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23 October 2012

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By EMAIL john.bracic@customs.gov.au

Mr John Bracic
Director Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
CANBERRA ACT 2601

Dear Mr Bracic

Statement of Essential Facts (SEF)
Alleged Dumping of Hot Rolled Coil Steel (HRC) from Japan

1. Introduction

We act for JFE Steel Corporation, Kobe Steel, Ltd. and Nisshin Steel Co., Ltd. (**the Co-Defence**) in relation to the current investigation by the Australian Customs and Border Protection Service (**Customs**) into alleged dumping of HRC exported from Japan, following an application lodged by Bluescope Steel Limited (**the applicant**). We refer to earlier submissions by our clients relating to this matter and request that they be read as one with this submission. In particular we refer to their submission of 25 September 2012 which Customs claims it was unable to take into consideration in preparing the SEF[1].

The publication of the SEF reveals the absence of evidence and persuasive reasoning in support of the CEO's preliminary findings on key issues such as cumulation and causation and the absence of any consideration or analysis of the impact of certain injurious non-dumping factors. These defects are compounded by failures to properly construe or consider relevant legislative and WTO provisions and consequently we repeat our earlier requests that the current investigation, in so far as it relates to exports of HRC from Japan, be terminated immediately.

[1] *SEF 188*: S.2.2.4 –p.5.

2. PRELIMINARY AFFIRMATIVE DETERMINATION (PAD)

Alternatively, in the event that the CEO maintains his current unsupported position in a final report to the Minister, we submit that the PAD in so far as it purports to relate to pickled and oiled HRC from Japan must be withdrawn. For that product the SEF finds that the non-injurious price is lower[2] than the normal value and equal to[3] determined export prices. In either event this is a finding that exports from Japan of that product have not caused material injury, a finding that is corroborated by the micro analysis by Customs of the automotive sector[4].

Section 269TD(4)(b) of *the Customs Act 1901* (Cth) (**Act**) restricts the circumstances in which Customs may require dumping securities to those where there is a reasonable satisfaction ...*that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues.*

On two grounds the responsible officer of Customs in this matter could not have been so satisfied. Firstly the only reason advanced in the SEF for imposing dumping securities was ...*to ensure that the industry does not suffer further injury while this investigation is completed*[5]. As exports of pickled and oiled product from Japan had not caused any injury there can be no issue of 'further' injury needing to be obviated and the present inclusion of the product in the preliminary affirmative determination (PAD) is an error that requires immediate rectification. The second reason for rectification of the PAD is that there are no reasonable grounds on which Customs could conclude that exportations of pickled and oiled HRC at materially injurious prices will occur in the future. Injurious exportations have not occurred in the past and there is not a scintilla of evidence produced by interested parties, or otherwise gathered by Customs, that they are likely to occur in the future.

3. Unsupported Conclusions

Even if all the findings in the SEF are accepted (many are clearly untenable) they do not justify the publication of the PAD or the dumping notice proposed in the SEF. Reduced to essentials, market segment findings relevant to material injury are:

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[2] *ibid*: s.2.3.8 – p.6
[3] *ibid*: s.10.6 – p.57
[4] *ibid*: s.8.7.1 – p.45
[5] *ibid*: s 12 – p.60

(i) in the pipe & tube market, the applicant enjoyed an overwhelming share of the market and, during the period of investigation, suffered no loss of volume or market share and was not subject to price undercutting. Although unprofitable the applicant had contributed to this situation by undercutting import prices by 4%, a move which negates any claim of a correlation between import prices and price suppression.

(ii) in the pickled & oiled segment (essentially the automotive sector) the applicant increased market share and was profitable and did not suffer injury due to allegedly dumped imports. (The claim that imported HRC prices undercut the applicant's prices must be disregarded as the comparison did not include weightings for different grades.)

(iii) in the manufacturing segment the applicant maintained sales volume at profitable levels. Again claims of price undercutting by imports must be disregarded as the comparative analysis was not calibrated by grade.

In summary, the findings reveal no evidence of loss of sales volumes or market share or properly assessed price undercutting in any segment and they identify that two of the segments were profitable and that any unprofitability in the remaining segment was overstated as a result of self inflicted price suppression of 4%. Leaving aside, for the moment, the substantial issue of other factors contributing to material injury, the unlawful adoption of a cumulated assessment of causation and the flawed reasoning in relation to causation in two of the segments, the macro analysis conclusion by Customs can only be based on either or both of two grounds. Firstly, prices of the insignificant volumes of imports of pipe and tube products caused material injury to the total HRC business of the applicant and secondly that such injury was caused by price suppression in the manufacturing sector. Observing that both the nominated segments were profitable, that the applicant had a near supply monopoly in the pipe and tube segment and that there was no material injury in the automotive sector can only lead to the judgement that the Customs' conclusion is patently unreasonable as it is based on the perverse proposition that the injury to the whole of the Applicant's HRC business is greater than the sum of the injury to the parts of that business.

4. Cumulation

The SEF fails to present a proper reasoned analysis of the issue of cumulation which must be resolved before embarking on any consideration of causation. Initially Customs claims that it ...***first*** *conducted a macro analysis*[6] [emphasis added] but later states that ...*following its*

[6] *ibid*: s.8 – p.31

examination of the effects of dumped imports on ... each of the key sectors ... Customs ... has assessed the overall impact that dumped imports had on the whole industry[7]. These inconsistent and confusing statements illustrate the muddled and unlawful approach taken by Customs on the issue. There is no detail or analysis provided of the many representations made by interested parties and in particular there is no acknowledgement that both the Act and the ADA provide that the default approach to causation analysis is to be conducted on a country by country basis. Ignoring this key principle, and confirming its prejudice on this matter, Customs indicates that it only embarked on micro-analyses ...*Due to the complexities in the market, which include the range of products within the HRC category and the different market sectors.*[8] While these are matters that are consistent with the default country by country approach they are not a reason for exploring that approach. It must be explored in the first instance because s269TAE(2C) mandates it. It is only if a country by country analysis reveals that certain features of the market may be relevant to the formation of the Minister's satisfaction under the subsection that each of the criteria, including conditions of competition, may be analysed to ascertain whether a cumulative approach would be 'appropriate'.

Micro-analyses in the present matter demonstrate that:

(i) there are three distinct market segments;

(ii) each of these segments has quite different 'market dynamics'[9], relating to product grades, finishes, specifications, substantial price differentials, product qualification processes and supply and contractual arrangements;

(iii) each of the three markets are substantially quarantined from the other. There are only isolated examples of sales of specific HRC products being sold to more than one segment.

(iv) Exports to the automotive segment are not causing injury and consequently observations of sales in the segment are not relevant to any consideration of the 'conditions of competition'. Exports that are not injuring an integral segment of the market cannot be injuring the whole market..

(iv) exports from all four of the nominated sources are not represented in significant quantities in any of the market segments;

(v) exports to the pipe & tube and automotive markets are almost exclusively from Japan and Korea. The volume and market share of those exports is so small that they cannot have caused material injury to the applicants total HRC production.

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[7] *ibid*: s.8 – p.32
[8] *ibid*: s.8 – p.32
[9] *ibid*: s.6.4 – p.19

(vi) competition between exports in the manufacturing segment is largely confined to Taiwan, China and New Zealand;

(vii) average import prices in the automotive sector exceeded prices in the pipe & tube sector by about one third;

Based on these undisputed analyses, the only possible reasoned finding that could be reached would be that the default approach must prevail and that it would not be appropriate to undertake a macro causation analysis based on cumulated exports from all nominated sources. Customs, however, has taken a different approach which is set out in its entirety in two paragraphs in the SEF[10] that contain three assertions and no reasoning or analysis. Essentially Customs has proceeded by way of assumption, a practice specifically condemned by a Panel of the WTO.[11]

The first assertion is that exports from the four nominated countries *...all compete across multiple market sectors*[12]. The statement is not supported by the facts and merely assumes that a presence in a particular market segment necessarily means that a specific HRC product competes with substitutable products from other sources. In addition, it does not address the rationale of the conditions of competition criterion. Customs observes, for example, that exports from Japan and Korea compete in two segments. That may be relevant to cumulating exports from those countries for the purpose of micro causation analysis of each of the segments but it is not a justification for embarking on a macro analysis. The key determinant in identifying the 'appropriate' basis for a causation analysis in a multi-source investigation is whether competition between export sources and between those sources and an Australian industry is best reflected in the dynamics of the total market for the goods in question. In the case of a substantially homogeneous product the answer will be clear – cumulation is appropriate. However, in the present context of a heterogeneous product, clear market segmentation and the absence of any significant inter-segment product substitutability, it would be totally inappropriate to undertake a causation analysis on the basis of a purported total market assessment.

The example cited by Customs in relation to HRC exports from Japan and Korea must also be disregarded on other grounds. The finding that exports to the automotive segment have not caused injury renders irrelevant for the purposes of causation analysis any observations about conditions of competition in that sector. Obviously conditions in a segment that are found not to cause injury to production for that segment cannot be found, in a macro analysis to be

[10] ibid: s.8.3 – p.32-33
[11] *EC – Tube & Pipe Fittings:* WT/DS219/R - p.7.239
[12] *SEF 188*: s.8.3 – p.32

contributing to any injury to the applicant's overall production of HRC. Furthermore, in both that segment and the pipe and tube segment the long term stasis in supply and contract arrangements observed by Customs, coupled with the overwhelming market share enjoyed by the applicant in the latter sector, are inconsistent with any claim that there should be a macro analysis based on cumulation

The second assertion by Customs is that *...some importers have imported HRC of the same grade from at least two countries/regions...*[13] That is evidence of intra-segment competition which is a 'given'; the real issue is the existence and nature of any inter-segment competition and the observation by Customs does nothing to illuminate that issue.

The third assertion is that *...the conditions of competition between imported and domestically produced HRC are similar as domestically-produced HRC can be directly substituted with imported HRC..*[14]. This is an unsupported proposition posing as a reasoned conclusion. No doubt some of the applicant's automotive products can be, and are, substituted for products imported into that segment and the same observation applies to the pipe & tube and manufacturing sectors. But again such observations are irrelevant to the issue of the appropriateness of cumulation which must focus on the conditions of competition between each relevant market segment.

The Co-Defence submits that, while there may be grounds for cumulating exports from two or more nominated countries for the purpose of conducting a micro causation analysis of a particular market segment, any objective and thorough examination of the conditions of competition in the HRC market will reveal that there are no grounds for embarking on a macro causation analysis based on cumulated exports from all sectors.

5. Causation – Micro Analysis

(i). Automotive segment

The conclusion by Customs that the applicant has not suffered injury due to dumped imports (pickled & oiled HRC) in the automotive sector is not disputed. What is disputed is the failure by Customs to recognise the consequences of that conclusion.

In the context of s.269TG of the Act the conclusion means that, as no material injury has occurred because of the alleged dumped exports of pickled and oiled HRC, a prerequisite for the

[13] *ibid*: - p.32
[14] *ibid*: - p.33

publication of a dumping notice has not been satisfied. Consequently any eventual dumping notice (as well as the anticipatory PAD) that includes pickled & oiled HRC would be invalid. The SEF implies that Customs is constrained from excluding sales to the automotive sector because it has no power of termination in respect of individual exporters. However requests for termination by the Co-Defence (never acknowledged or responded to by Customs) have always been in respect of exports from Japan.

In the light of the no injury finding in the SEF the only lawful course of action is for Customs to conform with the requirements of s.269TDA(13) and terminate the investigation immediately in respect of pickled and oiled HRC. It is not a lawful option to leave the product scope of any dumping notice to the consideration of the Minister.

In relation to the automotive sector the Co-Defence's specific request is the immediate termination of the investigation in relation to the export of pickled and oiled product from Japan and the exclusion of that product from the scope of the PAD.

(ii) Pipe & Tube segment

In its micro analysis of the pipe & tube segment Customs substantially ignores uncontested evidence that about one third of the market for finished tubular product is supplied by imports of HSS which have a far greater impact in that segment than the very limited quantities of imported HRC. Apart from acknowledging the existence of representations on the issue by various interested parties Customs, in its micro analysis, fails to consider the major impact on the applicant's revenues of the large volumes of an imported finished product whose HRC content outstrips the small volumes of HRC imports by a ratio of over 10:1. Instead the causation analysis focuses exclusively on imported HRC and, implausibly, attempts to attribute material injury to a price negotiating leverage allegedly enjoyed by local pipe & tube manufacturers. The proposition that a major global steel producer is, in price negotiations, at the mercy of modest sized end users belongs in the realm of whimsy. The reality in relation to all market segments is, as Customs acknowledges, that *...the Australian industry must compete with imports that are affected by internationally depressed steel prices*[15] In the period of investigation the prices of both HRC and HSS were so affected and it is simply unsustainable to ignore the large volumes of the latter in assessing the causes of injury.

[15] SEF 188: s 8.12 – p.50

The failure in the SEF to acknowledge the key role of HSS imports in influencing domestic prices of HRC demonstrates a fundamental misconception of the market. The pipe & tube segment absorbs a major proportion of the applicant's HRC production. The two major producers in that segment, who purchase over 90% of their requirements from the applicant, must remain competitive with HSS imports if the applicant is to sustain the production volumes necessary to maintain its own manufacturing costs at competitive levels. Obviously in the period of investigation that featured rapidly escalating raw material costs the applicant's desire to raise prices to its two key customers had to be tempered with the need to restrict those prices to a level that would allow the customers to remain competitive with imported HSS. This essential price restraint is obviously a major factor contributing to any observed price depression or suppression

The SEF acknowledges that the applicant's prices for pipe and tube undercut prices of imported product by 4% and attributes this undercutting to an overreaction to import offers or faulty market intelligence. Unable to attribute this self harm to dumped imports, the SEF then claims, paradoxically, that alleged price suppression can be attributed to the same management failures. The reasoning advanced in justification of the conflicting conclusions is opaque but appears to revolve around a claim that the applicant is entitled to a 'local premium' over imported products. The claim is said to have been agreed to by unidentified interested parties but the Co-Defence wishes to record its view that the concept of a local premium has no basis in relevant anti-dumping legislation or the realities of commercial life. The applicant has conceded that HRC is a commodity product and Customs agrees that local industry must compete at prevailing global or regional prices. It is not open to a local industry that already enjoys a production monopoly and a degree of natural protection as a result of Australia's geographically isolated market to claim the right to further insulation from world prices on the grounds of a local premium.

Consequently, for the same reasons advanced by Customs to support its view that imports of pipe & tube have not caused price undercutting, the conflicting proposition that those imports did cause price suppression must be rejected unequivocally. The establishment of price undercutting is an essential precursor to a legitimate claim of price suppression caused by dumped imports. Such a claim cannot be sustained in relation to the pipe & tube sector where there was no price undercutting and any price suppression was caused by a combination of faulty market intelligence, the commercial reality in a commodified market of a margin squeeze caused by declining regional benchmark prices for both HRC and HSS and accelerating raw material costs, as well as the misconceived judgement that the applicant had an 'entitlement' to a price premium.

The Co-Defence submits that for the reasons set out above and the negative correlation, observed in its submission of 11 September 2012, between claimed injury factors and the volume and values of Japanese exports to the segment, the investigation in so far as it relates to HRC exports from Japan must be terminated immediately and the scope of the current PAD amended accordingly.

(iii) Manufacturing segment

The conclusion by Customs in relation to the manufacturing segment that allegedly dumped imports of HRC caused price suppression and consequent material injury is based on an insistence that the only influences on the applicant's price setting for the segment is the import price of HRC and its claimed entitlement to a 'local premium'. This insistence is expressed in the following manner[16]:

> While price pressure has been put on manufacturers due to competition from imports of finished goods, Customs and Border Protection has found that the price of imported finished products was not the basis of BlueScope's pricing decisions. Rather BlueScope sets its price in this market sector by taking into account the import price of HRC.

The essence of this statement is that although Australian manufacturers of finished goods incorporating HRC were facing fierce price competition from imports, the applicant ignored this situation when formulating its pricing strategies. Such a claim, as noted above in the analysis of the pipe & tube sector, is inconsistent with market realities and would inevitably lead to a reduction in the applicant's sales volumes and a further increase in its unit production costs. Acting with prudence and restraint in these circumstances may cause the applicant some short term pain but it cannot be attributed to allegedly dumped exports. It is an inevitable consequence of being a producer of a staple commodity subject to significant fluctuations in costs and prices that are the outcome of global or regional factors.

In addition to this central flaw in the SEF analysis of the manufacturing segment, exports from Japan to the sector are so insignificant that they could not possibly have caused any material injury. Consequently the Co-Defence submits that the investigation be terminated immediately in respect of exports of HRC from Japan to the manufacturing sector and consequential amendments be made to the scope of the PAD.

[16] *ibid*: s.8.6.4 – p.43

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6. Causation – Macro Analysis

For the reasons set out in section 3 above of this submission the Co-Defence submits that there is no lawful ground for undertaking an analysis of the factors impacting the overall market for HRC in Australia. The SEF does, however, attempt such an analysis and some comment is called for.

As already noted at the segment level, excluding automotive, Customs has not seriously analysed or given sufficient weight to the influence of competition from imported finished products incorporating HRC. This omission and the failure to properly understand the dynamics of a commoditised market that features a continuing ebb and flow of international price and cost relativities has resulted in a simplistic imported HRC price = injury presumption than infects all the attempted analyses. While the SEF asserts that the applicant could have achieved higher prices if exports of HRC were not dumped this makes no allowance for the facts that the applicant had undercut import prices, acted on faulty market intelligence in the largest market segment and assumed an entitlement to a 'local price premium' as well as being restrained from raising prices by a range of other factors.

The multiplicity and seriousness of 'other factors' with general application together with segment specific factors identified above, when carefully assessed and persuasively analysed, strongly support the proposition that, even if cumulated, exports of HRC from nominated sources have not caused material injury to the Australian industry.

7. Unsuppressed Selling Price (USP)

Customs is proposing to include in the calculation of a USP for pickled and oiled exports from Japan an addition for a 'reasonable premium'. This is presumably the 'local premium' referred to earlier in the SEF. As there is no lawful basis for the introduction of this concept into an assessment of material injury the Co-Defence submits that it must be excluded from the calculation of the USP and the consequential non-injurious price.

8. Exemptions

As the applicant has acknowledged that it no longer produces HRC with a width greater than 1550mm the Co-Defence requests that the Minister exempts any HRC product of greater width

from any dumping notice and further requests that the 'specific automotive HRC requirements'[17] not produced by the applicant be also excluded from any such notice.

Yours sincerely
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[17] ibid: s.4.4.2 – p.13