J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

28 February 2018

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

REVIEW OF THE DECISION OF THE MINISTER IN RELATION TO THE CONTINUATION OF ANTI-DUMPING MEASURES

HOT-ROLLED COIL EXPORTED FROM TAIWAN

Dear Panel Member,

This submission is made on behalf of China Steel Corporation (CSC) to the Anti-Dumping Review Panel's review of the decision of the Minister to continue the anti-dumping measures applying to hot-rolled coil exported from Taiwan. CSC takes this opportunity to reiterate the position outlined in its application with regards to the evidentiary standard for being satisfied of the 'likely' future recurrence of dumping and injury in the absence of measures.

It is important to firstly highlight that the default outcome of a continuation inquiry is for the anti-dumping measures to expire at the end of the five-year period. This was confirmed by the Appellate Body in *US — Oil Country Tubular Goods*[1] which considered the continuation of measures as '*an exception to the otherwise mandated expiry of the duty after five years*'.

It is also accepted by the Commission that the definition of likely and likelihood means '*more probable than not*'[2], and that being satisfied of the likely recurrence of dumping and/or injury requires a foundation of positive evidence. In this context, it is appropriate to understand and outline the Commission's role and obligations in undertaking a 'likelihood' assessment.

The Panel in *US — Corrosion-Resistant Steel Sunset Review*[3], underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

[1] Appellate Body Report, WT/DS268/AB/R, para 178, page 61.
[2] Federal Court in *Siam Polyethylene Co Ltd v Minister for Home Affairs (No.2)*.
[3] Panel Report, WT/DS244/R, para 7.271, page 66-67.

> *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. 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 recurrence.* [emphasis added]

Similarly, the Appellate Body in *US — Corrosion-Resistant Steel Sunset Review*[4], considered the terms used in Article 11.3 of the WTO Anti-Dumping Agreement (ADA) and concluded:

> *This language in Article 11.3 makes clear that it envisages a process combining both investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated — and not simply if the evidence suggests that such a result might be possible or plausible.*

The Appellate Body[5] also found:

> *… that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions.*

It is clear then that in order to be satisfied that the recurrence of dumping and/or injury was likely, the Commission was required to take an active role in examining and analysing relevant gathered information, and to base its determination on a foundation of positive evidence and not mere assumptions. CSC contends that had the Commission met these obligations, it would have reasonably concluded that dumping and/or injury was not likely to recur in the absence of measures.

This is confirmed by the Commission's statements to the ADRP in the published conference summary[6], where it confirms that the close price competition between Taiwanese and Chinese exports of HRC throughout the region, was sufficient to assume that similar price competition would occur in Australia. However, this view ignores and overlooks that CSC's exports to Vietnam were not dumped and on that basis disproves the assumption held by the Commission.

The Commission confirms in the conference summary that it did not undertake a margin analysis as the BlueScope data was not sufficiently detailed to allow for a meaningful margin analysis. However, the Commission makes no mention of the requested third country export sales information contained and submitted in CSC's exporter questionnaire

[4] Appellate Body Report, WT/DS244/AB/R, para 111, page 39-40.
[5] Ibid. para 178, page 65.
[6] Anti-Dumping Commission - Conference Summary

response[7]. This data was sufficiently detailed to enable a broad margin analysis to be performed. CSC contends that had the Commission undertaken the active investigatory role envisaged by the Appellate Body, by examining and analysing CSC's third country export sales, it would have established that its initial assumptions were not valid. The margin analysis would have instead supported the view and that the absence of dumping duty measures in Vietnam did not result in CSC lowering its export prices to dumped levels in response to Chinese export prices, and given this, it was not reasonable to simply assume that the observed general market prices in Vietnam, were readily transferable to the Australian market.

In the published ADRP conference summary, the Commission's confirmation of limitations with the BlueScope data also highlights an important point that it conveniently opted to overlook in drawing inferences about the close price competition observed in the Vietnam market. In confirming that '*[t]he BlueScope data was not sufficiently detailed as to include model / grade types and as such could not provide a basis for an accurate margin analysis'*, it is apparent that the Commission was aware of the known limitations with the submitted pricing information at that time. Yet notwithstanding these known and acknowledged failings with the BlueScope pricing information, the Commission considered it sufficient to conclude that close price competition existed between Taiwanese and Chinese exports in the Vietnamese market and broader region. Given the Commission's awareness and understanding of the high degree of variance in HRC prices during the review period, the reliance on incomplete information does not accord with the Commission's obligations to rely on 'positive evidence'.

The Commission's own normal value calculations[8] based on verified sales information submitted by CSC showed that approximately [redacted] different model categories existed, with a significant variation in prices across the review period and within each quarter. For example, the pricing information shows that selling prices between the lowest and highest priced HRC models varied by as much as [redacted]% over the 12-month review period, and up to [redacted]% within the same quarter. Given these known variations in prices for different grades and types of HRC, it was incumbent on the Commission to query the accuracy of the BlueScope data (as it did in deciding that the data was not appropriate to undertake a margin analysis), given that it was being used to draw conclusions about price relativities in the Vietnamese market and without any means to properly establish whether a reasonable and proper comparison was assured.

Instead, the Commission appears to have simply accepted the failings and limitations of the BlueScope data, and based its assumptions of similar price competition in Australia and concluded a likelihood of recurrence of dumping. In CSC's view, this falls well short of the required active role of the Commission to examine relevant information and base its findings on positive evidence. It also confirms that the Commission's assumptions were based on data which it accepts was not sufficiently detailed to properly compare different types of HRC, at the expense of actual verified and positive data relating to CSC's third country exports which disproved the assumptions held by the Commission.

[7] CSC's Exporter Questionnaire Response – "Exhibit F-1 Third Country Sales.xlsx"

[8] ADC – "CSC - 4 – Normal Value.xlsb, worksheet "4A – WA Normal Values".

It is clear from the Commission's statements that its assumption was based on flawed data, when positive verified data existed which contradicted the adopted assumption. Given that the Commission's satisfaction of the likely recurrence of dumping appears to rest entirely on this sole assumption about similar price competition between Taiwanese and Chinese exports in the Vietnamese, Asian and Australian markets, it is clear that the Commission did not establish the likelihood of dumping on positive evidence.

Finally, it is noted that the Commission acknowledges in its conference with the ADRP, that Australian importers '*continued to source from Taiwan notwithstanding the availability of lower-priced Chinese product*' and notwithstanding that export prices were close to the relevant floor price, which in the case of CSC was at least 1.8% higher than the corresponding contemporary normal value. This confirms CSC's view that factors other than price were relevant to importers purchasing decisions, and again highlights that the Commission overlooked a reasonable conclusion that price competition did not exist between Taiwanese and Chinese imports in the Australian market.

Yours sincerely,

John Bracic