
**BEFORE THE BUREAU OF INDUSTRY
AND SECURITY**

U.S. DEPARTMENT OF COMMERCE

**COMMENTS ON THE PETITION FOR
THE IMPOSITION OF MONITORING AND SHORT SUPPLY CONTROLS
WITH RESPECT TO EXPORTS FROM THE
UNITED STATES OF COPPER SCRAP
AND COPPER-ALLOY SCRAP**

DOCKET NO. 040419121-4121-01

**ON BEHALF OF
THE INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.**

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EXECUTIVE SUMMARY

On April 7, 2004, the Bureau of Industry and Security (“BIS”) received a written petition from the member companies of the Copper & Brass Fabricators Council, Inc., and the Non-Ferrous Founders' Society (“Petitioners”) requesting that the Department of Commerce impose monitoring and controls on exports of recycled metallic materials containing copper pursuant to the provisions of section 7(c) of the EAA and section 754.7 of the Export Administration Regulations. Patton Boggs LLP submits these comments on behalf of and as counsel for The Institute of Scrap Recycling Industries (“ISRI”) in response to the notice published by BIS in the Federal Register on April 22, 2004 (the “Federal Register notice”) inviting public comment upon the petition. ISRI vigorously opposes the petition as both unwarranted, based on the lack of a demonstrated short supply situation, and inappropriate, based on its inconsistency with overall U.S. trade policy.

ISRI is a trade association of the scrap processing and recycling industry. It represents 1,300 companies that process, broker, and industrially consume scrap commodities, including metals, paper, plastics, glass, rubber, and textiles. Its members operate over 3,000 facilities that are located in every state and in every congressional district. ISRI estimates that these facilities employ between 60,000 to 70,000 employees. Many ISRI members are small family-owned businesses, including a significant number that have been in continuous operation for 100 years or more. Several are large, publicly traded corporations. ISRI members handle, process, ship, and/or ultimately recycle scrap commodities. Thus, ISRI’s members are vitally concerned with the potential imposition of short supply controls on exports of copper based scrap.

If the United States were to impose controls on the exports of copper-based scrap metal it would violate its obligations under the World Trade Organization (“WTO”) agreements. Article XI(1) of the General Agreement on Tariffs and Trade (“GATT”) prohibits restrictions on the “exportation or sale for export of any product destined for the territory of any other contracting party.” GATT Article XI(1). The purpose of this prohibition is to prevent a party to the WTO agreements from enacting measures that protect or promote its domestic industries. Petitioners have requested that the U.S. engage in the exact conduct that is prohibited by limiting the supply of U.S. copper-based scrap available to the world market for the purpose of reducing the domestic price of copper-based scrap for U.S. scrap consumers.

There are certain conditions under which a country may implement export restrictions. However, those conditions do not exist here. GATT Article XI(2)(a) permits temporary export restrictions when applied to prevent critical shortages of products essential to the member country. As demonstrated above, there is no shortage of copper-based scrap in the U.S., nor can such scrap be considered essential to the U.S. GATT Article XX provides several exceptions as well. Measures implemented pursuant to Article XX must not be applied in a manner that would constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade . . .” GATT Article XX. If imposed, the export controls would be unjustifiable discrimination between countries since the same conditions prevail in the U.S. market and the world markets for copper-based scrap. Such controls would clearly constitute a restriction on international trade. In the past, the U.S. has consistently taken the position that these types of controls are inconsistent with the GATT.

For these reasons, as more fully explained in the longer comment submitted by Patton Boggs LLP on behalf of ISRI, ISRI opposes the Petition requesting the imposition of monitoring and short supply controls on exports of copper and copper-alloy scrap.

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I. INTRODUCTION

These Comments are submitted by Patton Boggs LLP on behalf of the Institute of Scrap Recycling Industries, Inc. (“ISRI”), and its member companies. ISRI is a trade association that is representative of the United States industry that processes metallic materials capable of being recycled, specifically copper scrap and copper-alloy scrap (“copper-based scrap”), within the meaning of section 7(c) of the Export Administration Act of 1979, as amended (“the Act” or “the EAA”), 50 U.S.C. App. § 2406(c)(10)(A) and section 754.7 of the Export Administration Regulations (“EAR”) of the U.S. department of Commerce, 15 C.F.R. §§ 754.7(a) and (b)(2003).

ISRI is opposed to the imposition of either monitoring or export controls on copper-based scrap. This submission explains that such controls would violate the United States’ obligations under the international trade agreements of the World Trade Organization (“WTO”). Specifically, imposing controls on the export of copper-based scrap would violate Article XI of the General Agreement on Tariffs and Trade (“GATT”). The circumstances do not exist in the domestic copper industry to permit such export restraints under GATT Article XI or the exceptions to Article XI that are provided for in GATT Article XX. There has not been an increase in prices or a domestic shortage resulting from the increased exports adversely affecting the national economy or any sector thereof. Moreover, it is evident that the only purpose of imposing export controls is to reduce the current price of copper-based scrap to protect the domestic industry from the effects of the global market, which would be in direct contravention of GATT and the other WTO agreements.

**II. IMPLEMENTATION OF SHORT SUPPLY CONTROLS ON EXPORTS OF
COPPER-BASED SCRAP METALS WOULD VIOLATE THE GATT ARTICLE
XI PROHIBITION AGAINST EXPORT RESTRAINTS**

The imposition of short supply controls on the export of copper scrap would violate the United States' obligations under the international trade agreements of the World Trade Organization ("WTO"). The General Agreement on Tariffs and Trade ("GATT") is the basis of the WTO agreements and generally prohibits restrictions on the exportation or sale for export of any product destined to a WTO member country. Specifically GATT Article XI(1) states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on . . . the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT Article XI(1).

Clearly, unless some exception to the general prohibition contained in Article XI applies, the imposition of export controls on scrap metal would be prohibited by Article XI. Several exceptions do exist which allow WTO members to limit exports under specified circumstances. As explained below, however, none of these exceptions would apply to a limitation by the United States of exports of scrap metal.

A. **GATT Article XI(2)(a) Does Not Permit The Implementation of Export Controls on Copper-Based Scrap Metal Because There is not A Shortage of Copper-Based Scrap Metals and Copper-Based Scrap Metals is not A Product Essential to the United States**

Under GATT Article XI(2)(a), temporary export restrictions are permissible when applied to prevent or relieve critical shortages of food stuffs or other products essential to the Member country. Petitioners argue that there has been a significant increase in exports of copper-based scrap in relation to domestic supply and demand resulting in a shortage of U.S. copper-based scrap. Recent research conducted by Nathan & Associates demonstrates that there is, in fact, no "critical shortage" in the U.S. of copper scrap. Nathan & Associates is presently completing a report analyzing the availability of copper scrap in the United States. It expects to complete the report

shortly, and definitely before the hearing on May 19, 2004. Based on research completed to date Nathan & Associates found that at the end of 2003 there existed as a potential reserve 66.8 million metric tons of obsolete copper scrap in the United States compared to annual demand for copper scrap and copper-alloy scrap by the U.S. copper and brass industry of 1 million metric tons. The fact that a reserve of this size existed at the end of 2003 clearly demonstrates that there was not a “critical shortage” of copper-based scrap in the United States from 1999-2003 as asserted by Petitioners.

Petitioner’s claims that there is a shortage in the United States of copper scrap also do not comport with commercial realities. Supplies of the grades of scrap used by the domestic copper industry are readily available to meet the industry’s needs. No company at the scrap processing or scrap consuming side has been denied copper-bearing scrap. In fact, many scrap processors are experiencing delays in shipping appointments. Many ISRI members that are copper scrap processors are reporting that mills are delaying receipt of purchased scrap due to excess inventories of raw materials at the mills.

In addition, copper-based scrap metal can not accurately be characterized as a product “essential” to the United States. The Department of Commerce considered a related issue when it conducted a “Section 232” investigation of iron ore and semi-finished steel in 2001. That investigation concluded that, while iron ore and semi-finished steel are “important” to U.S. national security, “there is no probative evidence that imports of iron ore or semi-finished steel [even] threaten to impair U.S. national security.”¹ The Department of Commerce also found no evidence that inputs used in the manufacture of semi-finished steel – including scrap – were in short supply. *Id.* at 26.

¹ The Effect of Import of Iron Ore and Semi-Finished Steel on National Security, U.S. Department of Commerce, Bureau of Export Administration, Oct. 2001 at 1.

As a result, the Department of Commerce declined to recommend that imports be limited. By the same token, limiting exports from the United States of copper-based scrap metal can hardly be justified as necessary to relieve critical shortages of a material essential to the U.S. Thus, the conditions required in order to qualify for the exemption under GATT Article XI(2)(a) simply are not satisfied with respect to exports from the U.S. of copper-based scrap metal.²

B. The GATT Article XX Exceptions Do not Permit Controls on Copper-Based Scrap Because the Controls Would be Arbitrary and Unjustifiable Discrimination and Constitute A Restriction on Trade

In addition to the exceptions provided in Article XI, the GATT also provides for general exceptions in Article XX. However, measures implemented pursuant to Article XX must not be “applied in a manner which would constitute *a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade . . .*” GATT Article XX (emphasis added).

Export controls imposed on scrap would fail to satisfy this criterion for the availability of the exceptions listed under GATT Article XX. First, if imposed, the export controls would “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” Copper-based scrap is a commodity that is widely traded in the world’s markets. Prices for copper-based scrap have risen, not only in the U.S., but around the globe. Thus, the same conditions faced by copper-based scrap consumers in the U.S. are faced also in other countries. In other words, in all countries, “the same conditions prevail.” Imposing short supply controls on copper-based scrap metal would eliminate U.S. copper-based scrap metal from the world markets.

² Under GATT Article XI(2)(b), a country may restrict exports if necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade. This exception would clearly not be applicable to export controls imposed on scrap.

This would presumably be done to limit the United States' supply of copper-based scrap metal to the smaller market of U.S. scrap metal buyers and consumers in the hopes that, with a decrease in aggregate demand, there would be a corresponding decrease in the domestic price of copper-based scrap. This is precisely the type of arbitrary and unjustifiable discrimination against other WTO members that Article XX exceptions can not be used for.

Likewise, the imposition of export controls on copper and copper-alloy scrap would clearly constitute a restriction on international trade. The exceptions listed in GATT Article XX can not be used to justify a "disguised restriction on international trade." Limiting U.S. exports of copper-based scrap would not be a "disguised" restriction of trade, it would be a blatant restriction of trade. For this second, independent reason, the exceptions listed at GATT Article XX can not be used to justify export controls on U.S. exports of copper-based scrap.

Even assuming *arguendo* that the GATT Article XX exceptions might be available, none of them would or could serve to justify limiting U.S. exports of scrap. There are only two Article XX exceptions that could conceivably be invoked to justify limiting U.S. exports of copper-based scrap. The first would permit, among others, measures:

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.

Article XX(i).

Exception (i) could not justify export controls on scrap for several reasons. First, the imposition of such controls could not accurately be characterized as "part of a governmental stabilization plan." If controls are imposed, they will be imposed in isolation. The U.S. government does not have (nor

should it) an overarching plan in place designed to control prices or supplies of commodities. Second, the last time that controls were imposed on U.S. exports of scrap in 1973-74, the controls actually had the effect of increasing both worldwide and U.S. prices for scrap. As a practical matter then, it is unlikely that the imposition of controls would have the effect of holding the domestic price of scrap below the world price – as would be required to invoke the exception provided under GATT Article XX(i). Finally, as stated in the language of the exception, restrictions are not permitted if they operate to increase the exports of, or protection afforded to, a domestic industry. Imposing short supply controls on copper-based scrap metal exports would be an effort to do just that.

Separately, Article XX(j) permits measures:

(j) essential to the acquisition or distribution of products in general or local short supply; provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. . . .

GATT Article XX (j).

As explained above, there exists no general or local short supply of copper-based scrap metal. Export controls on copper-based scrap can therefore not be justified as “essential” to the distribution of products in short supply. Furthermore, imposing short supply controls on copper-based scrap metal exports would decrease the U.S. scrap metal supply available to the world market, thereby denying other WTO member countries equitable access to their share of the international supply of copper-based scrap metal. The Department of Commerce could attempt to address this issue by reducing, but not stopping, U.S. exports of copper-based scrap. Experience shows, however, that such a course of action would render the export controls ineffective. When controls on scrap were last imposed in 1973-74, the U.S. continued to allow some exports, albeit limited in quantity. The reduction in the quantity of U.S. scrap available to the world market drove up scrap

prices. Because some scrap was still being exported, U.S. prices followed world prices, *i.e.*, U.S. prices also increased. Thus, the U.S. would violate its WTO obligations if it cut all exports of scrap, and would render the controls ineffective if it were to limit, but not stop, all exports.³

III. THE UNITED STATES HAS CONSISTENTLY TAKEN THE POSITION THAT EXPORT CONTROLS LIKE THOSE AT ISSUE HERE ARE INCONSISTENT WITH THE GATT

In the past the U.S. has argued that export restrictions intended to benefit a domestic industry, either by bestowing a raw material price advantage or by restricting the supply of the raw material to foreign competitors is exactly the trade distortion Article XI seeks to prohibit. *Argentina-Measures Affecting the Export of bovine Hides and the Import of Finished Leather* (Wt/DS155/R) (December 19, 2000) (Authority granted by Argentina Government to representatives of the Argentinean tanning industry to participate in customs inspection of bovine hides before export was alleged to be a *de facto* export prohibition). In its third-party submission, the U.S. quoted the 1950 *Report of the Working Party on the use of the Quantitative Restrictions for Protective and Commercial Purposes*, which examined the use of both import and export restrictions and concluded that:

The[GATT] Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purpose of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restrictions would have to be determined on the basis of the facts in each individual case.

Essentially, the U.S. argued that Argentina was limiting exports to reduce input costs to the Argentinean industry and denying trading partners access to raw materials.⁴ Such a restraint was a

³ As explained above, the exception provided for in GATT Article XX(j) is not available in any event because the imposition of export controls on scrap would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a poorly disguised restriction on international trade.


textbook example of the behavior Article XI was intended to prohibit. Yet, this type of prohibited conduct is exactly what the U.S. would engage in if it were to implement export controls on copper-based scrap. The purpose of such short supply controls on copper-based scrap would be to lower the price of copper-based scrap to the domestic industry and limit the supply of U.S. copper-based scrap to the world market. GATT specifically prohibits such protectionist measures. The U.S. has and should oppose these types of export controls when imposed by other countries. By the same token, monitoring and export controls should not be imposed on the exports of copper-based scrap from the United States.

IV. CONCLUSION

The imposition of short supply controls on the export of copper-based scrap metal would violate U.S. obligations under the WTO agreements. GATT Article XI(1) generally prohibits export restrictions. While there are exceptions to this general prohibition, each such exception requires that certain conditions exist or be satisfied. No conditions exist within the copper-based scrap metal industry that would justify under a GATT exception the imposition of export controls on copper-based scrap. It is clear that the sole purpose of imposing export controls would be to reduce the domestic price of scrap metal and thereby protect one segment of the domestic copper manufacturing market. To do so would be in contravention of the WTO objectives and principles.

⁴ The U.S. made a very similar argument and relied on the same quote from the 1950 Working Report in *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* (L/6268-35s/98) (March 22, 1988) where the U.S. argued that Canadian regulations that prohibited the exportation or sale for export of unprocessed herring and pink and sockeye salmon violated Article XI.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel E. Waltz". The signature is fluid and cursive, with a large initial "D" and "W".

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