

Ms Lydia Cooke  
Manager, Operations 1  
International Trade Remedies Branch  
Australian Customs and Border Protection Service  
5 Constitution Avenue  
CANBERRA ACT 2600

23 July 2012

Dear Ms Cooke

**Re Hot Rolled Coil exported from Japan, Korea, Malaysia and Taiwan.**

We refer to the submission made by BlueScope Steel (BlueScope) dated 16 July 2012 in response to the submission made by our client, Nippon Steel Corporation (Nippon Steel), dated 9 July 2012.

As will be shown below, the BlueScope application remains deficient, despite its submission of 16 July 2012; and we urge Customs to request that the information identified in our client's submission be made publicly available without the need for further correspondence by us on this issue.

**1. Non confidential summaries of confidential information**

- 1.1 Our client does not seek the disclosure of confidential information. Our client's complaint is however that there has been no attempt by BlueScope to provide a non-confidential summary of the information provided to Customs in confidential Appendix A-9.2.1, A-9.2.2 and A-9.2.3.
- 1.2 Our request conforms with international legal norms. By way of example, the Panel decision in *China-Countervailing and Anti Dumping Duties on Grain Orientated Flat Rolled Electrical Steel From the United States* noted, at par 7.149, that Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article 6.5.1 of the Anti-Dumping Agreement provide that:

*The authorities shall require [interested Members or] interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such [Members or] parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.*

...

*In the Panel's view, the broad nature of the requirement to furnish non-confidential summaries applies to confidential information submitted in an application, as well as to information submitted in the course of an investigation...*

*The obligations in Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement fall upon the investigating authorities. The Appellate Body agreed with this interpretation in EC – Fasteners (China). The Appellate Body found*

*that in respect of information treated as confidential under Article 6.5, Article 6.5.1 imposes an obligation on the investigating authority to require that a non-confidential summary of the information be furnished. The Appellate Body noted that this accommodates the concerns of confidentiality, transparency and due process. Where "exceptional circumstances" exist, such that non-confidential information is not susceptible of summary, Article 6.5.1 requires that the party identify the exceptional circumstances and provide a statement explaining why summarization is not possible. The investigating authority must scrutinize such statements to determine whether they establish "exceptional circumstances".<sup>1</sup> (emphasis added, footnote in original)*

- 1.3 In this instance, BlueScope has simply claimed a blanket exemption for all the information it has provided in the Appendix A-2.2.1 to A-9.2.3.0. BlueScope has described all the information in these appendices as confidential, without providing an explanation or a non-confidential summary. Its only concession is to provide a non-confidential document for Appendix 9.2.1 which only sets out headings and a reference to a heading for Appendix 9.2.3. We note that there is no attachment to the letter that meets the listed description.
- 1.4 In any event, the mere listing of headings does not constitute an adequate non-confidential summary which gives a reasonable understanding of the substance of the information. Further, it does not provide a case for an exceptional circumstance. As noted by the Panel decision in *China- Countervailing and Anti Dumping Duties on Grain Orientated Flat Rolled Electrical Steel From the United States*, at par 7.198 to 7.200, broad summary claims of confidentiality are inadequate.
- 1.5 Nippon Steel has given examples of what it considers to be matters that can, and should have been disclosed at 3.5, 3.6, 3.10 and 3.11 of its submission.
- 1.6 Our client requests that Customs ensures that an adequate non-confidential summary of the information contained in the appendices referred to above is provided by BlueScope and placed on the public file as a matter of urgency.
- 2. Material injury and causal link**
- 2.1 Nippon Steel notes that BlueScope, in its 16 July 2012 submission, claims that it was unable to pass on cost increases during the investigation period but that it was not claiming that it was entitled to enjoy a static cost-price ratio. It is abundantly clear that BlueScope is conceding that its claim on price suppression is therefore not based on increasing prices to a point that would restore it to its former cost-price ratio.
- 2.2 As stated in our previous submission, Nippon Steel will make a detailed submission on material injury and causal link at the appropriate time.

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<sup>1</sup> Appellate Body Report, EC – Fasteners (China), para. 544. A number of panels have also taken this approach, see in particular, Panel Reports, Guatemala – Cement II, para. 8.213; Mexico – Steel Pipes and Tubes, para. 7.379; EC – Fasteners (China), para. 7.515, US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina), para. 7.135; and Mexico – Olive Oil, para. 7.89. These panels held that meaningful interpretation of the provisions must impose an obligation on the investigating authorities to require interested parties to provide a statement of reasons regarding why summarisation is not possible.

# CLAYTON UTZ

Sydney Melbourne Brisbane Perth Canberra Darwin Hong Kong

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### 3. Conclusion

- 3.1 Nippon Steel insists that Customs requires that the Applicant provide the information which it ought to have provided at the time of filing its application. In particular, we request that Customs ensures that an adequate non-confidential summary of the information contained in the appendices to the application is provided by BlueScope and placed on the public file as a matter of urgency.

Yours sincerely



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