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JW:lf
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Anti-Dumping Commission

Bluescope Ltd (BLS) - Application for an Anti-Circumvention Inquiry into Zinc Coated (Galvanised) Steel Exported from the Republic of Korea and Taiwan

I act on behalf of Wright Steel Sales Pty Ltd, a company that has been identified in the abovementioned application by BlueScope Limited (BLS) and also act for CITIC Australia Commodity Trading Pty Ltd, which has received and responded to an Importer Questionnaire in relation to this investigation. This supplementary submission further deals with the inadequacies in the BLS application and the reasons why the investigation should be terminated forthwith.

The uncertain ambit of the application renders it invalid

In my submission of 7 August 2015, I pointed to the fact that the application provides no parameters whatever as to which alloyed goods are covered or not.

As noted previously, it is not clear whether BLS intends there to be some cut-off between goods properly seen as being of more than minor difference based on alloy content, and those which are not. If this was its intent, it provides no suggested cut-off, nor any reasoning or evidence that would justify any particular cut-off. Conversely, based on the general tenor of the application, it may be more likely that it wishes instead, that its application covered all galvanized steel, no matter the level of alloy content.

As I noted before, the fact that BLS has not articulated which position it is asserting, renders the application fatally flawed, as any application of such a nature, with such drastic consequences for the viability of the businesses of other interested parties, should say what it wants. ADC should not have to guess and should not be effectively asked to make strategic choices on BLS' behalf.

Even if ADC were to overcome this inadequacy by determining that, notwithstanding the ambiguity, it means one or the other, it is still flawed, but for differing reasons in each scenario. If it is open-ended in intent, it is not, and cannot be supported by any evidence, and indeed none was provided. Conversely, if it seeks to impose a cut-off, again none was even indicated, let alone was such a cut-off supported by evidence.

In previous submissions, I addressed the reasons why that made for an improper application, but did not address the consequences for ADC and the Parliamentary Secretary were you

not to terminate forthwith. More fundamentally in that regard, regardless of which was the true intent of BLS, the application should now be rejected, albeit for further and differing reasons, being the invidious position it puts both ADC and the Parliamentary Secretary into. That will be so regardless of whichever was BLS' actual intent as to the level of alloy content.

If BLS asserts that the application should cover all galvanized steel, regardless of alloy content, and simply seeks to support this contention with broad allegations in its application, to the effect that adding alloy at any level is simply an evasion device and not commercially beneficial, that is readily contradicted by material to hand. My previous submission showed that BLS itself funds an independent university research group that has reported on the benefits of Boron. Here it is important to recall that BLS has provided no evidence whatever to the effect that Boron is not beneficial, while its own independent university group publishes articles to the contrary. These must be independent scientific studies that BLS either has read and knows contradict its application, or should have bothered reading and in the absence of doing so, renders its application negligently misleading. Even if those studies are flawed, they exist and are on their face better than the entire absence of evidence to the contrary provided by BLS.

BLS' advisers should also have researched the US experience as reported in the relevant WTO Committee, which found that boron can be beneficial for continuously annealing processes in particular, which is the process used by my clients' supplier. If they read them and ignored the point, that is misleading. If they do not understand the point, that is inadequate. If they think they can refute the point, they have not begun to attempt to do so.

On the basis of such contrary evidence to the assertions in the application, where no contradictory evidence is provided by BLS, ADC can only conclude that BLS has failed to show that alloy at any level should be caught within its application.

The application is more fundamentally flawed if BLS is somehow allowed to impose on ADC and the Parliamentary Secretary, an obligation to do what it refused to do with its application, namely, to indicate an appropriate cut-off between minor and more than minor alloy addition, and justify this with some scientific evidence.

While the Commission stated that it would take the breadth of the request into consideration in making the final recommendation,[1] this should only be taken into account as a basis for rejection on the basis of it being shown to be unduly broad by ADC enquiries. To take any other approach would be to place both ADC and the Parliamentary Secretary in an invidious position and leave both readily open to a challenge before the Federal Court that could not easily be successfully defended.

This is so for the following reasons. In a normal anti-dumping case, of which circumvention applications must be a subset, the applicant presents the best evidence and arguments it can muster, and opposing parties do likewise. ADC and the Parliamentary Secretary sit as independent adjudicators on the relative strengths of the opposing arguments and evidence. While ADC does at times undertake independent investigations, this is primarily for the purpose of verifying the data presented or employing differing calculation methods where expressly permitted to do so, as for example with normal values. It should not be for ADC or the Parliamentary Secretary to stipulate parameters that were not sought by the applicant itself, and which are nowhere stipulated as part of your duties to do so.

[1] Consideration Report No 290 p 10.

In response, BLS might argue that investigative authorities such as ADC must be allowed to make determinations within the parameters of an overly broad application. That itself may be debatable, but even conceding this possibility, it cannot justify ADC doing the work of BLS that the latter should have done in these circumstances.

There simply could not be any basis on which ADC or the Parliamentary Secretary could justify any cut-off point, if some limits were to be put on an otherwise successful BLS application, where BLS itself offered no such indication of a viable cut-off. I of course argue that no such success should be possible in whole or in part for a range of other reasons but for the sake of this argument, proceed as if the BLS approach is at least tenable.

If you sought to identify a cut-off that BLS would not nominate, neither ADC nor the Parliamentary Secretary would be able to undertake a comprehensive scientific analysis to be able to determine with sufficient confidence, what mix, of which of a myriad of alloys, under what production methods, and for what end users, would constitute more than a minor modification to the composition of non-alloy goods. I cannot imagine that either of you would wish to do so, even if you had the expertise or resources.

As to the potential to do so even if you were willing, neither ADC nor the Parliamentary Secretary has the capability to evaluate the numerous articles readily available in scientific journals. All of the published literature explains certain benefits in certain circumstances. Would you be evaluating this literature to identify a cut-off point? How would you determine the relevance of each study and its scientific merit? What would you conclude about studies not as yet undertaken, eg if a study said boron at 10 PPM was beneficial, what would conclude about 9 PPM or 8 etc?

Conversely, neither ADC nor the Parliamentary Secretary would be expected to undertake its own scientific experimentation to resolve these uncertainties. Nor would such findings be acceptable were either of you to attempt to do so.

If either or both ADC and the Parliamentary Secretary sought instead to take independent scientific advice, that again should be based on experimentation, and each of the parties would no doubt wish to bring their own scientific experts to give evidence and respond to your initial conclusions. Even if it was arguable that you could do so, I would again very much doubt that you would wish to do so or would wish to recommend that the Parliamentary Secretary choose to engage or sign-off on such an exercise. If you could not or would not, you could not impose a justifiable cut-off that BLS refuses to advocate.

Let me explore further the problems that you would face. Any purported cut-off point asserted by ADC and then proposed to the Parliamentary Secretary, would immediately find interested parties, whose goods were on the "wrong" side of the cut-off line, being able to legitimately argue that the cut-off is arbitrary and that they had been wrongly discriminated against as compared with those just inside the cut-off point. You would have to be aware that those on the right side could conduct a profitable business, while those on the other, could not possibly do so, given that they would be subject to historical normal values, export prices and NIPs that have no commercial validity in today's steel market.

Let me further explore the problem that would be faced by ADC should it choose to determine a cut-off point, as opposed to simply doing what customs adjudicators normally do, namely, rule on the validity of BLS' designation of such a point. For example, each of the alloys mentioned in the WCO definition of alloy steel, is measured in parts per million. A cut-off point would have to stipulate some number of parts per million, but would ADC

and the Parliamentary Secretary be asserting that one part less per million is of significant difference? How would such an assertion be supported as reasonable, if challenged in court?

Any ultimate determination by the Parliamentary Secretary that supports the application and provides a cut-off point, would be readily open to challenge on the basis that the decision-maker failed to follow all reasonable steps as required in law. The Parliamentary Secretary would need to explain why readily available scientific literature that suggested benefits at a higher degree of parts per million than the cut-off point as designated, were rejected. Conversely, if the Parliamentary Secretary accepted all such literature, all but the most minimal alloy additions would not be caught within the application. Even then, you would have no way of knowing whether another study might suggest an even broader cut-off, as the studies tend to present positive findings and do not purport to advocate a cut-off point. Once again, if a study says 10 PPM is significant, what can you conclude as an administrator about 9 PPM?

Furthermore, it would be close to impossible for ADC to recommend a meaningful cut-off point. Given that BLS is challenging all alloyed goods regardless of composition, there would be thousands of permutations of the different alloys mentioned in the WCO definition, at differing concentrations, and under differing production methods. ADC would simply find it impossible to set up cut-off points for each potential permutation of alloys and percentage compositions of such alloys. That is even more problematic given that the scientific literature shows clearly that some alloys are more or less beneficial, depending on the production processes, for example, the temperature and rate of cooling utilized at various stages. Twenty or so alloys, at a hundred or so levels of concentration individually, and far more when considered in combinations, with hundreds of temperature points, all multiplied out, would constitute an astronomical number of permutations for you to rule upon. You could not possibly wish to recommend that the Parliamentary Secretary do so.

Alternatively, an attempt to make decisions simply based on the interests of individual end users would be unworkable for a range of reasons. Would ADC and the Parliamentary Secretary track through to each end user, both trading houses, manufactures and ultimate users of manufactured product? Would it be making an independent determination for each potential end user? On what evidence would it do so? What if the same goods were imported by an individual trader for the benefit of two different end users, one who had a far greater interest in the benefits of alloys than the other? Would one be caught but not the other, even though the goods are identical and imported by the same trader? How could that operate at the customs barrier? Customs officers at the barrier would be unable to identify whether imported goods were subject to an anti-dumping duty notice or not.

As a general principle, import laws should not be based on end use and should certainly not be based on the mental attitudes of hundreds or thousands of end users, whose views may change over time. Such an approach would also be unworkable for new entrants into the market, whether traders or end users.

While the abovementioned problems of identifying any cut-off point could arise if these had been designated by BLS in its application, this would be fundamentally different as a matter of administrative law and process. It alleviates all of the above problems where ADC and the Parliamentary Secretary are concerned. If BLS had proposed a cut-off, as it should have done under an obligation to clarify the goods in issue in an application as required in both WTO law and Australian law, then ADC and the Parliamentary Secretary would simply be reviewing its arguments in favor of that cut-off, as against arguments of other interested parties against those submissions. In such normal circumstances, ADC and the Parliamentary Secretary are simply making administrative rulings <u>on balance</u>, by properly

taking into consideration the material presented by opposing parties and then determining which presentation is more compelling. Such a process of effectively "umpiring," is a valid way for a bureaucracy to deal with complex and contested scientific material. If BLS presents the better reasoned and proven argument in favor of its cut-off, so be it. Conversely, if instead, opposing parties do so, that again is reasonable in all the circumstances. Stated differently, the job of ADC is to evaluate an application, not draft it.

There are also good policy reasons for this position as well as the above arguments as to legal validity. If the onus is properly on the applicant to define the goods it seeks to attack, and if BLS makes too high an ambit claim that all alloyed products have no commercial benefits, a clearly unsustainable allegation, it should be more likely to lose. There is then more of a practical incentive for it to be reasonable in its application. That then makes the work of ADC and opposing parties more focused and appropriate in a policy sense.

Confidential

(end of confidential material)

Is the application repairable?

The public file contains a record of a meeting between ADC and BLS on 25 August, where, inter alia, ADC asked BLS for advice regarding the impact of adding boron and as to potential legitimate uses. It is pleasing that ADC has sought advice from BLS, but the application can only be seen as fundamentally flawed no matter what BLS presents in due course. This so for the following reasons:

The Note indicates that BLS "advised that they will be making public submissions which will set out the content of their advice, suggested alterations to the original notice and suggested ways of managing legitimate exports."

If all BLS intends to do is provide arguments in support of its earlier contentions, that is permissible, but none will be possible. As noted above, it is simply impossible to assert that boron can never have benefits.

If instead, BLS intends what it said in terms of "alterations to the original notice," it is admitting that the notice is incorrect. In such circumstances, a new notice should be required if it is to be allowed to pursue the essence of this claim. A flawed notice to which exporters and importers have already responded, and which has investigatory and reporting deadlines imposed by law, cannot be effectively made into a new notice that does need to comply with the statutory terms to that effect. To do so, would undermine the statutory moratorium on reissuing flawed applications and would leave my clients at risk of retroactive duties to an argument then modified. While ADC may of course not recommend retroactive duties, the threat itself is already a commercial concern, as any importer has to make a decision whether to seek to pass on in whole or in part, any such contingent liability and must consider whether to advise its accountants of this for reporting purposes.

More fundamentally, allowing BLS to change the application, would make all of the time and expense of the previous responses wasted, given that the essential argument was as to <u>any</u> potential, and not some stipulated level (as yet unknown). Hence there would need to be a whole new right to respond to what is now argued, which would contradict what was once argued.

In addition, allowing BLS to stipulate some cut-off level, would require them to back this up with some scientific evidence, which in turn would require us to evaluate that evidence, perhaps establish experiments to refute it, and then respond. At this point in time, we have no possible way of knowing what case BLS might now ask us to meet. When would we know and how long would we have to experiment and respond? Experimentation would take many months and a significant amount of money.

In so far as BLS now intends to advise as to how "legitimate" exports are to be treated, this would either relate to improper attention to use, or would make BLS an effective decision-maker if they were allowed to vet claims from time to time, and would be either wholly unworkable, or would be based on objective scientific evidence that for the above reasons, would need to be tested and debated.

Finally, ADC appears to have asked about boron, but the application covers a myriad of alloys, concentrations and techniques, so whether in this or a new application, BLS has to say what it intends for each. Interested parties have as much right to know what is not covered as to know what is, so they can trade in the former with impunity. Even if BLS was entitled to present a new cut-off for boron, which is denied, they much surely do so for all alloy pwermutations.

Conclusion

For the above reasons, it is fundamentally flawed, but for different reasons, if BLS is wrongly allowed to invite/demand that ADC and the Parliamentary Secretary do the work that BLS refused to do, or is alternatively, now allowed to present an effectively new application in the guise of a modification.

For the foregoing reasons, the application should now be rejected and interested parties should no longer have to undertake the expense and uncertainty of this investigation or the suggested revisions to it. ADC should only come to the conclusion that this improperly drawn application, shown to be such via subsequent material presented to ADC and the likely admission by BLS that it needs modification, is fatally flawed and should be terminated forthwith.

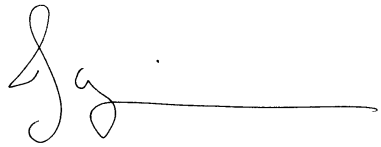
For completeness, I will, if necessary, put in a further supplementary submission on other grounds for rejection of the application, if ADC is unwilling to make an immediate termination decision.

Further confidential material.

(End of further confidential material)

In any event, if ADC was determined to continue, it would have to be that BLS first presents its "suggested alterations," with appropriate time then given for responses. For the above reasons, I believe allowing BLS to do so would be improper in law.

Yours faithfully



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