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FOR PUBLIC RECORD

By EMAIL joanne.reid@customs.gov.au

Ms Joanne Reid
Director Operations 2
International Trade Remedies Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
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Dear Ms Reid

Alleged Dumping of Hot Rolled Plate Steel (HRPS) from Japan

1. Introduction

We act for JFE Steel Corporation, Kobe Steel Ltd, Nippon Steel & Sumitomo Metal Corporation 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 HRPS exported from Japan, following an application lodged by Bluescope Steel Limited (**the applicant**).

The Co-Defence submits on a range of grounds that the injury, if any, to the economic performance of the applicant caused by allegedly dumped exports of HRPS from Japan is negligible and consequently the current investigation, in so far as it relates to those exports, should be terminated forthwith pursuant to s. 269TDA(13) of the *Customs Act 1901* (Cth) (**Act**) which relevantly provides:

If:

(a) application is made for a dumping duty notice; and

(b) in an investigation, for the purposes of the application, of goods the subject of the application that have been, or may be, exported to Australia from a particular country of export, the CEO is satisfied that the injury, if any, to an Australian industry or an industry in a third country, or the hindrance, if any, to the establishment of an Australian industry, that has been, or may be, caused by that export is negligible;

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the CEO must terminate the investigation so far as it relates to that country.

Before setting out those grounds, however, it is necessary to point out the unreliability in relation to Japan of the market data used by Customs in preparing the graph in section 9.7.2 of Consideration Report No. 198. No source is provided for the graph but even allowing for possible timing differences it is clearly incompatible with the Japanese export data provided in Table B-1.5 of the application that itself exaggerates Japanese volumes in the last year of the injury investigation period.. In relation to the graph we draw attention particularly to the patently inflated market share attributed to Japanese exports compared with both exports from all other nominated countries and exports from countries not included in the investigation.

The actual volumes and values of Japanese exports for the injury investigation period are set out in the following table.

HRPS Exports – Japan to Australia					
	2008	2009	2010	2011	2012
Volume					
Value (USD)					
Unit Value					
Source: Japan Customs					

2. Negligible Injury – Termination of the Investigation.

To establish whether allegedly dumped exports from a particular country of export have caused material injury to an Australian industry one of the first duties imposed on the Minister is to have regard to the volume of exports from particular countries. Section 269TAE(1) of the Act provides that:

In determining, for the purposes of section 269TG or 269TJ, whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused, or whether the establishment of an Australian industry has been materially hindered, because of any circumstances in relation to the exportation of goods to Australia from the country of export, the Minister may, without limiting the generality of that section but subject to subsections (2A), (2B) and (2C), have regard to:

(aa) [...]

(ab) [...]

(a) the quantity of goods of that kind that, during a particular period, have been or are likely to be exported to Australia from the country of export; ...

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Over the injury investigation period exports from Japan have accounted for about █% of the applicant's estimate of total exports of like goods and during the dumping investigation period exports from Japan have amounted to less than █% of the total exports estimated by Customs. Furthermore the applicant identified the period from October 2009 to September 2010 as the period in which *...exports of plate from ...Japan ...commenced to impact profit and profitability.*¹ The assertion is clearly unfounded as in 2010 the volume of exports from Japan remained static in absolute terms and represented only about █% of total imports and it was in that year that the unit export price from Japan increased by over █%. Any negative impact on profitability suffered by the applicant in that year was not caused by exports from Japan

Consideration of the volume of allegedly dumped exports from a particular country in relation to an assessment of material injury is required on two counts under both the Act and the WTO Anti-Dumping Agreement (ADA). The first involves the application of the statutory test set out in s.269TDA(4) & (5) as to whether the investigation must be terminated under s.269TDA(3) in relation to a particular country of export because the volume of dumped exports from that country is negligible. The Co-Defence is not seeking termination of the investigation under those provisions.

As noted in the introduction to this submission termination of the investigation is sought by the Co-Defence under s.269TDA(13) of the Act on the ground that the injury, if any, caused by allegedly dumped exports from Japan is negligible. The meaning of negligible injury for the purpose of the subsection is not defined in either the Act or the ADA but a reasonable contextual inference would be that 'negligible' is used in contradistinction to 'material'.

It is clear from a general reading of s.269TAE that assessment of the existence and degree of injury is primarily governed by two factors – the volume and price of the allegedly dumped exports. It is axiomatic that prices of exported goods that might otherwise cause damage to a domestic injury will not do so in circumstances where the volume of those goods is insignificant. This is recognised by the unambiguous statement of the applicant in its recent letter of 18 April 2013 (loaded onto the Public Record on 13 May 2013), that:

¹ BlueScope Plate Steel Application: Section A-8-1.

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BlueScope does not consider that the export prices from countries not included in the application are in sufficient volume to demonstrate an ongoing impact on prices

The essence of that statement is that exports at particular prices must be of a sufficient volume to have an impact on prices (ie – cause material injury) in the Australian market. The acknowledged insufficiency of export volumes from un-nominated sources is far greater in relation to exports from Japan. Export volumes of HRPS from un-nominated countries exceeded exports from Japan by 600% over the injury investigation period and by 450% during the dumping investigation period. In addition average unit prices from Japan consistently exceeded prices from both un-nominated and nominated sources. In these circumstances the applicant obviously cannot claim that exports of HRPS from Japan are in sufficient volumes to impact on prices in Australia and consequently the investigation into exports of HRPS from Japan should be terminated immediately on the ground of negligible injury.

The applicant's uncontested proposition quoted above, when applied to evidence related to exports from Japan, also impacts on the issue of cumulation in the present matter .

Section 269TAE(2C)(e) provides that:

In determining, for the purposes referred to in subsection (1) or (2), the effect of the exportations of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that:

...

(e) it is appropriate to consider the cumulative effect of those exportations, having regard to:

(i) the conditions of competition between those goods; and

(ii) the conditions of competition between those goods and like goods that are domestically produced.

As the applicant's proposition implicitly acknowledges that competition between exports from Japan and domestically produced goods is negligible there is no legal basis for including those exports in any cumulated analysis of material injury to the Australian industry.

3. Other Injury Factors

In its Consideration Report² Customs noted attempted rebuttals by the applicant of three factors other than dumping that may have caused material injury to domestic production. Those factors were the closure of the applicant's blast furnace and strip mill, the softening global demand for steel in 2012 and the strength of the Australian dollar in the same period. However Customs did not undertake any analysis of these factors or the applicant's attempted rebuttals and did not explore the existence or significance of other obvious injury factors.

It is not possible to reach a conclusion in the terms of s.269TC(1) of the Act that there appear to be reasonable grounds for the publication of a dumping notice without exploring the issue of other factors that may have caused material injury and testing the substance of any rebuttals made by an applicant on this issue. In failing to do either of those things the Co-Defence submits that the CEO failed to meet his obligations under the subsection.

A The Uncertainty Factor

Uncertainty caused primarily by the actions of the applicant, in the market for HRPS is the major factor in any analysis of any difficulties currently facing the applicant. Customs is aware from the rash of recent steel investigations that dual sourcing of the product by users has long been a feature of the market both in Australia and internationally. In the Australian context the many examples over recent decades of interrupted production and refusal, or constructive refusal, to supply by the monopoly producer has entrenched this imperative commercial practice. This self inflicted detriment has now been substantially increased by the applicant's announcement in 2011 of significant production facility closures.

Whatever the benefits, if any, to the overall operations of the applicant there can be no doubt that the decision is detrimental to the economics of the local production of HRPS. Faced with a cut of 25% in the availability of local supply and continuing uncertainty in relation to the scope and viability of the applicant's longer term operations, downstream Australian users have no option but to ensure the availability of alternative sources of

² Con. Report 198 – section 10.1.2

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supply. Effectively the applicant, as a producer of HRPS, has initiated a program of reducing volumes and, inevitably, increasing production costs. This self induced injury must not be attributed to alleged dumped imports, particularly in circumstances where the impact of the uncertainty factor is exacerbated by other matters unrelated to alleged dumping such as the depressed local and global market and the slowdown in China.

B..Other Imports

We have already highlighted above the applicant's claim that the volume of exports from un-nominated countries is insufficient to impact prices in the Australian market. This claim sits uneasily with the identification by the applicant of five countries whose export volumes are allegedly causing material injury when three of those countries have substantially smaller export volumes in the dumping investigation period. Throughout the injury investigation period exports from un-nominated countries have accounted for about 20% of the total volume of exports and at this level it is clear that they should be a significant element in any serious non-attribution analysis of the factors contributing to alleged injury to the Australian industry.

Of even greater significance is the growing trend of importing prefabricated knocked down products into Australia that is estimated to have reduced the total Australian market for HRPS by about 25%.³ The trend is given added impetus by the enthusiastic adoption of the Enhanced Project By-Law Scheme by the Mining and Construction sectors of the economy and impacts negatively not only on the economic performance of the applicant but also on the many local fabricators who have traditionally supplied those sectors. Again the non-attribution analysis must take account of the very serious impact of this prefabricated trend.

C Conclusion

The Co-Defence submits that the analysis of other factors must include, at a minimum:

- the self harm factors caused by the trade restrictive practice of refusal, and constructive refusal, to supply, by distribution practices and by the decisions to reduce HRPS capability and capacity;
- exports from un-nominated countries;

³ Public Record – Folio 199

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- exports of prefabricated products;
- peak raw material costs;
- softening global & local demand; and
- exchange rates

The conduct of the analysis is governed by the provisions of s.269TAE(2A) of the Act and Article 3.5 of the Anti-Dumping Agreement. Both provisions mandate that responsible authorities must adopt a 'non-attribution' methodology for reasons elaborated on by the Appellate Body of the WTO:

In order that investigating authorities, applying Article 3.5, are able 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 duties⁴.

The Co-Defence submits that the proper application of this methodology to the current matter will demonstrate that the level of detriment to the applicant caused by 'other factors' is of such a magnitude that no finding can be made that allegedly dumped exports from either Japan or nominated sources have caused any injury that could be properly described as 'material'.

Yours sincerely

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⁴ *US - Hot Rolled Steel*: para 223.

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