A&X Windows

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The Director – Investigations 1
Australian Trade Remedies Commission
GPO Box 2013
Canberra ACT 2601

Investigation No. 691: Aluminium windows and doors exported from the People's Republic of China. Response to the Statement of Essential Facts

Dear Director,

A&X Windows makes this submission in response to Statement of Essential Facts No. 691 (SEF 691). A&X Windows imports aluminium windows and doors (the goods) from the People's Republic of China (China). It is involved in the design, engineering and supply of the goods, project by project, for buildings in Class 2 and above under the National Construction Code. A&X Windows asks the Commissioner to have regard to the matters below in preparing the final report and the recommendation to the Minister.

The goods A&X Windows imports are made and exported by [exporter name to confirm], a residual exporter in this investigation. The SEF proposes a dumping margin of 24.4% for residual exporters. That is the rate behind the securities A&X Windows now pays following the preliminary affirmative determination, and the rate on which any interim dumping duty would be collected from it.

What is most directly relevant to A&X Windows is the arithmetic of its own rate. The residual normal value is an average of the selected exporters' normal values, and one of those normal values carries an amount for profit that s.45(3)(b) of the *Customs (International Obligations) Regulation 2015* (the Regulation) does not permit. Correcting it can move the residual rate in one direction only, and that is down.

Close behind it is the market A&X Windows works in. Every project it supplies is a Class 2 or higher building, procured by tender through a large construction company and supplied as an engineered and certified system designed for that building alone. The SEF accepts that these projects carry additional engineering, testing and certification requirements, and that imports are more prevalent in them. It then measures injury and causation as though the market were one undivided whole

1. A&X Windows and the projects it supplies

A contractor for Class 2 and above buildings

A&X Windows is a contractor. It does not sell windows and doors from a standard advertised range or a price list, and it does not supply the builders of detached houses. All of its work is on Class 2 and above buildings. Its customers are the large construction companies that hold the head contracts for those buildings

A project begins when it goes to tender, or when the construction company invites a small number of contractors to bid for the window and door package. A&X Windows prices the package from the architect's drawings and the project specification. If A&X Windows wins the package, the design work starts, with A&X Windows working with its supplier to prepare the shop drawings. These are the detailed fabrication and installation drawings for every window, door, frame and junction on the building, and for a single project they can run to over 200 pages. No two sets are the same, because no two buildings are the same.

The shop drawings are then the subject of engineering calculations. Those calculations confirm that each element, as drawn, complies with the building codes and standards that apply to that building. The engineered drawings are then certified for that job. A certification attaches to one building and is not carried across to the next.

On some projects the construction company also requires a performance mock-up. A&X Windows and its supplier build a full size sample of part of the facade, which is tested before production of the remaining goods is approved. Only after these steps does the supplier begin to manufacture. The goods that arrive on site are made to drawings prepared for that building, engineered for its loads and certified for its use.

Two kinds of product and two kinds of supplier

From where A&X Windows sits, the market for these engineered systems and the market for standard windows and doors are separate. Standard windows and doors for Class 1 housing are made in set sizes and ranges and sold through retailers and trade suppliers to the smaller builders who build houses. A Class 2 and above package is designed, engineered and certified as a system for one building, and is bought by tender from a large construction company.

In A&X Windows' experience, the manufacturers who concentrate on standard Class 1 products do not compete for the packages it bids for, and it does not meet them at tender. The SEF recognises the same distinction in its own words. It accepts that AWD supplied to large or complex projects "may be subject to additional engineering, testing, certification, design and project-delivery requirements". It also accepts that these differences are "particularly evident between lower density residential construction" and larger multi-residential, high-rise and non-residential projects. Its conclusion is that the differences "generally concern differences in the specifications, performance requirements and procurement of AWD rather than demonstrating the existence of wholly separate markets".

A&X Windows does not ask the Commission to find that the segments are wholly separate markets. Its point is narrower. Whatever label is given to the segments, the injury question in Class 2 and above buildings is whether the Australian industry was a competing bidder for packages of this kind, and whether imports took that work from it at dumped prices. The SEF does not answer that question.

2. The profit in the residual normal value

A residual exporter is an exporter that cooperated with the investigation but was not selected for individual examination. Its normal value is governed by s.269TACAB(2)(d) of the *Customs Act 1901* (the Act), under which that normal value "must not exceed the weighted average of normal values for like goods of cooperative exporters from the same country of export". Normal values of exporters found not to be dumping, or to be dumping at less than 2%, are left out of that average. The SEF applied that provision.

Yuanjiang was found to be dumping at 34.8%. Its normal value is therefore one of the normal values in the residual average. Residual exporters accounted for approximately 49% of Chinese exports to Australia in the investigation period. An error in Yuanjiang's normal value travels into the rate on about half of all the goods exported from China, including the goods A&X Windows imports.

How Yuanjiang's profit was worked out

Yuanjiang did not sell like goods in China, so its normal value was constructed. For the profit element, the SEF records that the commission "used a weighted average OCOT profit based on the domestic sales of like goods" by two other selected exporters. Therefore, the profit figures put into Yuanjiang's average were measured on the other exporters' profitable sales only. For one of them, the SEF states that "the commission calculated profit using the profit for Foshan AMJ's domestic like goods sales in the OCOT". Every loss making sale was removed before the average was struck.

What section 45 of the Regulation provides

Section 45 of the Regulation governs the amount for profit in a constructed normal value. Its first rule carries an express limit. Section 45(2) provides that "The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade."

That rule could not be applied to Yuanjiang, which had no domestic sales. Section 45(3) then requires the Minister to use one of three alternatives. The second is "identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export". The SEF does not identify the paragraph it relied on. The method it describes, an average of other exporters' profit on their domestic sales of like goods, is the method in s.45(3)(b).

The words "in the ordinary course of trade" appear in s.45(2). They are absent from s.45(3)(b). The drafter put the limit in the first rule and left it out of the alternative, in the same section of the same instrument. The alternative asks for the "actual amounts realised". A sale made at a loss realises an actual amount, and on the text of the Regulation it belongs in the average. The Commission's Dumping and Subsidy Manual reads s.45(3) in the same way. Of the three alternatives, it states that "there is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the Commission read any ordinary course of trade requirement into them."

The point has been decided once before, against the method now used. In ADRP Report No. 39, the Anti-Dumping Review Panel examined a profit rate worked out under s.45(3)(b) for a Chinese exporter of steel reinforcing bar. Having reviewed the confidential calculations, the Panel Member "agreed with Hunan Valin that this profit rate has not been established in accordance with section 45(3)(b) of the CIO Regulation".[1] The Panel then directed the Commissioner "to

[1] Anti-Dumping Review Panel, ADRP Report No. 39, *Steel reinforcing bar exported from the People's Republic of China*, 2016, para 89.

recalculate the profit in accordance with regulation 45(3)(b), that is, by including the actual amounts realised by other exporters, without the application of the ordinary course of trade test".[2]

The Commission complied. Its reinvestigation report records that "in recalculating an amount for profit under regulation 45(3)(b), the Commission did not filter out the non-OCOT sales of other exporters."[3] SEF 691 has gone back to the method the Commission set aside in that reinvestigation, and does not say why.

The Federal Court and the Appellate Body

The Full Federal Court has considered the same words. In Steelforce, Perram J said of s 45(3)(b) "it seems to me that this provision is focused on the determination of an actual amount realised in an actual defined period."[4] Bromwich J concluded that "Perram J is correct to adhere to the precise terms of the legislative scheme".[5] An average from which every loss making sale has been removed is not the amount the other exporters actually realised in the investigation period. It is the amount they realised on their profitable sales.

Section 45(3)(b) gives effect to Article 2.2.2(ii) of the Anti-Dumping Agreement. WTO reports do not bind the Commission, but they show how the obligation the Regulation implements is understood. In *EC – Bed Linen* the Appellate Body held that "in the calculation of the "weighted average", all of the "actual amounts incurred and realized" by other exporters or producers must be included, regardless of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not".[6] It reached that view from the same contrast between the first rule and the alternatives: "The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the Anti-Dumping Agreement, no exclusion should be implied."[7]

On this question the Australian and WTO positions are the same. The Regulation, the Manual, the Review Panel, the Commission's reinvestigation and the Full Court all read s 45(3)(b) without a filter.

The sales removed were the loss making sales. Restoring them to a weighted average of profit can only lower that average, or leave it where it is. A lower profit gives Yuanjiang a lower constructed normal value. Because that normal value is averaged into the residual normal value, the residual normal value falls, and so does the 24.4% residual margin.

A&X Windows asks the Commission to recalculate Yuanjiang's profit under s 45(3)(b) on all of the other exporters' domestic sales of like goods, to recalculate the residual normal value and margin on that basis, and to publish the corrected residual rate.

3. Class 2 and above buildings: division, segments and causation

The SEF finds three market segments: residential, multi and high rise residential, and non-residential. It accepts that "the Australian market is not homogeneous". It accepts that "some Australian industry members may have greater exposure to Class 1 buildings or generally the residential segment". And it accepts that "some imported AWD may be more prevalent in the Class 2 to Class 9 buildings and in particular commercial construction projects within the non-residential segment".

Read together, those findings place the imports and the Australian industry at different ends of the market. Where imports are concentrated in Class 2 and above work and the industry's sales are weighted to Class 1 work, how much the two actually compete is the central causation question. A&X Windows' work sits entirely within the part of the market where the SEF accepts imports are more prevalent.

Having found three segments, the SEF measured nothing within any of them. Each injury indicator is either a figure for the whole industry or a figure for Ventora. On sales volume, the SEF states that "this analysis has been undertaken at an aggregate level incorporating all sales by these entities". Market share is reported as one industry figure. Price suppression and profit are assessed on Ventora's results. Ventora's own sales by segment are not stated, so the SEF does not show whether the producer whose results carry the price and profit findings supplies Class 2 and above packages to any material extent.

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[2] Anti-Dumping Review Panel, letter to the Anti-Dumping Commissioner dated 14 August 2016, reproduced in Anti-Dumping Commission, Reinvestigation Report No. 369, *Steel reinforcing bar from China*, 2016, PDF p 1.
[3] Anti-Dumping Commission, Reinvestigation Report No. 369, *Steel reinforcing bar from China*, 2016, s 4.2, p 8.
[4] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, Full Court of the Federal Court of Australia, [99] (Perram J).
[5] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, Full Court of the Federal Court of Australia, [139] (Bromwich J).
[6] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, para 80.
[7] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, para 83.

The SEF's answer to the segment argument occupies a paragraph. It finds that the industry "has actively participated in projects across Class 1 buildings as well as Classes 2 through to 9 buildings", and that "this demonstrates that the Australian industry does compete across each segment within the Australian AWD market". Because the industry "has been both successful and unsuccessful across the range of building classes", the SEF concludes that it "has experienced injury in the form of lost sales across the entire Australian market".

A producer that submits some Class 2 tenders and wins a few is present in that segment. Presence does not show that imports into the segment took material volume from it, held down its prices or reduced its profit. The SEF moves from participation to injury with no measurement between the two.

The capability finding rests on the same footing. The SEF finds that the Australian industry "supplies and competes to supply AWD across Class 1 buildings through to Class 9 buildings". The evidence for it is in Confidential Attachment 1. Nothing on the public record shows what share of the industry's sales went to Class 2 and above projects, how many industry members supplied them, or at what scale. A finding that some members supplied some projects in each class is consistent with participation in Class 2 and above being marginal.

When the SEF reaches the claim that the industry lacks the technical capability offered by imports, it disposes of it by cross-reference. It notes that the claim "was prominent in submissions by entities involved in construction of multi and high rise residential and commercial projects", and then finds, by reference to section 4.7, that the industry "does have the technical capability offered by imported goods and is capable of supplying all AWD market segments". Capability in the sense that matters to A&X Windows' customers is the capacity to deliver the sequence in section 1 including shop drawings for a whole building, engineering to the applicable codes and standards, project certification and, where required, a tested mock-up, at the scale and on the programme of a large project. Interested parties told the Commission that constraints on supplier choice for these projects result "in procurement delays, possible redesign of projects, recertification and increased costs to businesses and ultimately consumers". The SEF does not say how many Australian manufacturers delivered packages of that kind in the investigation period, or how many such packages they delivered.

The information needed to measure the segments was before the Commission. Tender respondents identified building classes, and the Commission classified each project by segment for its own analysis. No figure in the SEF reports sales, imports, lost tenders or undercutting by segment.

What a reasoned determination requires

The Commission's Manual states that "there is nothing to preclude the Commission from performing a sectoral analysis of an industry and/or market if it yields a better understanding of the effects of imports and a more thorough analysis and conclusion", and that "Any conclusions drawn from a sectoral analysis must explicitly be related back to the industry as a whole."

The Appellate Body has explained what objectivity requires once an authority looks at parts of an industry: "where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry."[8] The reason it gave applies directly here: "Different parts of an industry may exhibit quite different economic performance during any given period."[9]

A finding that the goods are like goods does not settle the causation question. In *China – Autos (US)* the panel said:

"The finding of like product does not alone suffice to fulfil the obligation to make a reasoned determination of causation. We can readily envisage a scenario where domestic and imported goods are found to be 'like' within the meaning of Article 2.6 of the Anti-Dumping Agreement and/or footnote 46 to the SCM Agreement, but differentiation of goods within those two categories affects the competition between them in ways that have an impact on the assessment of causation."[10]

That is the scenario section 1 describes. An engineered and certified package for a residential tower and a standard window bought from a trade supplier for a house are like goods for the purposes of this investigation. They are not bought by the same people, through the same process, or from the same suppliers.

The tender evidence and the injury figure

[8] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 204.
[9] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 204.
[10] Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R, 23 May 2014, para 7.343.

The SEF measures the injury at $422.6 million. The commission "evaluated a total value of approximately $455 million during the investigation period" and found that "the total loss to the Australian industry by value was $422.6 million". It describes that figure as "approximately 15% of the total Australian AWD market value".

On the SEF's own figures, the loss equals about 93% of the value of every tender and quotation the Commission says it reviewed. Either the industry lost almost every project it reported, or the $422.6 million includes amounts of a different kind from the $455 million. The SEF does not say which, and the final report should give the composition of both.

The $72.6 million part of the figure is described in three different ways. At page 190 it relates to tenders that industry members "elected not to bid for, having assessed that their success rate was low despite their historical competitiveness with these customers and/or projects". At page 193 it is an annual estimate: "the annual value of work foregone is quantified at 72.6 million, after failing to win business on the basis of price". By page 203, "industry quantified a further annual loss of $72.6 million in business from former customers who had switched to Chinese imports of the goods".

A project the industry chose not to bid for, an annual estimate of work forgone and business lost from customers who switched are three different things, each needing its own evidence. None is a tender lost in the investigation period, which is what the $350 million is said to be. The SEF adds an annual estimate to a figure for a single period without explaining why the two can be added. The words "industry quantified" also matter. They describe the industry's own estimate, and the SEF does not say how it was tested.

This bears on A&X Windows' segment. In a Class 2 and above tender, a decision not to bid is itself a statement about capability, resources or programme as much as price. The SEF does not record which building classes the projects not bid for belonged to.

The SEF is candid about the limits of the material. It states that "given the significant scale and breadth of the AWD market it is not possible to achieve a representative sample of the market, despite the considerable volume of information provided by interested parties". In its materiality assessment it nevertheless concludes that "the commission considers the magnitude of lost sales would have exceeded this figure had the commission had a broader pool of tender information to assess".

That conclusion is not open on the SEF's own premise. A sample accepted as unrepresentative cannot support an inference about what a larger sample would show, in either direction. The tender lists came from supporting industry members and from importers who chose to respond, and members who lost work are the most likely to report it. That is a reason to treat the $422.6 million with care. It is no reason to assume the true figure is higher.

5. Factors other than dumping

Section 269TAE(2A) of the Act requires the Minister to consider whether any injury to an industry "is being caused or threatened by a factor other than the exportation of those goods", and provides that "any such injury or hindrance must not be attributed to the exportation of those goods". The listed factors include "contractions in demand or changes in patterns of consumption" and "the export performance and productivity of the Australian industry".

The Appellate Body has explained that the assessment "must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".[11] Without that step, an authority "would have no rational basis to conclude that the dumped imports are indeed causing the injury".The method is for the authority to choose, but the separation must be made.

<u>"Primary cause" is a different test</u>

On imports that were not dumped, the SEF concludes that the volume of dumped goods "is indicative of dumped and/or subsidised goods being the primary cause of injury to Australian industry despite the presence of other imports". Section 269TAE(2A) does not ask which cause is primary. It requires that injury caused by other factors not be attributed to dumping, and that cannot be done without some estimate of how much injury the other factors caused. The SEF makes no such estimate for any factor.

<u>Demand</u>

The SEF accepts that "there has been a contraction in demand since FY2023, as well as during the investigation period, and this may explain in part the reduction in sales value achieved by Australian industry". Its own figures allow that part to be estimated. In the investigation period Australian industry sales value fell by about 6%, while the market fell

[11] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para 223.

by about 2%. Had the industry held its share of a market that shrank by 2%, its sales would still have fallen by 2%, about one third of the decline the SEF records. The SEF does not make this calculation or any other.

Competition within the Australian industry

The SEF accepts that "the observed trend in Ventora's market share may have been impacted by such events", meaning departures, new entrants, acquisitions and consolidation. Its answer is that the industry as a whole lost share. That answer separates nothing. If customers moved from a consolidated incumbent to other suppliers, the effect on Ventora is real and is not caused by dumping.

Costs, aluminium and the measures on extrusions

The SEF finds that costs "have increased (unrelated to Chinese imports)". Ventora's cost to make and sell per unit rose by around 25% over the injury analysis period, most of it in FY2022, partly because lower production spread fixed costs over fewer units.

Aluminium is the largest input. The SEF observed that aluminium accounted for between 55% and 80% of the selected exporters' raw material costs, and that "Ventora's increase in raw material costs over the injury analysis period was approximately 7% higher than the change in LME". Ventora's aluminium became dearer relative to the world price over the same period in which the SEF finds injury.

The SEF does not ask why. The Commission's own record suggests one answer. Aluminium extrusions from China have been the subject of Australian measures for many years, and the SEF itself refers to "REP 657 and previous commission cases into aluminium extrusions exported to Australia from China". Measures on extrusions raise the landed cost of imported Chinese extrusions, and they allow Australian extruders to price up to that duty paid level.

The SEF does not say whether Ventora imports its extrusions, buys them in Australia or makes its own. Each answer leads to the same place. If it imports from China, part of its cost increase is the duty. If it buys locally, part of the increase may reflect local suppliers pricing to the duty paid level of imports. Either way, part of Ventora's higher cost is the effect of existing measures on its main input, which the exporters of the goods do not bear.

The relative efficiency of Chinese producers

The SEF accepts that Chinese producers may have lawful cost advantages, including lower raw material, labour and energy costs, higher productivity, automation and scale, and that "These relative efficiencies may have been a contributing factor in importers sourcing the goods from China, and in turn the observed deterioration in the economic performance of the Australian industry across the injury analysis period." Part of that gap is the extrusion duty described above, which Chinese makers do not pay on their inputs and Australian makers do.

The SEF's answer is that "margins of the magnitude assessed in relation to Chinese exports unfairly leverage the legitimate efficiencies that Chinese manufacturers may enjoy". That sentence takes the two effects together and does not separate them.

A&X Windows asks the Commission to identify, for each factor in section 9.9 of the SEF, the injury that factor caused in the investigation period, including the effect of measures on aluminium extrusions on Ventora's costs, and to explain how the injury attributed to dumping was found after that injury was excluded. Where an effect cannot be quantified, the final report should say why and explain how it was separated.

6. Conclusion

A&X Windows submits that the SEF does not yet establish that dumped imports caused material injury to the Australian industry, or that the proposed residual rate is the rate the evidence supports. It asks the Commission, in the final report, to:

- recalculate the amount for profit in Yuanjiang's normal value under s 45(3)(b) of the Regulation as the weighted average of all the actual amounts realised by the other exporters on domestic sales of like goods, without an ordinary course of trade filter, consistent with section 9.3 of the Manual and the 2016 reinvestigation.
- recalculate the residual normal value and margin on that basis, and publish the corrected residual rate.
- report sales, imports, tender losses and undercutting for each of the three segments the SEF has found, state how many Australian industry members supplied engineered and certified packages for Class 2 and above buildings, and explain how imports into segments with limited Australian supply caused injury to the industry as a whole, and

- identify and, where possible, quantify the injury caused by contraction in demand, competition among Australian producers, Ventora's cost increases including the effect of measures on aluminium extrusions, and the relative efficiency of Chinese producers, and attribute to dumping only the injury that remains.

Yours sincerely

A&X Windows