Ms Lydia Cooke
Manager, Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA ACT 2600

8 August 2012

Our ref 11276/80133959

Dear Ms Cooke

Hot rolled coil steel exported from the Republic of Korea, Taiwan, Japan and Malaysia

We act for Nippon Steel Corporation (**Nippon Steel**) and refer to our client's earlier submission dated 9 July 2012.

This additional submission addresses, to the extent it can given the brevity of the Australian Industry Visit Report (**Visit Report**), the issue of material injury.

We respectfully submit that:

(a) there is no basis on which a Preliminary Affirmative Determination could be made given the evidential material considered by Customs; and

(b) Customs' inability to draw conclusions concerning causation demonstrates that Customs cannot be satisfied that any alleged material injury is the result of dumping. Consequently, material injury has not been (and is unlikely to be) established.

2. **Introduction**

2.1 Our client acknowledges that, given the limited nature of its export volumes to Australia and the high cost of participating in an investigation, it has not provided a fully compliant exporter questionnaire response.

2.2 The amount of domestic sales and cost information required to complete the exporter questionnaire response is burdensome and the time and expense of full compliance is disproportionate to the benefit assessed in terms of Australian sales.

2.3 Our client's recent submission to Customs of its export data must however be accorded significant weight, given that Customs can verify the information provided by our client against its own data and information obtained from importers. Customs should indeed accept this information and assess it with a view to determining whether our client materially contributed to any injury suffered by the Applicant (which is denied). Given Customs' ability to cross check the information provided by Nippon Steel, the information submitted must be fully addressed in the Statement of Essential Facts. Any rejection of the information must be supported on reasonable and rational grounds.

2.4 Our client is confident that the evidence it has provided, assessed against other verified information from the relevant importers with whom it deals, will show that its export price is well above the non-injurious price.

3. **Detailed consideration**

3.1 Customs previously stated that the issues that it will be addressing in the Visit Report will include:

(a) obtaining additional financial data to assist in the analysis of the claimed injury to Australian industry;

(b) giving the company the opportunity to provide any further comments or raise any further issues it believed to be relevant to the investigation; and

(c) discussing and gathering data relevant to establish an unsuppressed selling price.

3.2 Our client considers that the Visit Report does not meaningfully address the issues nor the Applicant's claims on material injury. Rather, it amounts to a repetition of the claims made by the Applicant.

3.3 Our client is deeply troubled, and this is a concern we also share, that there is a total failure of consideration given to the issue of "other possible causes of injury".[1]

4. **Market segmentation**

4.1 A key issue in the determination of this application is that, as BlueScope acknowledges, there are three separate markets:

(a) Pipe and Tubing;

(b) Automotive; and

(c) Manufacturing.[2]

4.2 Customs noted in the Consideration Report that the Applicant claims that both the Australian industry and imports of the goods under consideration compete across each market segment in Australia.[3] It is claimed that they compete via the same distribution channels in order to sell product directly to larger Australian manufacturing companies, and to distributors that sell to these markets.

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[1] See para 10.2 of this submission.

[2] See BlueScope's application at page 17 which specifies that this market is made up of a number of discrete market segments such as agriculture, mining, oil and gas and non-residential construction. Product examples include steel furniture, hardware and tools etc.

[3] Consideration Report, pg 12.

4.3 Our client considers that this statement is unrealistic and too broad. It is clear that the market for hot rolled coil steel (**HRC**) should be treated as segmented, at the very least, between HRC supplied to the automotive industry, and that supplied to the pipe and tube and general manufacturing industries.

4.4 Customs has before it submissions from Ford[4] General Motors Holden (**GMH**)[5] and Toyota[6]. These automotive manufacturers have emphasised that it is only the exported product from either Japan, in the case of Ford and Toyota, or Korea, in the case of GMH, which meet their required technical specifications.[7]

4.5 In the Visit Report, the Applicant states that it sells HRC in the three markets directly, as well as through its own distributor and others into these markets. It states that a confidential diagram was provided to demonstrate how these imports compete. Our client notes that this diagram does not appear to be confidential, and to the extent that it does purport to have confidential information, a non-confidential version of this diagram was not made available to interested parties.

4.6 It is clear from the nature of the application itself that the principal concern of the Applicant is the pipe and tubing sector while the Visit Report and the Australian Steel Industry Association submission[8] both record that the Applicant's Western Port facility, which was built to meet the needs of the Australian automobile industry, was closed during the investigation period.

4.7 The fact that the Applicant may hold hope of supplying a product to the automotive sector is not an answer that carries any weight in coming to a determination on material injury. Likewise, any statement that it can produce an "equivalent" product to that supplied by Nippon Steel or other manufacturers currently supplying Toyota, Ford or GMH is irrelevant to the determination on material injury. In any event, and as stated elsewhere in this submission, the car manufacturers have expressly stated that BlueScope's product is not "*equivalent*"[9] to imported product and certain product has not approved at all for use by the Australian manufacturers given the rigorous testing undertaken, the 5 year cycle of their cars and performance requirements of those manufacturers.

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[4] See submission of Ford Motor Company of Australia Limited (**FMC**) dated 2 August 2012.

[5] See submission filed by Hunt and Hunt on behalf of GMH dated 25 July 2012.

[6] See submission filed by Toyota Tsusho (Australasia) Pty Ltd dated 24 July 2012 and separate submission of Toyota Motor Corporation Australia Limited (**TMCA**) dated 25 July 2012 which states that "*BlueScope is unable to supply TMCA with Australian produced or manufactured product that is an equivalent to imported* [product] *for use by TMCA's local component suppliers*".

[7] See FMC submission in which Ford submits that it does not consider BSL [BlueScope] grades to be equivalent to those engineered into its vehicles in the key qualities of 'Yield & Tensile Strength, Crash Performance and BSL does not produce product relevant to the automotive sector that is less than 1.6mm or wider than 1.55m.

[8] See submission from Australian Steel Association Inc. dated 25 July 2012 at paragraph 3.3.1.

[9] See for example submission of Toyota Tsusho (Australasia) Pty Ltd dated 24 July 2012 at page 3 and TMCA's submission at page 1.

4.8 As an extension of the above issue, our client's exporter questionnaire response details:

(a) every sale made by it (through the trading companies) in the Australian market during the investigation period; and

(b) the exact product specification of every sale transaction in the Australian market during the investigation period.

The evidence is clear both as to exact specification of the product approved, utilised and needed by the car manufactures (and which BlueScope is unable or has not been approved to supply the automotive manufactures).

4.9 Our client considers that the market is required to be segmented in light of the submissions made by the interested parties referred to above. That segmentation is so stark and evident in the numerous submissions filed on the public record that it would be unreasonable for Customs to ignore it but treat the market (pipe and tube, general manufacturing and automotive) as homogeneous.

5. **Price undercutting**

5.1 Our client notes that in the Visit Report, Customs stated that the claim on price undercutting will be assessed when visits to importers are completed.

5.2 Our client agrees that Customs is not in a position to make a final determination on whether or not there is price undercutting until importer visits have taken place and an appropriate price comparison is made.[10]

5.3 Our client is, however, concerned with the fact that there is no indication in the Visit Report that Customs' intention is to verify information obtained from the Applicant against information it will obtain from importers. This is of concern to our client as Customs has stated in the Consideration Report that the Applicant had provided "probative evidence" that the price offered for imported goods from the nominated countries undercuts the Applicant's price of the locally made goods.[11]

5.4 In its submission of 9 July 2012, our client raised its concerns regarding price undercutting and the lack of any probative evidence, in particular on prices based on actual contracts or sales.[12] That concern remains live and must be addressed.

5.5 It is unusual for a Consideration Report to state that probative evidence has been provided on price undercutting, and our client can only assume that the term "probative" was not used to imply that Customs was in a position where it could conclude that price undercutting had *in fact* occurred.

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[10] "Customs and Border Protection will undertake a price undercutting analysis that focuses on data that covers transactions made during the investigation period. This analysis compares the price of the imported goods with the sales price of the locally produced goods, ensuring that transactions are made under the same conditions (e.g. timing, volume, discounts, delivery, credit, same customer etc)" - Custom Manual, pg 105.

[11] Consideration Report, pg 27.

[12] See par 4.23 to 4.28 of Nippon Steel's submission dated 9 July 2012.

5.6 It would be of concern, and contrary to Customs' own methodology, to conclude that price undercutting had occurred if that conclusion was based on the inadequate information provided by the Applicant as part of its application. To date, there is no other information available on the public file.

5.7 For the above reasons, our client is concerned that there is no indication that Customs, as part of its visit on the Applicant, obtained the necessary pricing information or supporting documentation such as contracts.

5.8 We consider that Customs must clarify this issue further and amend the Visit Report.

6. **Price Suppression**

6.1 There is no reference to price suppression under the "causation" portion of the application. The application only contains a general statement that the Applicant has suffered price suppression by reference to the whole of the injury analysis period. The charts at page 28 of the Visit Report purportedly depict total revenue and costs, and unit revenue and costs. As noted by Customs itself, the margin between revenue and costs may (not must) be an indication of price suppression.

6.2 Given the historically high cost increase of raw materials, in particular coking coal and iron ore prices, as well as decline in the overall steel market, the chart begs the question whether the decline in margin between revenue and cost is attributable to the allegedly dumped imports. This very point was raised by our client in its submission with reference to *China-Countervailing and Anti-Dumping Duties on Grain Orientated Flat Rolled Electrical Steel From the United States*[13], which suggested that the ability to maintain a historical margin between price and costs may not always be possible.

6.3 Our client made a submission on this point on 9 July 2012, and the Applicant responded on 16 July 2012. We also note that the verification visit occurred on 26 to 28 June 2012. Our client considers that the response by the Applicant, whilst acknowledging that it was not basing its price suppression argument on maintaining a static cost price margin, did not in any way meaningfully address the issue of the impact of substantial cost increases in coking coal and iron ore prices, or the weaker demand and impact of the Australian dollar. These were all matters identified by the Applicant in its own documentation which was referred to by our client as well as other interested parties. The Visit Report, under "causation" is, however, silent on what inquiries were made by Customs on these critical issues.

7. **Causation - Legal Standard**

7.1 In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan AB-2001-2*, the Appellate Body stated that:[14]

> *"The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective*

[13] WTO: WT/DS414/R dated 15 June 2012. See Nippon Steel's submission dated 9 July 2012 at para 4.13.

[14] WTO: WT/DS184/AB/R dated 24 July 2001 at para 193.

examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process." (emphasis added)

7.2 One of the key issues in this case is consideration of the "other factors" which caused or contributed to the material injury.

7.3 The Appellate Body also said in the same case, at paragraph 223 that:

"[To] ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties..." (emphasis added)

7.4 The Dumping Manual, under "other factors", states:

"In accordance with s. 269TAE(2A) of the Act, any factor other than the exportation of dumped goods is causing or threatening to cause material injury must be considered, such as:

- *the volume and prices of imported like goods that are not dumped; or*
- *the volume and prices of importations of like goods that are not subsidised; or*
- *contractions in demand or changes in patterns of consumption; or*
- *restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or*
- *developments in technology; or*
- *the export performance and productivity of the Australian industry*

The list is illustrative of any known factors. The Australian industry is asked in the application form to identify any such factors. Factors brought to Customs and Border Protection's attention by interested parties, and any additional factors Customs and Border Protection may become aware of in the course of the investigation, will be included in the analysis." [15]

7.5 The legal authorities referred to above may be summarised as requiring an examination that is in conformity with the principles of good faith and fundamental fairness and Customs must engage in a proper and carefully considered separation exercise of the "other factors" from the injurious effects of the allegedly dumped imports.

7.6 It is also clear that a failure to give proper consideration to those factors would also breach the policy statement made by Customs in its Dumping Manual.

7.7 Our client wishes to reinforce the requirement that objectivity and proper consideration be given to "other factors". In particular, issues raised by our client and other interested parties must be addressed and given significant weight.

8. **Price Effects**

8.1 In considering price, the Applicant stated that it suffered in three ways. As its policy was based on prices which reflected import parity: [16]

(a) the benchmark price for import prices was lower than it had been in the past;

(b) in the past it was able to assess import prices and determine a benchmark in the mid-range, but in the current market its benchmark has been at the lower end of import prices; and

(c) that it was unable to achieve the premium on import prices it had achieved in the past and in the current market it was only achieving an unspecified but lower premium. It is then said that when it attempted to raise the premium, customers responded by reducing sales volume.

8.2 The statement made by the Applicant raises the issue of its pricing policy and how it operates in the context of a large product range, the three market segments, and exports from a variety of companies (and countries) in determining the benchmark price.

8.3 No evidence is provided, or statement made, about how the Applicant goes about this task. The whole subject area is very dimly lit. It must be presumed that the Applicant operates sector by sector, as it has referred to some exporting countries as having a tendency to specialise in certain markets. No information is provided as to what time period is used to determine the benchmark and whether the benchmark is determined on some weighted average basis. All that is stated is that it would prefer to charge the higher, or highest, export price it can find and not use the lower end of the benchmark. The curiosity however is that the Applicant goes on to state that it has a pricing policy of charging more than the benchmark

[15] Dumping Manual, pg 14.

[16] Visit Report, pg 33.

price. The Applicant does not state that it has been unable to charge the same level of premium that it had in the past, but rather that the current market condition does not allow it to achieve what it had once "*sought*" to achieve.

8.4 The Applicant, in its application, made only one reference to a premium and offered no meaningful explanation of the basis for its calculation. In the Visit Report, it does not appear that Customs has asked any particular questions as to the basis for the premium - which should be non-confidential and therefore included in the Visit Report - or how it operated in each of the market segments and how the benchmark price was determined in those segments.

8.5 Our client notes that the use of a premium would logically undermine the claim of price undercutting as the Applicant's policy is to charge more than an import benchmark price, with the only dispute being as to how much more it can charge.

8.6 In relation to quality, no evidence was provided by the Applicant other than a general assertion that customers were aware of the quality of the HRC produced by the Applicant and by importers. Again, there is no reference to the question of quality in relation to supplying GMH, Ford and Toyota and no questioning by Customs on this key issue.

8.7 Finally, the application does not cover all the HRC imported into the Australian market - some 22.4% of imports for year 2011/12 (based on March to April) come from countries not covered by the application. There is no mention of what role these imports have in determining the import parity price and how those prices compare to those from the nominated countries.

9. **Unsuppressed selling price**

9.1 Our client notes that the Applicant has not provided any evidence of its position on an unsuppressed selling price even though it is in a position to do so and one of the stated reasons of the visit it to obtain the Applicant's views on this very question. It can only be assumed that the Applicant has no view or does not wish to put forward a view so that interested parties like my client are deprived of answering the issue in a timely submission.

9.2 Our client further notes that the Applicant's pricing policy has been to match import parity pricing and the only objection to this policy is that in the Applicant's opinion, the import prices from nominated countries have been dumped.

10. **Other possible causes of injury**

10.1 The Visit Report provides even less information than that provided by the Applicant in the application. This is particularly so given that the publicly stated purpose of the visit to the Applicant was to consider the injury claim. The Applicant is in the best position to *elaborate* on those claims and provide supporting evidence. The Visit Report in four sentences simply repeats in an extreme and summary form its reference to the impact of the GFC, and the cost of shutting down the Applicant's export business. The difficulty of the analysis is so plain that it bears no further comment.

10.2 The issue of "other factors" assumes particular significance in this case as the claim for material injury has occurred against a background of substantial injury from non-dumping

factors. Indeed, as the Applicant itself has acknowledged,[17] it has been the victim of a "*perfect storm*" of three particular events. Customs was also provided with an ASX media release authored by BlueScope and dated 22 August 2011, which is attached to the Visit Report. That market release stated:

> "*...the Company is experiencing an unprecedented combination of economic challenges in the form of a* ***record high Australian dollar****, low steel prices and* ***high raw material costs*** *and these challenges are compounded by the* ***low domestic steel demand*** *in the wake of the GFC*".[18] (emphasis added)

10.3 None of those factors and issues were addressed in the Visit Report.

10.4 Our client considers that it was incumbent on Customs, as part of its verification visit, to address the very question of cost drivers in some detail, as well as a weaker domestic demand in considering the issue of "other factors". Indeed, without a proper consideration of these other factors, no determination can be made as to whether the Applicant suffered and material injury caused by the effect of dumped imports. The information which addressed these issues was in the possession of the Applicant, who took the strategic decision not to go into the details of these other factors because the circumstances which made up "*the perfect storm*", as opposed to alleged dumping, caused the injury to the industry.

10.5 Rather than meaningfully address any questions to the Applicant, Customs has summarised the claims made by the Applicant in its application at 10.1 of the Visit Report, and apart from a discussion on pricing which is not an "other factor" consideration, it summarised "*other possible causes of injury*" with a statement made by the Applicant in the application. There was no reference to the impact of cost increases caused by, for example, the dramatic increase in the cost of iron ore and coking coal, weaker domestic demand or the Australian dollar.

10.6 Customs has indicated that causation will be assessed and discussed in the Statement of Essential Facts or, if appropriate, in the Preliminary Affirmative Determination. However, these documents are based on information collected from the Applicant, exporters and importers. Unless Customs re-visits the Applicant and seeks additional information, then it will be proceeding from a wholly inadequate factual basis in assessing the "other factors". Our client considers that no material injury finding can be made in the absence of a proper factual consideration of these factors.

10.7 We would respectfully submit that the Visit Report, in simply repeating the claims made in the application, is of such limited value that Customs must fully re-asses the Applicant's claim. Customs has failed to ask questions that would allow it to come to any view on the impact of these factors in considering the question of material injury. We also refer to Customs' statement that it is not able to draw conclusions solely from the examination of the Applicant's claim.

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[17] See statement from Diane Grady, Chair Remuneration Committee of the Board of BlueScope included in submission from Clayton Utz on behalf of Nippon Steel Corporation, dated 9 July 2012. This statement was made at the AGM of BlueScope in 2011. See also Appendix 3 of submission from the Australian Steel Association.

[18] See attachment Gen 2 to the Visit Report.

11. **Preliminary Affirmative Determination**

11.1 Our client wishes to address the issue of the possibility of a Preliminary Affirmative Determination being made in this case in relation to the question of causation.

11.2 As would be well known to Customs, its Dumping Manual states:

> *"In respect of causal link, it is likely that most of the information needed to undertake the assessment would have been gathered upon completion of importer verification visits and visit reports, typically completed by day 80. Customs and Border Protection seeks to obtain importer sales information that would be sufficient for price comparisons and market share analysis. The claims made by the industry in its application concerning causal link are assessed against information gathered during these importer verification visits. For example, using sales information provided by importers may allow for a preliminary price undercutting analysis that supports allegations made by the industry. Verified information from importers also allows for a better assess as to whether any claimed decline in market share has been taken up by imports from the nominated country."*[19] (emphasis added)

11.3 We submit that on the evidence at hand, Customs is disabled from imposing any Preliminary Affirmative Determination for the following reasons.

(a) First: Customs' practice is to consider causation only after having regard to verified information obtained at importer visits. We note that only one importer visit report is on the public file.

(b) Second: until the verification visit report is finalised, Customs is not in a position to undertake a preliminary assessment of price undercutting.

(c) Third: on the information before Customs, there is no indication that there is any loss of market share.

(d) Fourth: the question of price suppression has not been adequately addressed, nor is there any evidence of significant price depression.

(e) Fifth: although there is a chart depicting a decline in profit and profitability, no proper analysis has been undertaken to separate and distinguish the effect of weaker domestic demand, impact of higher costs and the inability of the market to absorb cost increases.

(f) Sixth: Customs has not asked questions or obtained information from the Applicant on the critical issue of increased costs of coking coal and iron ore, weak domestic demand, impact of a high Australian dollar or the impact of prices of non-dumped imports.

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[19] Dumping Manual, pg 110.

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(g) Seventh: Customs has not adequately addressed the issue of market segmentation and therefore, on this ground alone, is not in a position to conduct a proper analysis of material injury.

11.4 In total, Customs is not in a position to consider the imposition of a Preliminary Affirmative Determination.

12. **Conclusion**

12.1 Our client is of the opinion that Customs has failed to properly inquire as to the im pact of "other factors" on the alleged material injury sustained by the Applicant. By failing to make inquiries in respect of these "other factors", Customs cannot be satisfied, objectively, that material injury has been made out. Additionally, given Customs' admission at page 34 of the Visit Report that it is difficult to draw conclusions on the Applicant's claims on causation, the requisite causation test has not been satisfied. In the circumstances, a Preliminary Affirmative Determination should not be made.

12.2 Finally, we will make a fuller submission on material injury once the issues outlined in this submission have been addressed and upon our examination of any additional material placed on the public file.

Yours sincerely

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