

21 May 2013

Mr G Gleeson  
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commercial+international

By email

Dear Sir

## **POSCO - alleged dumping of hot rolled coil from Korea Reinvestigation of certain findings**

As you are aware, we represent POSCO in this matter.

On 7 May 2013, the Australian Customs and Border Protection Service (“Customs”) announced the initiation of its reinvestigation into the alleged dumping of hot rolled coil (“HRC”) exported from Japan, Korea, Malaysia and Taiwan, on the basis of the recommendations of the Trade Measures Review Officer (“TMRO”).

POSCO wishes to discuss the recommendation made by the TMRO in paragraph 59 of his report in this matter (“the TMRO Report”),<sup>1</sup> specifically:

*In these circumstances, I consider it would be appropriate for me to recommend to the Minister that the CEO should be directed to reinvestigate whether it would be preferable to structure the conditions attaching to the imposition of dumping duties in imports for the automotive industry in such a way that imports that are acknowledged by Customs not to be causing or likely to cause injury to BlueScope are not liable to duty under the dumping duty notice in the first instance and only exempt if subsequently exempted under section 8(7) of the Customs Tariff Act.*

In doing so, it is clear that the TMRO was drawing a distinction between goods that are not liable for dumping duties in the first instance, and goods that, although liable for dumping duties, might be exempted from that liability through the application of Section 8(7) of the *Customs Tariff (Anti-Dumping) Act 1975* (“the Tariff Act”).

POSCO’s primary submission is that it is preferable that the conditions attaching to the imposition of dumping duties on imports be structured in such a way that imports of HRC that have been determined to be non-injurious do not have dumping duties levied against them in the first instance.

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<sup>1</sup> *Hot rolled coil steel – Review of a decision to publish a dumping duty notice dated 2 April 2013.*

This submission is arranged in the following way:

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We are available to discuss any matters arising from this submission, and ask you to please contact us should that be necessary.

## **1 Imports of HRC for automotive industry uses were found to be non-injurious**

Customs’ report to the Minister in this matter<sup>2</sup> (“Report 188”) found that imports of HRC for automotive industry uses had not caused material injury to the Australian industry.

Specifically, Report 188 found that:

*While [Customs] has found that BlueScope has reduced its sales to the automotive sector over the injury period, it has not found any evidence to link this reduction to competition from imports. No evidence has been provided of contracts lost to exporters in the nominated countries during the investigation period.*

*Due to the longer term nature of contracts in this sector, [Customs] concludes that the loss of sales volume is due to other factors, such as the reduction in the number of cars manufactured in Australia. Similarly, no evidence has been provided to indicate that profits in this sector have declined and even if this has occurred, that this is a result of competition with imports.<sup>3</sup>*

And:

*However, BlueScope has not provided, nor has [Customs] found, any evidence to support the claim that BlueScope has suffered from reduced returns or an erosion of profit as a result of factors other than the contraction in the automotive sector. In the absence of this evidence, [Customs] is unable to conclude that BlueScope has suffered injury in the automotive sector due to dumped imports.<sup>4</sup>*

These findings are important to emphasise at the outset of this submission, for two reasons.

Firstly, the fundamental substantive obligation that is placed on an investigating body when it is analysing whether imports that have been alleged to have been dumped have caused material injury to the

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<sup>2</sup> International Trade Remedies Branch Report to the Minister Number 188 – Hot Rolled Coil Steel Exported from Japan, the Republic of Korea, Malaysia and Taiwan dated 19 November 2012.

<sup>3</sup> Report 188, page 60.

<sup>4</sup> Ibid.

domestic industry is that any finding of such causation must be based on positive evidence.<sup>5</sup> The above extracts from Report 188 show that there is no positive evidence, whether supplied by BlueScope or otherwise placed before Customs during the investigation, which could satisfy the allegation that HRC for automotive industry uses caused BlueScope material injury.

Secondly, the original investigation has determined that any injury that BlueScope had suffered in its sales to the automotive sector are not the result of the subject imports, but rather other factors such as the diminution in the number of cars manufactured in Australia. A finding of causation must be based on positive evidence, and any injury that is attributable to other causes must not be attributed to the subject goods. This non-attribution exercise is prescribed by Article 3.5 of the *Anti-Dumping Agreement* (“AD Agreement”). It is implemented in Australian law by Section 269TAE(2A) of the *Customs Act 1901* (“the Act”), which requires that the Minister must consider whether any injury to the Australian industry has been suffered because of a factor other than the subject imports. Where such injury has been suffered, the Minister must ensure that it is not attributed to the subject imports. If the non-attribution exercise is carried out in a sub-standard or haphazard manner then an objective and unbiased investigating authority cannot conclude that dumping had caused any injury to the domestic industry.<sup>6</sup>

Thus, we can see that the relevant finding of Report 188 was twofold. Firstly, there was no evidence to support BlueScope’s claims that it had suffered material caused by the imports of HRC for automotive industry uses. Secondly, there was no evidence that any injury that BlueScope had suffered from its sales to the automotive industry was a result of anything other than economic issues facing that industry, being issues which were unrelated to dumping.

POSCO notes that the question of whether BlueScope had suffered injury in its sales of HRC to the automotive industry is not open to reinvestigation, and does not consider it is within Customs power to revisit such findings within that context. However, it is worth reiterating these findings, to provide some context to the primary question being addressed in the reinvestigation from POSCO’s perspective, which is whether dumping measures are to be imposed in respect of imports that have not been found to be injurious.

## **2 Minister’s ability to exempt non-injurious imports from dumping measures**

Due to the abovementioned non-injurious finding, many interested parties submitted that Customs should terminate the investigation insofar as it related to HRC for automotive industry uses, or at the very least exclude such imports from any final dumping measures imposed. However, Report 188 explained that:

*In making this finding, [Customs] does not have the authority within the legislation to recommend the termination of the case in respect of individual suppliers to the automotive industry. Within the terms of the legislation, the CEO can only terminate an investigation on the basis of negligible injury in regards to ‘a particular country of export’. [Customs] has found that countries that sell HRC to the automotive sector also sell HRC to other market sectors.<sup>7</sup>*

We also note that a recent letter from Customs indicated an opinion that it could not redefine the scope of the “like goods” once an investigation has been initiated:

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<sup>5</sup> *Report of the Appellate Body United States – Anti-dumping Measures on Certain Hot-Rolled Steel products from Japan* (WT/DS184/AB/R) 24 July 2001, para 192.

<sup>6</sup> *Report of the Panel – Anti-dumping Measure on Farmed Salmon from Norway* (WT/DS337/R) 16 November 2007, paragraph 7.660.

<sup>7</sup> Report 188, page 60.

*[Customs] is of the opinion that there is no provision in the [Act] that enables the redefinition of the goods the subject of the application (goods under consideration) after an application made under section 269TB has been accepted and a public notice has been published under Section 269TC. Section 269TC makes it clear that where the notice has been published...that the Chief Executive Officer of [Customs] is then under a duty to provide a report to the Minister in respect of the goods under consideration as described by the notice.<sup>8</sup>*

We consider this to be a too-rigid reading of Section 269TC, and a too-rigid restriction on Customs' ability to undertake a sophisticated consideration of the "like goods" issue generally.

At the initiation of an investigation an investigating authority does not possess the totality of the facts required for the publication of a dumping notice. For an investigation to be initiated, the Chief Executive Officer of Customs ("CEO") only need consider whether "*there appears to be reasonable grounds*" for the publication of a dumping notice in respect of the goods which are the subject of the application.

Section 269TB(1)(a) confirms that an application needs to be made in relation to:

*(a) a consignment of goods:*

*(i) has been imported into Australia;*

*(ii) is likely to be imported into Australia; or*

*(iii) may be imported into Australia, being like goods to which subparagraph (i) or (ii) applies.*

According to Section 269TG dumping duties can only be imposed on goods that are dumped and where, because of that dumping, material injury has been suffered by the Australian industry producing like goods. That conclusion can only be arrived at following a careful investigation of the circumstances raised by the application. The question of what are the "like goods" and against which "like goods" measures might be imposed is not to be, and should not be, excluded from consideration, whether as a matter of law or discretion.

If this were not the case, the autonomy of Customs as an investigating authority would be unduly and improperly limited. At the time of initiation, Customs will not have received any input from the consumers of the subject goods in the domestic market – consumers who may have very real technical reasons for sourcing their product from one supplier instead of another. Secondly, locking in a broad understanding of the "like goods" at the initiation of the investigation may mean that variations of the subject goods that are found to be non-injurious, or indeed not produced by the domestic industry at all, will then be considered for duty imposition, without legal justification or without any commercial need or economic merit for doing so.

As has helpfully been pointed out by the TMRO, Section 33(3A) of the *Acts Interpretation Act 1901* ("the Interpretation Act) provides the Minister with flexibility in the application of final anti-dumping measures. Section 33(3A) of the Interpretation Act provides that:

*Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) with respect to particular*

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<sup>8</sup> Letter from Customs to Mr John Cosgrave regarding the hot rolled plate steel investigation, dated 1 May 2013.

*matters (however the matters are described), the power shall be construed as including a power to make, grant or issue such an instrument with respect to some only of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters.*

As POSCO argued, and as the TMRO accepted, a dumping notice is an instrument of an administrative or a legislative character. It is therefore open to the Minister to publish a dumping notice with respect to some only of the “like goods” identified at the initiation of the investigation, and to make different provision with respect to different classes of those “like goods”.

POSCO submits that where it has been determined that a certain category or class of the subject goods is found to be non-injurious, the Minister must apply Section 33(3A) of the Interpretation Act so that the dumping notice excludes such non-injurious imports from the dumping notice. Such an outcome is both preferable, and legally correct under the WTO regime.<sup>9</sup> The TMRO agreed that the Interpretation Act provides the Minister with that power and potential; that there was no contradiction to the application of Section 33(3A) in the terms of the relevant Customs Act provisions; and that it was open to the Minister to exercise a discretion not to impose measures on imports of HRC for automotive industry uses.<sup>10</sup>

### **3 It is correct and preferable not to impose measures against non-injurious imports**

The TMRO asks Customs to consider whether it would be preferable to construct the dumping notice in such a way as to remove HRC that has been shown to be non-injurious from the imposition of dumping measures. POSCO submits that it is necessary<sup>11</sup> to do so, and that proceeding in that way is also correct and preferable.

No illegality attaches to the sale of low priced goods into the markets of a WTO member. It is only when dumped products are found to have caused material injury to the domestic industry that a WTO member *can and may* impose dumping duties. However, the dumping duties are not a form of punishment but, rather, are a means of alleviating injury to the domestic industry.

As discussed above, the particular form of HRC that was found to be non-injurious was HRC for automotive industry uses. As Report 188 explained, the Australian automotive industry is itself facing difficult financial conditions, having suffered a “contraction” resulting in the reduction of the number of cars it produces. The imposition of dumping duties on automotive HRC would have a detrimental effect on the business of Australian car makers, and would be contrary to the public interest as a consequence. POSCO submits that it is preferable that the anti-dumping system be administered and applied in a flexible and reasonable manner that avoids the imposition of trade-impeding duties in scenarios where there is no reason to impose such duties (because, as in this case, no injury has been caused) or where the imposition of such duties would be needlessly detrimental to domestic industries.

It is not only preferable that HRC for automotive industry uses is excluded from any dumping notice, it is also an outcome that would be in compliance with Australia’s WTO obligations. The *General Agreement on Tariffs and Trade* (“GATT”) expressly provides that a Member may not impose dumping duties on a dumped product unless it is found that such dumping has caused material injury to an industry in the

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<sup>9</sup> POSCO argued, in its application to the TMRO, that the Minister was legally precluded from publishing a notice in respect of goods found not to be injurious. The TMRO did not agree with this proposition. POSCO maintains the position as argued in its TMRO application, but recognises that an exclusion under the auspices of Section 33(3A) of the Interpretation Act will lead to the same outcome.

<sup>10</sup> TMRO report, paras 51 and 52.

<sup>11</sup> See footnote 9.

territory of the Member concerned. For example, Article VI.6 of the GATT provides, in part:

*No contracting party shall levy any antidumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry...*

This provision makes it clear that dumping duties are not to be imposed on imported goods that are found not to have caused injury. In order to comply with this obligation, other jurisdictions have adopted mechanisms to allow the selective imposition of dumping duties on certain goods (injurious goods) but not on other goods (non-injurious goods). For example, both the United States and Canada will exclude from any dumping measures like goods that have been found not to injure the domestic industry.<sup>12 13</sup>

Therefore not only is it preferable that the dumping notice be drafted in such a manner as to remove HRC for automotive industry uses from the measures, but such an approach would also better reflect Australia's WTO obligations and the practice of other jurisdictions.

#### **4 It cannot be considered that imports of HRC for automotive industry threaten material injury**

The TMRO elaborates his report in relation to the question of excluding HRC for automotive industry uses with these considerations:

*55. Accepting this reasoning does not necessarily mean that BlueScope might not suffer injury in the automotive sector during the prospective period of operation of the dumping duty notice – clearly, if contracts were offered for the supply of HRC for a new vehicle model or on the expiry of a pre-existing contract for HRC supply for an ongoing vehicle model, BlueScope might well suffer injury if the prices tendered for imported products were at dumped levels.*

*56. Moreover, while BlueScope might not suffer injury if HRC declared on entry to be destined for use in the automotive industry was in fact used in that industry, it could well suffer injury if such HRC was in fact used in other sectors and otherwise applicable dumping duties thereby avoided.*

The TMRO goes on to note that Section 33(3A) allows the Minister “to make different provision with respect to different matters or different classes of matters”. As the TMRO explained, this allows for the

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<sup>12</sup> See for example *Certain stainless steel plate in coils from Belgium, Canada, Italy, the Republic of Korea, South Africa and Taiwan* (May 21 1999), in which, despite being the subject of the anti-dumping investigation, cold-rolled stainless steel plate was found not to have caused material injury to the domestic US industry. As a result, cold-rolled stainless steel plate was excluded from the final dumping duty orders (<http://www.gpo.gov/fdsys/pkg/FR-1999-05-21/pdf/99-12892.pdf>).

Similarly, in an investigation concerning certain warm-water shrimp from Thailand, USITC determined that a domestic US industry had not suffered material injury as a result of imports of canned warm-water shrimp from Thailand. Such shrimp was excluded from the dumping measures which were ultimately imposed on the other types of warm-water shrimp (See <http://ia.ita.doc.gov/frn/2005/0502frn/E5-369.txt>).

<sup>13</sup> Once the Commissioner of the Canada Customs and Revenue Agency has initiated an investigation, the Canadian International Trade Tribunal will undertake a “preliminary injury enquiry”. If this enquiry determines that no injury has been caused by any class of the goods subject to the investigation, the Commissioner will terminate the dumping investigation with respect to those goods (See <http://ia.ita.doc.gov/frn/2005/0502frn/E5-369.txt>).

dumping notice to be drafted in such a way as to accommodate such considerations.<sup>14</sup>

We do not consider that either of these considerations impact upon the exercise of the Minister's power to exclude imports of HRC for automotive industry uses from any notices published under Section 269TG in an expansive and unconditioned way, as we will now explain.

The consideration expressed by the TMRO at paragraph 55 of his report appears to require a consideration of whether imports of HRC for automotive industry uses threaten to injure the Australian industry in the future. In this investigation, it has been determined that there has been no material injury caused by imports of HRC for automotive industry uses. The question of whether imports of HRC for automotive industry uses threaten material injury in the future has not been argued by the Australian industry nor has it been considered by Customs. Deciding not to exercise a discretionary power to exclude HRC for automotive industry uses on the basis of a threat of material injury in the future would not be a relevant consideration, because the underlying investigation has not established that to be the case. Dumping measures can only be imposed in relation to the threat of material injury, if the existence of such a threat is based upon fact and not merely on allegation or remote possibility.<sup>15</sup> Further, any application of anti-dumping measures based on a threat of injury must be considered and decided with special care.<sup>16</sup>

The original investigation concluded that there was no evidence – whether provided by BlueScope, or otherwise procured throughout the investigation – that BlueScope had suffered any injury in relation to its production of HRC for automotive industry uses beyond that caused by the contraction in demand arising from a reduction in the number of cars produced by the Australian automotive sector. Having not found any actual material injury, and not having any facts, argumentation, investigation or findings directed towards the proposition that injury is threatened by imports of HRC for automotive industry uses in the future, we submit that Customs or the Minister could not now be satisfied that there was a threat of future material injury.

Even if Customs were now to reconsider the record to see whether a finding of threat of injury arising from imports of HRC for automotive industry uses could be arrived at, it would find that there are insufficient facts to demonstrate that there is any threat of the required magnitude, or that any threat is clearly foreseeable or imminent.

Firstly, it was found that there was no injury actually caused to BlueScope by reason of imports of HRC for automotive industry uses. Customs' report found that the Australian automotive industry was in a position of some decline. How these conditions might change is not apparent. Secondly, throughout the investigation many interested parties indicated that HRC produced for automotive industry uses was distinct from HRC produced for use by other industries.<sup>17</sup> Thirdly, many operators in the automotive industry have submitted that BlueScope's HRC does not have the requirements needed, such as yield strength, tensile strength, crash/impact performance or elongation required for use by the automotive

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<sup>14</sup> *Review of Decision to Publish a Dumping Duty Notice* paragraph 59.

<sup>15</sup> Article 3.7 of the AD Agreement.

<sup>16</sup> Article 3.8 of the AD Agreement.

<sup>17</sup> These include submission of Toyota Tsusho (Australasia) Pty Ltd dated 24 July 2012; submission of Ford Motor Company of Australia Limited dated 2 August 2012; submission of Tokyo Boeki Steel & Materials Ltd dated 8 August 2012; submission of Nippon Steel Corporation dated 8 August 2012 (page 3); submission of JFE Steel Corporation, Kobe Steel, Ltd and Nisshin Steel Co., Ltd dated 11 September 2012; submission of Nippon Steel & Sumitomo Metal Corporation dated 23 October 2012 (pages 2 and 3); and submission of Nippon Steel & Sumitomo Metal Corporation dated 13 November 2012.

industry.<sup>18 19 20</sup> Indeed, BlueScope itself stated that it could not reproduce some of the technical characteristics that the automotive industry requires of its HRC.<sup>21</sup> On these bases it is clear to us that that no threat of material injury such as that postulated by the TMRO exists.

Finally, in relation to the TMRO's concern regarding circumvention,<sup>22</sup> we note that it is not uncommon for goods to be excluded from certain import duties on the basis of the user industry. For example, Schedule 4 of the *Customs Tariff Act 1995* allows concessional by-law entry for "aluminised steel classified under 7210.61.00, 7210.69.00 or 7212.50.00 in Schedule 3 for use in the manufacture of automotive muffler exhaust systems and components". Similar to a section 8(7) exclusion, or indeed a Tariff Concession Order, compliance with a dumping notice that excludes HRC for automotive industry uses would be subject to Customs usual monitoring and compliance practices.

The temptation for a disreputable importer to make an incorrect statement on an entry document is no different in the case of a choice between a type of HRC subject to measures and a type that is not, as it might be between HRC and a banana. Such an administrative issue should not be considered a bar to the correct and preferable decision which is only to impose duties against goods that have been dumped and have caused material injury, in compliance with Australia's WTO obligations.

## **5 Non-discriminatory treatment of POSCO's pickled and oiled HRC for automotive industry uses**

POSCO submits Customs should now proceed with the exclusion of HRC for automotive industry uses from the measures concerned. This fully obviates any need for further discussion of the treatment of POSCO's "pickled and oiled" ("P/O") HRC for automotive industry uses.

Nonetheless we do refer you to those paragraphs of the TMRO's report that question why P/O HRC for automotive industry uses from one country should be treated differently to that of another country.<sup>23</sup> That questioning is rhetorical, as the TMRO clearly means to indicate to all concerned that there should not be any such differential treatment – a proposition with which POSCO agrees.

## **6 Conclusion**

It is correct and preferable that Customs adopt a flexible approach to the application of dumping measures in the circumstances of this case, so that those measures do not apply to HRC for automotive industry uses.

This will prevent the application of dumping duties to goods that are not causing injury.

It will prevent causing any unnecessary and meritless increase of costs to an Australian industry that is currently suffering from a contraction in demand.

It will reflect Australia's WTO obligations.

Conversely, we see no reasonable grounds that would militate against excluding HRC for automotive

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<sup>18</sup> Submission of the Ford Motor Company of Australia dated 2 August 2012.

<sup>19</sup> Letter from Harrington Industries attached to POSCO Visit Report.

<sup>20</sup> Submission of Toyota Tsusho (Australasia) Pty. Ltd. dated 24 July 2012.

<sup>21</sup> Report 188, page 17.

<sup>22</sup> See TMRO Report, para 56.

<sup>23</sup> See TMRO Report, paras 63 and 64.



industry uses from any dumping measures imposed by the Minister.

Therefore, POSCO submits that Customs should recommend that the Minister exercise his power to publish a dumping notice under Section 269TG in such a way that HRC for automotive industry uses is not subject to any duties, on the basis that such a way of proceeding is required as a matter of law, or is a proper exercise of power and discretion under Section 33(3A) of the Interpretation Act.

Yours sincerely

A handwritten signature in black ink, appearing to read "Alistair Bridges", is written over a light grey rectangular background.

**Alistair Bridges**  
Solicitor