23 September 2020

The Director, Investigations 2
Anti-Dumping Commission
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Dear Director,

Continuation Inquiry No. 546 concerning Steel reinforcing bar exported from Korea, Singapore, Spain, Taiwan

AUSTRALIAN INDUSTRY RESPONSE TO EXPORTER SUBMISSION

InfraBuild (Newcastle) Pty Ltd (**InfraBuild**), refers to the submission of the Spanish exporter, Compañía Española de Laminación S.L. (**Celsa Barcelona**), in response to *Statement of Essential Facts No. 546* (**SEF 546**)[1] and makes the following observations and comments.

The Spanish exporter asserts that the evidence that *…Celsa Barcelona has not dumped the goods to Australia…* and *…Celsa Barcelona did not export the goods to Australia… gives no support for a finding that there would be a continuation or recurrence of dumping by Celsa Barcelona and a continuation or recurrence of material injury caused by dumped imports from Celsa Barcelona as a consequence of the expiration of the measure.*[2] Additionally, the exporter makes the entirely unsubstantiated claim that SEF 546 indicated that *…the Australian industry is no longer "materially injured" by imports subject to the measure*.[3] The latter claim; along with most of the Spanish exporter's submission; may be a matter of opinion, however, even if all three of these *…key pieces of evidence…* (as the exporter puts it), are true, none support the conclusion that the continuation of the anti-dumping measures not be secured.

[1] EPR Folio No. 546/031
[2] EPR Folio No. 546/031, p. 2.
[3] EPR Folio No. 546/031, p. 2.

(a) Claimed absence of exports and dumping in the 'inquiry period'

As a matter of domestic law and WTO jurisprudence it is acceptable by all; except the Spanish exporter; that an absence of current or 'present' dumping does not preclude a conclusion that the expiration of the measures would …*more probably than not…*[4] lead to a recurrence of dumping. The best statement of the principle is contained in the report of the panel of the Dispute Settlement Body in *US - DRAMS*[5]

> However, the second sentence of Article 11.2 requires an investigating authority to examine whether the "continued imposition" of the duty is necessary to offset dumping. The word "continued" covers a temporal relationship between past and future. In our view, the word "continued" would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset present dumping. Thus, the inclusion of the word "continued" signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.
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> Furthermore, Korea's argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of "no dumping" (*e.g.,* when a retrospective assessment finds that no duty is to be levied) is also inconsistent with note 22 of the AD Agreement. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, "a finding in the most recent assessment proceeding … that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty". If Korea's interpretation of Article 11.2 were accurate, then an investigating authority would be obligated under Article 11.2 to terminate an anti-dumping duty upon making such a finding, and note 22 would be meaningless. In our view, **this confirms a finding that the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2**.[6] (**emphasis** added)

Panel Member O'Connor makes this precise observation in *ADRP Report No. 70*:

> As to the significance of the Applicants' negative dumping margins throughout the inquiry period, neither the Anti-Dumping Agreement nor the Act requires revocation as soon as an exporter is found to have ceased dumping and the continuation of measures is not precluded a priori in any circumstances other than where there is present dumping.[7]

Therefore, the issue for the Commission to consider under s.269ZHF(2), as it correctly did in SEF 546, is whether *…expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping… and the material injury that the anti-dumping measure is intended to prevent*.

On this question, the Spanish exporter suggests that *…in light of the strong recovery of the Spanish economy…*[8] *Celsa Barcelona's commercial focus and sales practices is now significantly different. Celsa Barcelona has pivoted its sales and marketing focus onto the domestic Spanish and EU market, and away*

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[4] In *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838, Justice Rares stated *"I am satisfied that the word "likely" in s.269ZHF(2) should be interpreted as meaning more probably than not"*.
[5] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999.
[6] *US – DRAMS*, paras. 6.31 - 6.32.
[7] ADRP Report No. 70, *Hot Rolled Coil Exported from Japan, the Republic of Korea, Malaysia and Taiwan* (April 2018), p. 13.
[8] EPR Folio No. 546/031, p. 3.

from non-EU countries.[9] With respect, the evidence supports neither of these tenets of the exporter's claim for absolution.

Firstly, CONFIDENTIAL ATTACHMENT 1, indicates that since January 2020, Celsa Barcelona has accounted for all exports of the goods from Spain. Furthermore, Celsa Barcelona has exported to Australia in the first four months of 2020, at least 62 per cent of the volume previously exported across the entire 2017.

Secondly, the evidence does not support the exporter's assertion of *…strong recovery of the Spanish economy.* According to the Bank of Spain, *… Spain's economy will struggle to recover from the impact of the coronavirus pandemic to such an extent that it will still be as much as 6 per cent smaller at the end of 2022 than it was before the crisis hit…*[10] noting further that:

> Spain's economy contracted a record 18.5 per cent in the second quarter of this year compared with the previous three months, following a 5.2 per cent first-quarter contraction.[11]

Quite apart from the Spanish exporter's recurrence of export volumes at a time of declining domestic economic conditions, Celsa Barcelona's central claim against the likelihood of recurrence of dumping is that as *…a profit-making business and is focused on supplying the high demand and profitable domestic market. It is only reasonable to assume that this will continue to be the case, irrespective of the continuation or expiration of the dumping measure*.[12] Again, this claim is not supported by the evidence. The Spanish exporter's economic conditions are so dire that its parent company *…has obtained approval from banks and the national credit institute (ICO) for a credit line of up to Eur75 million ($81.21 million) and also to roll over debt payments due this year.*[13]

Therefore, it remains the Australia industry's contention that the evidence points to a recurrence of exports by Celsa Barcelona immediately following the end of the 'inquiry period'. Whether or not these exports were dumped, does not preclude the Commission from concluding that the expiration of the measures will result in a recurrence of dumping. By its own admission in its submission to the Commission, the Spanish exporter is now highly motivated to resume exporting the goods at dumped prices, given the deterioration in domestic market conditions, and that the, conditions of a previously *…strong recovery of the Spanish economy… gave it no economic incentive for Celsa Barcelona to recommence exporting substantial volumes of GUC to Australia, let alone to engage in dumping, should the measure be allowed to expire*… no longer exist.

(b) Claim that the Australian industry is no longer "materially injured" by imports subject to the measure

The exporter's suggestion that the Commission must necessarily find material injury caused by it, *currently*, is without foundation. On the ordinary meaning of the text of the provision under s.269ZHF(2), the Commission is not obliged to find that injury is *currently* being caused to the domestic industry by goods exported subject to measures. This would be a nonsensical interpretation of the provision, given that the primary object of *…the anti-dumping measures is intended to prevent…* the dumping and the material injury. Therefore, even if the Spanish exporter is correct to assert that the *…Australian industry is no longer "materially injured" by imports subject to the measure …* then this is of limited consequence, given that it is not necessary for the Commission to also be satisfied that the Spanish exporter has caused the Australian

[9] EPR Folio No. 546/031, p. 2.
[10] https://www.ft.com/content/53ab7751-56cb-4c19-8855-43065aea6448 (accessed 21 September 2020)
[11] https://www.ft.com/content/53ab7751-56cb-4c19-8855-43065aea6448 (accessed 21 September 2020)
[12] EPR Folio No. 546/031, p. 2.
[13] Platts SBB, *Spanish steelmaker Celsa gains credit, rollover approvals – source*, Thursday, 07 May 2020 (

industry to suffer material injury, *currently*. The Commission need only be satisfied that …*the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping…and the* material injury *that the anti-dumping measure is intended to prevent.*

The Commission recognised in SEF 546, that the goods remained price sensitive:

> As InfraBuild reduces its prices in line with import offers, the comparison of InfraBuild's final prices and import prices will not show the full extent of price undercutting.[14] (emphasis added)
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> …
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> In Investigation 264, the Commission found that rebar is a highly price sensitive commodity good.[15] In this inquiry, the Commission has been provided with examples of InfraBuild's customers quoting import price offers in price negotiations. While the pricing structure for some models of rebar has changed (section 7.4.8 refers), the Commission accepts that the new pricing mechanism is influenced by import pricing. As discussed in section 3.5, the rebar produced by the Australian industry are identical or closely resemble the goods imported from the subject countries. In addition, the main exporters of rebar from the subject countries are ACRS certified (sections 3.4.2 and 7.4.5 refer), providing assurance to customers that they are substitutable goods.[16] (emphasis added)

During the course of verification of the Australian industry's financial information and claims made in its application for continuation, evidence of the direct impact of importer price offers of sales of the goods from Spain was presented to the Commission. The evidence established the cause and effect of the Spanish price offers, irrespective of whether resulting in a sales to Australia. This injury was independent and isolated from any injury caused by goods imported from other sources, irrespective of whether subject to these measures, other measures applicable to like goods, or from sources not subject to measures.[17]

As such, given the 'present' or *current* material injury demonstrated during the 'inquiry' period, it is submitted that the expiration of the measures would lead, or would …*more probably than not*… lead, to a continuation of the material injury that the anti-dumping measure is intended to prevent, independently of any "undumped" sources of the goods. This rationale rests on the assumption that given the *current* presence of the "undumped" goods exported to Australia, the Spanish exporter has continued to export the goods to Australia, then it only stands to reason that this outcome would continue following the expiration of the measures. In fact, given the price sensitive nature of the Australian rebar market, it is …*more probably than not*… that the expiration of the measures against the Spanish exporter or the country generally, will result in a further reduction in export price and therefore increased price undercutting of the Australian industry's prices, thereby further exacerbating the levels of material injury experienced by the domestic industry. The Senior Panel Member concurred with this view in the recently concluded *ADRP Report No. 119*,[18] when she concluded that continuation or recurrence of dumping can confer a price advantage to the exporter that can cause injury:

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[14] SEF 546, p. 55.
[15] Original fn 61: *REP 264, Final Report p. 93*.
[16] SEF 546, p. 55.
[17] Refer to Response to *Verification Agenda Items 7.5 and 11.2*, Responses to enquiries dated 16 July 2020 (Item 11), and Responses to enquiries dated 4 August 2020 (Attachment: *Catalogue of Offers*).
[18] Anti-Dumping Review Panel, *Review of a Ministerial decision concerning Power Transformers exported from the Republic of Indonesia and Taiwan* (14 September 2020)

> *Dumping can mean that the price of the dumped product is cheaper than if it would have been if not dumped and that the lower price can give an advantage to the exporter of the dumped product. Such a price advantage can assist the exporter to win tenders it may not otherwise have done, to the detriment of the Australian industry.*[19] (emphasis added)

Applied here, given the price sensitive nature of the Australian rebar market, it follows that Celsa Barcelona may be expected to lower its export prices to Australia upon the expiration of the measures in order to compete. This in turn will cause the Australia industry further injury in the forms of price depression, suppression, lost profit and profitability.

In any event, even if the Commission were to (erroneously) conclude that Celsa Barcelona was not *currently* causing material injury to the domestic industry, then it remains entirely viable for the Commission to nevertheless conclude that the expiration of the measures would *lead to* a *recurrence* of the material injury, given the price advantage that the recurrence of dumped exports would confer on the Spanish exporter. The Senior Panel Member considered a similar argument to that advanced by Celsa Barcelona in *ADRP Report No. 119*, and dismissed the idea that undumped sources may be the exclusive cause of all future injury:

> *The principal conclusion in the China investigation seems to have been that the injury being suffered by the Australian industry is due to non-dumped product. I do not consider that this assists in establishing that dumped product from Indonesia would not have a price advantage in future tenders.*[20] (emphasis added)

So long as price remains a consideration for the purchase of the goods, then according to the Senior Member *…it is reasonable to draw the conclusion that dumped exports by CG Power in the future are likely to give it a price advantage in future tenders*.[21] This conclusion, is equally, if not more applicable, to highly commoditised goods such as rebar, where price is highly relevant to the purchase making decision of customers.

Conclusion

Since the end of the 'inquiry period', Celsa Barcelona has resumed exporting the goods to Australia in significant volumes and historically low prices. The absence of export sales during the 'inquiry period' meant the Commission was unable to determine a dumping margin for the Spanish exporter. However, this conclusion does not preclude the Commission from concluding that the expiration of the measures would likely lead to a recurrence of the dumping.

The Commission has consistently found that the Australian rebar market is highly price sensitive. Dumped prices give Celsa Barcelona a price advantage in the Australian market. Given the price competition in the Australian market, including the prices of "undumped" goods from sources not subject to measures, then the Spanish exporter would need to lower its export prices to compete (which it has demonstrably done following the inquiry period), thereby undercutting the Australian industry's prices. The expiration of the measures would therefore *…more probably than not…* lead to a continuation of the material injury the current measures were intended to prevent. However, even if the Commission concludes that the Spanish exporter's dumped goods are not currently causing the Australian industry material injury, by reason of the current measures, then the price sensitive conditions for competition in the Australian market means that

[19] ADRP Report No. 119, p. 31.
[20] ADRP Report No. 119, p. 32.
[21] ADRP Report No. 119, p. 32.

the expiration of the measures will likely lead to a recurrence of the material injury the current measures are intended to prevent.

The presence of “undumped” sources of the goods in the Australian market does nothing to preclude these conclusions. In fact, when considered in light of the price sensitive nature of the Australian rebar market, strongly indicates that if the measures were to expire, then Celsa Barcelona’s export prices would be more likely to decline to compete with these other sources. This would result in a continuation of the dumping and causing the Australian industry to experience further price depression, suppression and lost profits and profitability (in the case of sales achieved), or lost sales and production volumes and reduced capacity utilisation (where sales are lost).

Please do not hesitate to contact your InfraBuild Steel representative on record with any questions.

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT