**PUBLIC RECORD**

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The Director, Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2600

**BY EMAIL:**
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Dear Director,

**Anti-Dumping Review Panel Review No. 130 concerning steel reinforcing bar exported from Korea, Singapore, Spain, Taiwan**

**AUSTRALIAN INDUSTRY SUBMISSION**

InfraBuild (Newcastle) Pty Ltd (**InfraBuild Steel**), an applicant for review of the Minister's decision under section 269ZHG(1)(b)[1] refers to the recently published file note[2] on the Anti-Dumping Commission's (**the Commission**) electronic public record, inviting interested parties to make submissions to the reinvestigation being conducted pursuant to section 269ZZL concerning certain findings in REP 546.

In this submission we wish to address certain substantive issues arising from the third "finding" subject to Panel Member Ellis' request for reinvestigation:

> *whether the expiration of the measures in respect of Daehan and uncooperative and other exporters from Korea would lead, or likely to lead, to the material injury that the anti-dumping measure is intended to prevent.* [3]

At the outset, we note that the Commission is of course bound to conduct the reinvestigation into certain findings as set out in Member Ellis' request under s.269ZZL(1)(a). However, we observe that this should be read within the context of the overarching mandate of s.269ZZG(5)(c) that the Review Panel *…conduct the review in relation to those [reviewable] grounds and no other grounds*. We note that the expiration of the measures against the Korean exporters was not a reviewable ground.

[1] All legislative references refer to the *Customs Act 1901* (Cth) unless specified otherwise.
[2] EPR Folio No. 546/039 (26 February 2021).
[3] Letter from Panel Member Ellis to Commissioner, Anti-dumping Commission dated 10 February 2021, p. 1.

We observe that in the course of the continuation inquiry, the Korean exporter, Daehan, asserted that the *…material injury suffered by the industry was caused by other factors, being the non-dumped rebar exports from Turkey…* and that *non-dumped Turkish rebar exports will continue to cause material injury to Infrabuild, and at prices that continue to undercut Korean equivalent prices…* such that *… the exports from Korea would not likely lead to a recurrence of material injury*.[4] There are a number of problems for the Korean exporter with this argument.

Firstly, the exporter's assertion ignores the central question to the test of causation under s.269ZHF(2),[5] that is, *what would be* the effect of the "expiration of the measures"? The exporter's original submission on this topic failed to consider the impact of the "expiration of the measures" on the price and or volume that it will trade in the Australian market, and whether *this* change … *would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the* material injury *that the anti-dumping measure is intended to prevent*.

Secondly, the exporter's suggestion that in the course of the continuation inquiry the Commission must necessarily have found material injury caused by it, *currently*, was without foundation. On the ordinary meaning of the text of the provision under s.269ZHF(2), the Commission was 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 Korean exporter was correct to assert that the *…material injury suffered by the industry was caused by other factors, being the non-dumped rebar exports from Turkey…* then this was of limited consequence, given that it was not necessary for the Commission to also be satisfied that the Korean exporter had caused the Australian industry to suffer material injury, *currently*. The Commission need only have been 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*. Clearly, evidence of current dumping and material injury would demonstrate "more probably than not"[6] that the expiration of the measures would lead to a continuation of dumping and material injury, but an absence of *current* dumping and material injury does not preclude the conclusion that the expiration of measures would lead to a *recurrence* of the dumping and the material injury. This conclusion was upheld by the Panel of the WTO Dispute Settlement Body in *US – DRAMS*,[7] which considered the use of the word "continued" in Article 11.2 of the Anti-Dumping Agreement:

> *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*

[4] EPR Folio No. 546/030

[5] Legislative references are to the *Customs Act 1901*, unless otherwise specified.

[6] 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"*.

[7] *United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*

*authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.*

*Furthermore, with regard to injury, Article 11.2 provides for a review of 'whether the injury would be likely to continue or recur if the duty were removed or varied'. In conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (i.e., future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes a priori the justification of continued imposition of anti-dumping duties when there is no present dumping.*

*In addition, we note that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a 'present' analysis.*[8] (emphasis added)

***The impact of "the expiration of the measures"***

Despite the Commission concluding that it was unable to assess the suitability of the Korean *…exporter's domestic sales for the purposes of establishing the normal value under section 269TAC(1) as it was not satisfied of the completeness, relevance and accuracy of the data relating to a portion of Daehan's domestic sales and its cost to make and sell…*[9] it nevertheless determined a dumping margin of 3.9 per cent, which was consistent with the dumping margin determined following the conclusion of *Review of Measures No. 489*.[10]

In spite of the current anti-dumping measures in place against the Korean exporter, which were for five months of the 'inquiry period' at the rate of 9.7 per cent with interim dumping duties calculated on an *ad valorem* basis, the exporter continued to dump by at least a margin of 3.9 per cent across the 'inquiry period'. The impact of the Korean exporter's on going dumping in spite of the current measures resulted in the Commission's price undercutting assessment which *…found evidence of price undercutting in the range of 0.02 per cent to 4.0 per cent*.[11] Even though the Australian industry considers that the Commission's assessment understates the extent of price undercutting by importers of the goods sourced from the Korean exporter; as the Commission's price undercutting analysis does not take account of the price depression caused to the Australian industry under its import parity pricing models when assessing price undercutting margins; the Commission's analysis nevertheless demonstrates the current impact of the Korean exporter's dumped exports on prices for the goods and like goods in the Australian market. 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.*[12] (emphasis added)

[8] *United States – Anti-Dumping Duty on Dynamic Ramdom Access Memory Semiconductors (DRAMS) of one Megabit or above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, paras. 6.26-6.29.
[9] SEF 546, p. 39.
[10] REP 486 & 489, p. 20.
[11] SEF 546, p. 53.
[12] SEF 546, p. 55.

…

*In Investigation 264, the Commission found that rebar is a highly price sensitive commodity good.*[13] *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.*[14] (emphasis added)

Therefore, the evidence before the Commission was that:

(i) Daehan continued to export goods to Australia at dumped prices across the 'inquiry period',

(ii) despite the existence of measures with *ad valorem* rates of 9.7 per cent applying for the first five months of the 'inquiry period' and 3.9 per cent for the balance of the 'inquiry period', that Daehan continued to export the goods at dumped prices, and

(iii) the dumped exported goods undercut the Australian industry's prices and caused the Australian industry to experience price depression, suppression, lost profits and profitability.

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 exported from Korea by Daehan was presented to the Commission. The evidence established the cause and effect of the dumped Korean goods either offered or sold into the Australian market. 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.[15]

As such, given the 'present' or *current* dumping *and* 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 dumping and 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 Korean exporter has continued to dump, maintain sales volume and undercut the Australian industry's prices, 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 Korean exporter or the country generally, will result in a further reduction in export price and therefore increased levels of 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 published *ADRP Report No. 119*,[16] when she concluded that continuation of dumping can confer a price advantage to the exporter that can cause injury:

[13] Original fn 61: *REP 264, Final Report p. 93*.
[14] SEF 546, p. 55.
[15] 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*).
[16] 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.*[17] (emphasis added)

Applied here, given the levels of dumping by the Korean exporter at a time subject to the measures, and given the exporter's identification of lower priced "undumped" goods exported to Australia, then given the price sensitive nature of the Australian rebar market, it follows that the Korean exporter 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. Given that the Korean exporter is already causing such injury to the Australian industry even with the presence of measures, it is likely that injury will be amplified in the absence of measures.

In any event, even if the Commission were to conclude that the Korean exporters were not *currently* causing material injury to the domestic industry, in spite of exporting the goods at dumped prices, 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 current and continued dumped exports would confer on the Korean exporters generally, and Daehan, specifically. The Senior Panel Member considered a similar argument to that originally advanced by Daehan 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.*[18] (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*.[19] 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. Therefore, contrary to the Korean exporter's original assertion that the Commission's *…reasoning for the preliminary findings are fundamentally unsound…* the Commission did in fact reach the correct or preferable decision in its final report to thie Minister (REP 546) on the basis of the evidence and facts before it:

> *The Commission analysed the subject countries' export behaviour in terms of volumes and price, levels of dumping, available capacity and evidence of price undercutting. Further, the Commission reviewed the impact of measures by other countries, the substitutability and price-sensitive nature of the goods, and the influence of import prices on the Australian industry's prices as well as the expected supply of and demand for rebar in the next few years.*
>
> *The impact of these factors on the likelihood that dumping and material injury will continue or recur are discussed as it relates to each of the countries subject of this inquiry.*[20] (emphasis added)

[17] ADRP Report No. 119, p. 31.
[18] ADRP Report No. 119, p. 32.
[19] ADRP Report No. 119, p. 32.
[20] SEF 546, p. 8.

***Daehan's factual inaccuracies asserted in the course of the continuation inquiry***

*(a) Historic and incomplete import price and market data*

The Korean exporter originally pointed to InfraBuild's analysis of rebar exported from Turkey contained in its application for the publication of a dumping duty notice concerning the goods from that source. Firstly, the analysis presented in that application only covers export volumes and values until 30 June 2018. The price "undercutting" analysis Daehan relied upon is InfraBuild's estimate based on its market intelligence for deliveries up to December 2018. The conclusions Daehan sought to extrapolate from this historic document are limited and not as far-reaching as the Korean exporter sought to assert. The Commission has more comtemporary price data from importers (until at least 30 December 2019) and offer data from the Australian industry (until at least August 2020). Further, since the initiation of *Review of Measures No. 566*, the Commission should also have further import volume and value data from Australian Border Force. This additional information is open to the Commission to consider in conducting this reinvestigation.

Daehan further neglected to mention that at the time InfraBuild lodged its application concerning rebar exported from Turkey, the measures against the Korean exporter amounted to an *ad valorem* rate of duty of 9.7 per cent. Even if Daehan was correct to assert that Turkish exports of the goods undercut both InfraBuild and other exporters, then all this serves to indicate is the effectiveness of the measures at the time. In any event, **the relevant question for the Commission is one of recurrence of material injury upon the expiration of measures**.

*(b) TRINDEX data*

Daehan originally presented an extract from the Commission's Trade Remedy Index (TRINDEX) as evidence of ongoing price undercutting by Turkish exports. With respect, given that the data presented is an index of an historic 2017 base, then the relative positions of the index for either Korean or Turkish exports is not indicative of anything other than each source's movements since the base period. To suggest, as Daehan originally did, that *…the data confirm[s] that Turkish prices substantially undercut Korean equivalent prices…*[21] either indicates a complete misunderstanding of the concept of indexation or is designed to be misleading.

**Conclusion**

Daehan exported the goods to Australia at dumped prices during the 'inquiry period'. To the extent that there is evidence of *current* dumping during the term of the measures strongly indicates that *…more probably than not…* the exporter will continue to export goods at dumped prices. However, even if the exporter was not found to be dumping during the inquiry period, then this does not preclude the Commission from concluding that the expiration of the measures would likely lead to a recurrence of the dumping.

The Korean exporter undercut the prices of the Australian industry for the goods. This occurred while Daehan was subject to measures in the form of *ad valorem* duties, initially at 9.7 per cent, and more recently, 3.9 per cent. The Commission has consistently found that the Australian rebar market is highly price sensitive. Dumped prices give the Korean exporter a price advantage in the Australian market. During the 'inquiry period' the price advantage was achieved by exporting the goods at dumped prices. Given the price

[21] EPR Folio No. 546/030, p. 5.

competition in the Australian market, including the prices of "undumped" goods from sources not subject to measures, then the Korean exporter would need to lower its export prices to compete, thereby further 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 Korean 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 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 Korean 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).

To discuss any aspect of this submission, please do not hesitate to contact your InfraBuild Steel representative on record.

FOR AND ON BEHALF OF THE

**AUSTRALIAN INDUSTRY APPLICANT**