PUBLIC RECORD

27 October 2020

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

BY EMAIL:
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Dear Director,

Review of Anti-Dumping Measures No. 566 concerning steel reinforcing bar exported from Korea, Singapore, Spain, Taiwan

AUSTRALIAN INDUSTRY RESPONSE TO EXPORTER SUBMISSION – CELSA BARCELONA

InfraBuild (Newcastle) Pty Ltd (**InfraBuild**), the applicant and a member of the Australian industry producing like goods to the goods the subject of this review of anti-dumping measures (**REV 566**), refers to the submission of the exporter from Spain, Compañía Española de Laminación S.L. (**Celsa Barcelona**); published on 2 October 2020;[1] and makes the following observations and comments in response.

The use of paragraph numbers, headings and sub-headings below follow those contained in the exporter's submission.

"2. We understand that Continuation 546 and Review 566 are each intended to be a review under Article 11 of the WTO Anti-Dumping Agreement."

InfraBuild understands that the *Continuation Inquiry into Anti-Dumping Measures* concerning the goods the subject of REV 566 is conducted under Division 6A[2]; as permitted under Article 11.3 of the *Anti-Dumping Agreement*;[3] and this review of anti-dumping measures is conducted under Division 5; as permitted under 11.2 of the *Anti-Dumping Agreement*. We see nothing in Australia's domestic law to prevent the Anti-Dumping Commission **(Commission)** from running a concurrent, or even, consecutive review of measures under Division 5, and continuation inquiry under Division 6A, subject to the time limits on applications under

[1] EPR Folio No. 566/004.
[2] Legislative references are to provisions of the *Customs Act 1901*, unless expressly stated.
[3] Agreement on Implementation of Article VI of GATT 1994

s.269ZA(2)(a) being satisfied. Neither is there any WTO jurisprudence to suggest that they may not be conducted concurrently or consecutively, subject to the measures not having been earlier terminated. Indeed, the Commission has regularly conducted concurrent and consecutive reviews under Division 5, and continuation inquiries under Division 6A.[4]

"4. …There are two procedures now underway which have as their end-point a decision as to whether 'duty is necessary to offset dumping'. To add further umbrage it is indicated in the newly initiated Review 566 that Spanish exporters are required to provide comprehensive responses to the exporter questionnaire before the outcome of Continuation 546 is due to be announced."

We fail to understand the exporter's "umbrage" given that the Commission's consideration of information following the expiration of the 'inquiry period'; in this case partly captured by the review period of REV 566; is always relevant and necessary to the Commission's consideration of whether to recommend that the Minister take steps to secure the continuation of the anti-dumping measures, and satisfaction 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/or the material injury that the anti-dumping measure is intended to prevent. We should think that a significant number of the export sales by the Spanish exporter now identified by the Commission as having occurred within the review period of REV 566, should always have been disclosed by the exporter as forward orders in the context of the *Continuation Inquiry into Anti-Dumping Measures* (**CON 546**).

"5. Clearly, the Commission must first complete Continuation 546 and decide if the subject measure 'shall be terminated on a date not later than five years from its imposition'. Such decision must be informed by, and based on, the conduct of that inquiry itself. If, in light of the evidence collected and verified by the Commission in Continuation 546, the Commission is not satisfied that the expiry of the duty would be likely to lead to a continuation or recurrence of dumping and injury, then the subject measure must be allowed to expire. As a result, there is no measure to be further 'reviewed'. It follows that the initiation of Review 566 creates an unlawful repetition of an existing procedure, which creates undue burden for the exporters concerned, Celsa Barcelona included."

There is no dispute that the Commission must complete CON 546, within the statutory timeframe, however, there is an ongoing obligation on the Commissioner to have regard to relevant and reliable information which is available to him, this includes, at a minimum, the Australian Border Force (**ABF**) import database. If not already extracted for the purposes of concluding CON 546, it may also be used in considering changes to the variable factors under REV 566. Indeed, WTO Disputes Settlement Body jurisprudence identies an obligation on investigating authorities to consider "past" and "present" facts:

> *…Future 'facts' do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated, to the present. We recall that one of the fundamental goals of the Anti-Dumping Agreement as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts. Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present.*

[4] Refer for example, EPR 499 and 505 concerning *hot rolled structural steel sections from Japan, Korea, Taiwan, Thailand.*

> *The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.*[5] (emphasis added)

Should the Minister accept the Commissioner's recommendations, and continue the measures against the Spanish exporter, then there is no hindrance to REV 566 continuing. On the other hand, should the Minister decide that the measures not be continued against the Spanish exporter, then with the expiry of the measures on or before 19 November 2020, any report by the Commissioner under s.269ZDA may recommend that the dumping duty notice remain unaltered, or have effect in relation to a particular exporter or to exporters generally; other than Celsa Barcelona; as if different variable factors had been ascertained.

"6. …However, such an attempt to influence the Commission is misguided. The Commission already has verified information before it, as collected in the inquiry period, the force of which cannot be overborne by the snippets of unverified information that Infrabuild now seeks to advance. Unverified information in a different procedure extending beyond the inquiry period cannot overturn the body of verified longer-term information already amassed in Continuation 546. To proceed otherwise would be legally incoherent."

We repeat our analysis in response to the exporter's assertions made in paragraph 5, above, and remind the Commission that there is a positive obligation on it to consider all relevant and reliable information. Furthermore, the exporter's suggestion that the Commission's consideration of information is confined to the "inquiry period" is entirely misguided, as there is no such concept within our domestic law, and WTO Dispute Settlement Body jurisprudence does not seek to confine an investigative authorities consideration of matters under Article 11.3 of the WTO Agreement to such a period:

> *Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination.*[6]

"7. The proposed review period for Review 566 overlaps the inquiry period in Continuation 546 by six months. For exports from Spain, the continuation inquiry confirms that there were no exports in the inquiry period. …"

Assuming that the outcome of CON 546 is that the anti-dumping measures applying to Celsa Barcelona are secured, then the outcome of REV 566, whenever concluded, permits the Minister under s.269ZDB(7) to declare, that the dumping duty notice, either remain unaltered, or be taken to have effect or to have had effect, in relation to Celsa Barcelona, as if the Minister had fixed different variable factors in respect of that exporter, relevant to the determination of duty. This will ensure that the most contemporary and effective measures are imposed. We see no good reason to oppose this outcome.

[5] Report of the Panel, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted on 9 January 2004, para. 7.279.
[6] *Ibid*., para. 7.166.

Paragraphs 8 to 11 (inclusive)

We observe that the Spanish exporter's comments in paragraph 8 to 11, to the extent (if any) that they are substantive, relate to CON 546 now under consideration by the Minister.

"12. Further, we request the Commission to discontinue, revoke or suspend Review 566 immediately. The undue burdens placed on exporters may not be a significant legal concern to the Commission, however the carriage of two review procedures at the same time and in respect of substantially overlapping periods should be."

REV 566 was properly initiated, and there is no basis for the Spanish exporter to call for its discontinuance, revocation or suspension. We observe that *Statement of Essential Facts No. 546* proposes to recommend to the Minister that she secures the continuation of the dumping duty notice applying to rebar exported to Australia from Spain (except Nervacero S.A) for another five years until 19 November 2025. Provided this recommendation is made and accepted by the Minister, then it is entirely appropriate, given the exports to Australia by Celsa Barcelona within the review period for REV 566, that the variable factors be reascertained and contemporary and effective measures be imposed.

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

FOR AND ON BEHALF OF THE

AUSTRALIAN INDUSTRY APPLICANT