alloyed” galvanised steel and, each end use application and whether the individual customers were adequately examined by the Commission.

CITIC’s assertions are targeted to challenge whether the Commission conducted its analysis in a sufficiently “thorough” enough manner, rather than establishing the investigation of minor modification was incorrect. The Commission’s investigation in its assessment of minor modification was sufficiently robust and supported by the available evidence submitted by interested parties. The independent report (where the author’s independence is also critiqued and challenged by CITIC) was similarly persuasive to the Commission’s stated preliminary views as contained in SEF No. 290.

It cannot be accepted that CITIC has sufficiently evidenced that the Commission (and the Parliamentary Secretary) have erred in any way in the assessment of the factors detailed in Regulation 48(3). BlueScope therefore submits that the decision of the Parliamentary Secretary concerning the minor modification of circumvention goods was the correct and the preferred decision.

(f) Confidentiality

- *Commission disregarded confidential information*

CITIC has detailed an alleged customer example (names redacted, etc) that made a request of Yieh Phui for galvanised steel incorporating boron allegedly prior to the imposition of the measures.

BlueScope has examined CITIC's commentary (paragraphs 238 to 248) concerning the assessment of this matter by the Commission. BlueScope has noted above that the addition of boron in steel products as a means of circumventing measures, has been an industry wide strategy for a number of years and has been reported (refer BlueScope submission 15 November 2015) widely.

BlueScope concurs with the Commission's stance concerning representations on behalf of Yieh Phui about purchases in another country. Assertions of this nature are difficult for the Commission to validate and do not relate directly to the Commission's investigation concerning supply and demand for the circumvention goods in Australia. BlueScope does not consider that the Commission's response is unreasonable in this regard. The issue before the Commission is whether the exporter is circumventing the measures in Australia, having considered all relevant aspects related to the export of the non-alloy and circumvention goods to Australia.

BlueScope does not consider that the Commission (or the Parliamentary Secretary) has made the incorrect decision by not accepting the confidential information relating to an alleged customer purchase of boron coated galvanised steel in another country.

- *inadequate non-confidential summaries of the applicant*

The Member will note that the redacted information does not relate the representations on behalf of Yieh Phui.

This matter is therefore not relevant to CITIC's appeal.

- *parallel inquiry*

It is not clear to BlueScope whether CITIC is merely making a statement or raising the conduct of a parallel inquiry as a means of contesting the outcomes of Report No. 290.

- *An unfair inquiry period was selected*

CITIC contends that it is inappropriate to consider an inquiry period that "*predated the relevant anti-circumvention regulation*". It may be considered inappropriate by CITIC for the period prior to the commencement of the investigation to be considered, however, it is the Commission's practice to examine trends typically over a four-year period (including the investigation period) in its injury assessment.

The period of inquiry nominated by the Commission is considered reasonable for the purpose of establishing trends and impacts associated with the circumvention goods. Division 5A does not specifically limit the Commission's analysis as the selection of the inquiry period.

(g) No legal basis for the variation of the original notice

- *Wrong application of Regulation 48(2)(b)*

CITIC is repeating its view that the circumvention goods have not been slightly modified prior to export. The Commission was satisfied that the goods had been modified (i.e. the circumvention goods differed to the goods the subject of the original notice that were non-alloyed galvanised coated steel).

BlueScope does not consider that the Commissioner or the Parliamentary Secretary has made the incorrect decision in this regard.

- *Failure to review each of the variable factors*

It is again suggested by CITIC that the Commissioner (and the Parliamentary Secretary) have made the incorrect decision to not revise the variable factors to reflect contemporary prices in the investigation period.

BlueScope agrees with the ADRP's stated view in Report No. 21 that there exists a separate assessment and review regime to allow for the revision of the variable factors.

Division 5A does not require the Commissioner (or impose an obligation on the Parliamentary Secretary) to revise each of the variable factors, hence the decision was not inconsistent with the legislative requirements (nor are the provisions inconsistent with Australia's WTO obligations).

- *The Commission did not address each of the requirements of Regulation 48(3)*

CITIC submits that the Commissioner has not made the correct decision as he has not considered each of the 13 factors listed in Regulation 48(3). However, Regulation 48(3) states:

*"For the purposes of determining whether a circumvention good is slightly modified, the Commissioner must compare the circumvention good and the good the subject of the notice, having regard to any factor that the Commissioner considers relevant, including **any of the following factors**:" (emphasis highlighted).*

The Regulation requires the Commissioner to take account of any factor, being any relevant matter, including any one of the 13 factors subsequently identified in the Regulation. Whilst the Commission may examine each of the 13 factors, it is not a requirement that all 13 must be considered.

- *The Commissioner wrongly failed to address each of the designated factors*

CITIC argues that it follows that as the Commission has allegedly not examined and assessed each of the 13 criteria listed in Regulation 48(3), then the Commissioner has failed to address each of the designated factors.

As it is evident that the Commissioner is not required to examine all 13 of the identified factors, the Commissioner has not failed to address the relevant factors in his assessment of the circumvention goods.

Relevant considerations omitted from CITIC's application

BlueScope draws the Member's attention to the change in import volumes for alloyed galvanised coated steel immediately following the imposition of measures on exports from Taiwan (refer Confidential Attachment 1 – Taiwan Galvanised Steel Monthly Imports – Other Alloy). The graph demonstrates the minimal volumes of imports ex Taiwan for alloyed galvanised steel prior to the imposition of measures on 5 August 2013.

Subsequent to the original notice there is a consequential spike in alloyed galvanised steel import volumes, peaking above 5,500 tonnes a month at the time of the commencement of the anti-circumvention inquiry No. 290. Thereafter, there was a substantial decline in import volumes of alloyed galvanised steel from Taiwan. This sudden decline of imports occurred in concert with the anti circumvention inquiry No. 290 outcomes.

The graphical evidence confirms that the key driver in the increase in imports of alloyed galvanised steel from Taiwan was not a well-established niche market for boron-added galvanised steel, but the attractiveness of an absence of interim duties applicable to the alloyed subheading classifications of galvanised steel from

Taiwan. The graphs in Confidential Attachment 1 are based upon the import volumes of alloyed galvanised steel classified to 7225.92.00 (statistical code 38) and 7226.90.00 (statistical code 71).

The trending increase in import volumes of alloyed galvanised coated steel was related to the absence of interim duties on the alloyed subheadings and was therefore not related to the claimed end-use specific requirements of the customer.

The available information on import volumes and trends for the alloy classifications is in contrast with the assertions of CITIC concerning a niche market for alloyed galvanised steel incorporating boron.

Conclusions

CITIC's application for review is premised on the view that the Commissioner (and hence the Parliamentary Secretary) has not adequately considered the provisions of Regulation 48(3), has relied upon information from the nominated expert that was not adequately appraised of the complete benefits of boron-alloyed galvanised steel, that the circumvention goods were not slightly modified, and did not adjust the variable factors on the circumvention good as he is obligated to do.

BlueScope does not consider that CITIC has demonstrated that the decision of the Parliamentary Secretary is inconsistent with the requirements of Division 5A or that the Parliamentary Secretary has failed to consider the relevant factors as per Regulation 48(3). It is BlueScope's view the decision of the Parliamentary Secretary is the correct and preferred decision as it relates to the circumvention goods as findings in Report No. 290.

If you have any questions concerning this application for review, please do not hesitate to contact me on (02) 4275 3859 or BlueScope's representative Mr John O'Connor on (07) 3342 1921.

Yours faithfully



Alan Gibbs
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