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Court File No. _____

FEDERAL COURT

BETWEEN:

**ÇOLAKOĞLU METALURJI A.S.,
İÇDAS ÇELİK ENERJİ TERSANE VE ULAŞIM A.Ş.,
EKİNCİLER DEMİR VE ÇELİK SANAYİ A.Ş.,
KROMAN ÇELİK SANAYİİ A.Ş.,
KAPTAN DEMİR ÇELİK ENDÜSTRİ VE TİCARET A.Ş.,
İRPEX INTERNATIONAL INC. and
TURKISH STEEL EXPORTERS' ASSOCIATION**

Applicants

-and-

**ALTASTEEL INC.,
ARCELORMITTAL LONG PRODUCTS CANADA, G.P.,
GERDAU AMERISTEEL CORPORATION,
JEBSEN & JESSEN METALS GMBH, and
MAX AICHER (NORTH AMERICA) INC.**

Respondents

NOTICE OF APPLICATION

(Application for Judicial Review under section 18.1 of the *Federal Courts Act*)

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AND TO: **Attorney General of Canada**
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APPLICATION

1. This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, of the decision of the Canada Border Services Agency (“**CBSA**”) dated May 10, 2023, with respect to the conclusion of a re-investigation concerning certain concrete reinforcing bar originating in or exported from the Republic of Türkiye (“**Türkiye**”) (RB1 2022 RI) (the “**Decision**”).

2. The Decision was the conclusion of a re-investigation proceeding, initiated on September 8, 2022, as part of the CBSA’s ongoing enforcement of the Canadian International Trade Tribunal’s (“**Tribunal**”) order issued October 14, 2020 in Expiry Review No. RR-2019-003. As part of the proceeding, the CBSA requested and audited detailed information on costs and selling prices of certain goods. CBSA also requested and received information from the Government of Türkiye in relation to a purported particular market situation.

3. The Decision established the minimum prices at which rebar from Türkiye can be exported without the imposition of antidumping duties. The Decision also established the basis for retroactive duties on past importations from Türkiye.

THE APPLICANT MAKES APPLICATION FOR:

- a. An Order quashing the Decision and declaring the Decision to be invalid and/or unlawful;
- b. An Order declaring that CBSA re-investigation proceedings are *ultra vires* the CBSA’s authority and/or jurisdiction;
- c. Alternatively, an Order quashing or setting aside the Decision and referring the matter back to the CBSA for re-determination in accordance with such directions as this Honourable Court considers appropriate;
- d. A confidentiality order pursuant to Rule 151 of the *Federal Courts Rules*;
- e. Costs of these proceedings; and

- f. Such further and other relief that this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

A. Background to the Decision

4. Çolakoğlu Metalurji A.S., İçdas Çelik Enerji Tersane Ve Ulaşım A.Ş., Ekinciler Demir Ve Çelik Sanayi A.Ş., Kroman Çelik Sanayii A.Ş., Kaptan Demir Çelik Endüstri Ve Ticaret A.Ş., (collectively, the “**Turkish Producers**”) are Turkish producers of rebar. Irpex International Inc. (“**Irpex**”) is an importer of Turkish rebar. The Turkish Steel Exporters Association is a non-profit business organization comprised of steel producers and exporters in the Turkish steel industry, of which the Turkish Producers are members.

5. The Respondents Arcelormittal Long Products Canada, G.P., Gerdau Ameristeel Corporation, And Max Aicher (North America) Inc. are Canadian rebar producers. The Respondent Jebsen & Jessen Metals GmbH is an importer of Turkish rebar.

6. On June 13, 2014, pursuant to subsection 31(1) of the *Special Import Measures Act*, (“**SIMA**”) the President of the CBSA initiated investigations respecting the alleged injurious dumping and subsidizing of rebar originating in or exported from the People’s Republic of China, the Republic of Korea and the Republic of Türkiye .

7. On December 10, 2014, pursuant to paragraph 41(1)(a) of SIMA the CBSA issued a final determination that, *inter alia*, certain rebar from Türkiye, had been dumped. This determination included findings with respect to the margin of dumping and normal value applicable to rebar. The CBSA terminated the subsidy investigation in respect of subject goods from Türkiye.

8. On January 9, 2015, pursuant to subsection 43(1) of SIMA, the Tribunal determined, *inter alia*, that the dumping of rebar from Türkiye had not caused injury to the domestic industry but was threatening to cause injury to the domestic industry.

9. Pursuant to section 76.03 of SIMA, findings of injury or threat of injury and the associated protection in the form of anti-dumping or countervailing duties expire five years from the date of the finding, unless the Tribunal initiates an expiry review before that date. The Tribunal's mandate in an expiry review is to determine whether expiry of the finding is likely to result in injury to the domestic industry and to make an order either continuing or rescinding the finding, with or without amendment for a further five years.

10. On October 14, 2020, pursuant to subsection 76.03(03) of SIMA, the Tribunal's conclusion in expiry review inquiry RR-2019-003 was to continue its finding, without amendment.

11. In September 2022, the CBSA initiated a re-investigation proceeding (RB-2022-RI) with respect to the normal values and export prices concerning rebar originating or exported from Türkiye. This re-investigation culminated in the Decision that is the subject of this application.

B. The CBSA did not have authority or jurisdiction to conduct the re-investigation

12. The CBSA's authority and jurisdiction are provided by, and limited by, the *Canada Border Services Agency Act* (the "CBSA Act"), SIMA, and the *Special Import Measures Regulations* (the "Regulations").

13. The CBSA was established pursuant to the CBSA Act, which sets out the CBSA's mandate and powers.

14. SIMA reflects Canada's implementation of the World Trade Organization's Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "WTO Anti-Dumping Agreement") and the Agreement on Subsidies and Countervailing Measures.

15. SIMA and the Regulations constitute a comprehensive scheme for determining and imposing dumping and countervailing duties with respect to goods imported into

Canada. SIMA and the Regulations empower the CBSA and the Tribunal to carry out specific, prescribed functions to this end.

16. Re-investigation proceedings, including the one subject to this application, are *ultra vires* the CBSA's legislated authority and/or jurisdiction. There is no authority under the CBSA Act, SIMA, or the Regulations for CBSA to initiate and conduct re-investigations.

17. The CBSA's own publications indicate that re-investigations are outside the scope of its governing legislation.

18. CBSA publishes departmental memoranda that outline the legislation, regulations, policies, and procedures governing the CBSA's various programs and duties. The departmental memoranda with respect to SIMA specify the legislative provisions under which CBSA acts and derives its authority. The departmental memorandum concerning re-investigations and normal value reviews (Memorandum D14-1-8, "Re-investigation and Normal Value Review Policy") does not identify any such provisions or authority.

19. CBSA Memorandum D14-1-8 specifically notes that re-investigation proceedings are not legislated by SIMA:

2. Re-investigations and normal value reviews are administrative proceedings conducted to update values; establish values for new products or models subject to the measures in force; and establish values for exporters that do not currently have values.

[...]

4. Although up-to-date values are important, proceedings legislated by SIMA – i.e. investigations, scope proceedings, anti-circumvention investigations and expiry review investigations – take precedence as statutory deadlines must be respected. [emphasis added]

20. In effect, CBSA conducts re-investigations pursuant to its own initiative rather than pursuant to any delegated authority or jurisdiction.

21. The CBSA's Special Import Measures Handbook, which provides guidance to CBSA in administering the anti-dumping and countervailing program, does not identify any statutory authority for conducting re-investigations.

22. In the Notice of Initiation in the underlying re-investigation, the CBSA purports to have "initiated a re-investigation to update the normal values and export prices, in accordance with the Special Import Measures Act". The Notice of Initiation and the Decision do not identify any provision of the CBSA Act, SIMA, or the Regulations by which the re-investigation was purportedly conducted.

23. The CBSA's Notice of Initiation stated the re-investigation is part of the CBSA's enforcement of the Tribunal's order issued October 14, 2020 in Expiry Review No. RR-2019-003. That Tribunal's order mandated the continued application of the Tribunal's previous finding, which was premised on the CBSA's final determinations in the initial investigation conducted pursuant to the procedures prescribed by SIMA. The Tribunal order did not contain (and could not contain) any direction to engage in a re-investigation. A re-investigation is not required to enforce the Tribunal's order.

24. SIMA mandates the steps for calculating and imposing anti-dumping and countervailing duties, including the procedure in dumping and subsidy investigations. Re-investigations, including the one subject to this application, do not include or follow the steps that SIMA mandates be followed when calculating and imposing anti-dumping and countervailing duties.

25. In the case of dumped goods, the anti-dumping duty that can be imposed under SIMA is equal to the margin of dumping of the imported goods. The margin of dumping, and thus the duty imposed, is determined based on a determination of the normal value and export price of goods. SIMA mandates the methodologies that must be used for determining normal values. SIMA provides that the normal value and margins of dumping are to be determined by CBSA in an investigation as set out in SIMA, for which SIMA prescribes the necessary procedure.

26. Re-investigations are complex proceedings that impose significant burden in terms of time and expense on the foreign companies targeted by such proceedings, including the Applicants.

27. Through re-investigations, the CBSA (part of the Canadian government) imposes its authority and conducts detailed investigations and audits of foreign entities as well as foreign governments. At the outset of a re-investigation, CBSA sets out a schedule for the proceedings, advises interested parties of their right to retain legal counsel, gives parties the opportunity to submit evidence, file legal argument and reply submissions, and sets out the conditions under which confidential information is submitted and disclosed to counsel. As part of these proceedings, CBSA issues detailed requests for information seeking disclosure of confidential financial and other information from foreign companies and governments. CBSA representatives also travel to foreign countries to review and audit financial and other documents of foreign companies. Re-investigation proceedings result in the mandated imposition of duties on goods imported into Canada that are priced below specified amounts. Importantly, normal values determined in the course of re-investigations can be applied retroactively to prior imports into Canada. Failure to participate in re-investigations results in the imposition of high rates of duties on imports. At the conclusion of a re-investigation, the CBSA issues a notice of conclusion setting out its analysis and reasons. All of this is carried out without authority or jurisdiction.

28. The Decision mandates the normal values that apply to certain rebar from Türkiye. The CBSA stepped outside its legislative authority to mandate the prices at which rebar from Türkiye is permitted to be exported to Canada without the imposition of duties.

29. The re-investigation proceeding, and the resulting Decision has caused prejudice to the Applicants, including directly causing the loss of sales and business.

30. SIMA and the Regulations contain no reference to, let alone provide authority to conduct, re-investigations to revisit or update normal values, export prices, and/or amounts of subsidy applicable to imported goods.

C. Errors in the Decision

31. In the alternative, should the Court find that the CBSA has authority to conduct re-investigations, the Applicants submit that the Decision is unreasonable and should be set aside.

32. As part of the Decision, the CBSA found that a particular market situation existed in the Turkish rebar market during the period of investigation such that domestic sales in Türkiye did not permit a proper comparison with the sale of goods to importers in Canada. The CBSA's finding of a particular market situation was unreasonable, contrary to law and based on erroneous findings of fact made without regard for the material before it.

33. First, CBSA erred in finding that there was a surge of Russian billet imports into Türkiye between April and August 2022. No such surge occurred.

34. Second, CBSA erred in finding that Russian billet imports into Türkiye between April and August 2022 were heavily discounted. Evidence on the record clearly showed that Russian billet was not discounted relative to billets imported from other sources.

35. Third, CBSA erred in concluding that imports of Russian billet into Türkiye between April and August 2022 depressed scrap prices in Türkiye.

36. Fourth, CBSA erred in concluding that rebar selling prices in Türkiye during the last portion of the period of investigation were depressed and suppressed by the presence of Russian billet.

37. Fifth, CBSA erred in concluding that hyperinflation and currency devaluation distorted the prices of production inputs and rebar selling prices in Türkiye. There was no evidence for such a finding.

38. Sixth, CBSA erred in finding that the non-application of hyperinflationary accounting rules led to a distortion in the costs reported by the Turkish Producers and to defective rebar pricing policies in Türkiye. There was no evidence for such a finding.

Indeed, CBSA made no adjustments to the input costs reported by the Turkish Producers.

39. Seventh, CBSA erred in concluding that the alleged PMS had different impact on the Turkish producers' domestic and export selling prices such that it was not appropriate to compare them. The evidence on the record was that domestic and export selling prices moved in tandem. Moreover, there was no basis for making such a comparison in respect of exporters who did not make export sales to Canada.

40. The CBSA's determination of the existence of a particular market situation resulted in higher normal values for rebar from Türkiye than would otherwise be the case. The CBSA's determination that there was a particular market situation in Türkiye was premised on the series of errors describes above and is therefore unreasonable.

41. The Applicants rely on:

- a. *Federal Courts Act*, , RSC 1985, c F-7, s. 18.1.
- b. *Federal Courts Rules*, SOR/98-106, r. 3, 301-316, 317-318.
- c. The WTO Anti-Dumping Agreement.
- d. *Canada Border Services Agency Act*, S.C. 2005, c. 38
- e. *Special Import Measures Act*, R.S.C., 1985, c. S-15.
- f. *Special Import Measures Regulations*, SOR/84-927.
- g. CBSA's departmental memoranda and SIMA Handbook.
- h. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

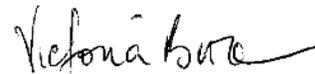
42. The affidavit(s) of the Applicants;

43. Any information filed with the Court in respect of the request below; and
44. Such further and other material as counsel may advise and this Honourable Court may permit.

REQUEST FOR MATERIAL IN THE POSSESSION OF THE CBSA:

THE APPLICANTS HEREBY REQUEST that the CBSA send to the Applicants and the Registry, in accordance with rule 318 of the *Federal Courts Rules*, certified copies of all materials that were before the President and/or other CBSA officers and officials or otherwise considered by the CBSA with respect to the conclusion of re-investigation: certain concrete reinforcing bar (RB1 2022 RI). This request is being made pursuant to Rule 317 of the *Federal Courts Rules*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June 2023



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