

Email

15 May 2013

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A/g National Manager Operations
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Our ref 11276/80133959

Dear Mr Wilson

**Hot rolled coil steel exported from the Republic of Korea, Taiwan, Japan and Malaysia
Reinvestigation of certain findings remitted from TMRO**

We act for Nippon Steel & Sumitomo Metal Corporation (**Nippon Steel**).

This submission responds to the invitation issued by the Australian Customs and Border Protection Service (**Customs**) on 7 May 2013 concerning the reinvestigation of certain findings of the Trade Measures Review Officer (**TMRO**) made on 2 April 2013.

The TMRO has remitted the matter to Customs for the purpose of reinvestigating four issues. The first issue concerns Hyundai Steel. The second issue relates to whether grounds exist for setting measures with reference to prices other than those established during the investigation period. Our client makes no submission in respect of those issues as it is not the subject of nor directly affected by them.

The two issues to which our client does respond however are:

1. whether it would be preferable to structure the conditions attaching to the imposition of dumping duties on imports for the automotive industry in such a way that imports that are acknowledged by Customs and Border Protection 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 (Anti-dumping) Act 1975*); and
2. why pickled and oiled hot rolled coil (**Pickled HRC**) from Korea, Malaysia and Taiwan sold to and used in the automotive sector should not be treated in the same manner as Japanese imports of Pickled HRC sold to and used in the automotive sector.

Conspectus

We consider that, in respect of issue 1, the legislative uncertainty surrounding the application of s.33(3A) of the *Acts Interpretation Act 1901* (Cth) and its interaction with the issuance of dumping notices under the *Customs Act 1901* (Cth) can only be resolved judicially. The immediate remedy for the non-Japanese exporters is to apply for an exemption.

As to the second issue, Customs correctly determined that the non-Japanese exporters supplied all 3 market segments whereas the Nippon's Pickled HRC was consumed exclusively by two Australian car manufacturers. Additionally, Nippon supplied data to Customs which was verified and cross-checked by

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Customs with the local importers and further cross-checked against data from the two local car manufacturers. The data included the grades, types, sizes and thicknesses of steel. No other exporter from Korea, Malaysia or Taiwan did so. Of significance also is the fact that Nippon outlined qualitative issues and its lengthy history of supply to the two local manufacturers which differentiated its product. These factors assume significance because these are the micro factors that led Customs to consider that Australian Industry was not injured in the automotive sector.

Detailed Reasons

The TMRO's recommendations arose out of an application made by a Korean entity (**Korean Exporter**), on whose behalf a submission was made by Moulis Legal, which exported, amongst other things, Pickled HRC. The basis of the complaint to the TMRO was that the finding of no material injury on the importation of Pickled HRC from Japan and calculation of a non-injurious price had effectively discriminated against the Korean Exporter's exports to the automotive sector.

We submit that the Korean Exporter has sought to conflate general findings in the context of the automotive sector that relate specifically to Nippon and sought to draw from them an advantage to itself to which it is not entitled.

The finding of Customs, read in context, was that that no material injury had been caused by imports of Pickled HRC from Japanese exporters to the automotive sector. That this is so is evident from the statements in part 8.8.2 of the Report to the Minister in which the arguments recorded were advanced by and peculiar to Nippon. It was those arguments which fed into Customs' overall finding.

What was critically different between the findings made by Customs in so far as they related to our client in comparison to Korea (and specifically the Korean Exporter) was that Pickled HRC from Japan only went to the automotive sector, whereas the Pickled HRC supplied by Korean exporters (generally) went to the other sectors. This point is simply not addressed in the submission by the Korean Exporter, nor was it considered by the TMRO. This distinction alone is sufficient for Customs to uphold its previous findings and recommendations.

Legal basis for the exemption of certain categories of goods from the imposition of measures

The TMRO agreed with the submission from the Korean Exporter that section 33(3A) of the *Acts Interpretation Act* 1901 empowers Customs to issue a Dumping Notice in respect of a sub-set only of "like goods".¹

The TMRO concluded that this power could be used to make different arrangements or impose different conditions for imports for the automotive industry reflected in the Dumping Notice. The TMRO, in considering the issue of whether or not the provisions of section 33(3A) of the *Acts Interpretation Act* 1901 applies, acknowledged that a discretion existed and relied on the example that the discretion could be exercised so that measures against Pickled HRC imports would be excluded if the imported Pickled HRC related to pre-existing automotive sector contracts.

¹ That is, to issue a Dumping Notice with respect to "some only" of the relevant "like goods" or with respect to a particular class or particular classes of "like goods", and to "make different provision with respect to different matters or different classes of matters."

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Our client, Nippon Steel, makes the following points:

1. Customs was ultimately satisfied that Japanese imports of Pickled HRC were supplied exclusively to two Australian car manufacturers and did not cause injury to BlueScope in the automotive sector of the market.
2. the Korean Exporter supplies the automotive sector (General Motors Holden) with Pickled HRC but there was an undisputed finding by Customs, not challenged by the Korean Exporter, that it sells this product into other market segments. This fact was recognised by the TMRO as a factor weighing against the exercise of the s.33(3A) discretion.²

Same Treatment of Pickled HRC

The TMRO noted that imports of Japanese Pickled HRC had their level of measures set at the non-injurious price whereas this was not so for Korean exports.³

The TMRO acknowledged, and in our submission justifiably, that Customs "*was not satisfied that pickled and oiled HRC from other countries was sold entirely into the automotive sector...*"⁴ (our emphasis). Respectfully, we suggest that Customs was correct in its assessment.⁵ The facts are that our client supplies only the local automotive industry whereas the non-Japanese importers do not.

The TMRO raised a concern that the finding that past Japanese exports of Picked HRC had been *entirely* for use in the automotive sector, is no guarantee that this will remain in the case for the future. The dumping application can only be decided on the facts of the case that have been established during the investigation period. These findings cannot now be impugned in the manner suggested by the TMRO. Neither can the TMRO or the Korean Exporter subvert the established facts by pleading a lack of equality of outcome when the facts are different to start with - our client is an exclusive supplier to the automotive industry and the Korean Exporter is not.

Conclusion

Nippon does not consider that, even assuming that the provisions of section 33(3A) of the *Acts Interpretation Act 1901* had application, the Minister should exercise the discretion to allow the conditioning of the Dumping Notice to cater for Pickled HRC to exports from Korea for the reasons referred to above.

There is a divergence of facts relating to our client and the Korean Exporter such that:

² Paragraph 56 of TMRO report.

³ Report to the Minister Number 188 at Page 76 (par 10.1) where Customs found that:

"... for exports of pickled and oiled HRC from Japan, the non-injurious price is lower than the normal value. Therefore the lesser duty rule is given effect by imposing duty at an amount sufficient to remove the injury but less than the full margin of dumping.

For all other exports of HRC from the nominated countries, Customs and Border Protection has found that the non-injurious price is not lower than the normal value. As a result the lesser duty rule has no effect and duties are to be imposed at the full margin of dumping.

⁴ Paragraph 62 of TMRO report.

⁵ Report to the Minister Number 188 at Page 79.

Sydney

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Darwin

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- (a) Customs should not change its findings;
- (b) the facts support the lesser duty rule applying to exports from Japan, but not to exports from Korea.

We consider that Customs' original findings should not be disturbed.

Yours sincerely



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