

11 June 2013



## POSCO

### **Alleged dumping of hot rolled plate steel exported from the Republic of Korea**

### **POSCO's exports to Australia have not caused material injury to the Australian industry**

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NON-CONFIDENTIAL VERSION

## A Introduction

On 12 February 2013, Australian Customs and Border Protection Service (“Customs”) published Australian Customs Dumping Notice No 2013/18 (“ACDN 2013/18”), which officially initiated a dumping investigation into hot rolled plate steel (“plate steel”) exported to Australia from a range of countries, including from the Republic of Korea.

ACDN 2013/18 explained that the Australian industry, BlueScope Steel Limited (“BlueScope”), had alleged in its application (“the Application”) that plate steel exported from Korea had been imported at dumped prices and that this had caused the Australian industry material injury through:

- loss of sales volume;
- lost market share;
- reduced revenues;
- price depression;
- price suppression;
- reduced profitability;
- reduced return on investment;
- reduced employment levels; and
- reduced attractiveness for re-investment.

Without detracting from the primary position of our client, POSCO, which is that it has not imported plate into Australia at dumped prices – this submission is intended to establish that its imports have not caused any injury, material or otherwise to the Australian industry.

## B Requirements of a material injury determination

The imposition of dumping duties is not a punitive act. There is nothing illegal about selling low priced goods into the markets of a WTO member. Indeed, the continued supply of low priced inputs is usually of great benefit to the economy of the importing country. Hence, it is only when dumped products are found to have caused material injury to the domestic industry of an

importing country that a WTO Member may impose dumping duties. These duties are not a form of punishment; they are simply imposed to alleviate the continuation of the injury.

The requirement that “dumping” needs to be “materially injurious” is reflected in Article VI of the *General Agreement on Tariffs and Trade* (“GATT”). Australia has implemented this obligation domestically in Section 269TG of the *Customs Act 1901* (“the Act”). That Section requires that, before a dumping notice can be imposed, it must be established that imports of the goods under consideration have been dumped and, because of that:

*material injury to an Australian industry producing like goods has been caused, or is being caused or threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered*

Material injury is therefore a fundamental condition precedent to the imposition of dumping measures on any given product.

The requirements of the injury analysis that an investigating body must fulfil are explained in Article 3 of the WTO's *Anti-Dumping Agreement* (“the AD Agreement”). Our understanding of that Article must be informed by reports of the Panels and the Appellate Body under the *WTO's Dispute Settlement Understanding*, which further explain an investigating authority's responsibility in undertaking an investigation into allegations of material injury.

Article 3.1 of the AD Agreement is particularly relevant to injury analysis for two reasons. Firstly, Article 3.1 sets out the fundamental obligations of an investigating authority when undertaking an injury analysis. These fundamental obligations are to base the injury determination on positive evidence, and on an objective analysis of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like goods, and the consequent impact of those imports on domestic producers of such products.<sup>1</sup> This has two implications on an injury determination:

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<sup>1</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, paragraph 192.

- the requirement that a determination be based on positive evidence relates to the quality of the evidence that an investigating authority may rely upon in making the determination, and provides that the evidence must be affirmative, objective, verifiable and credible.<sup>2</sup>;
- the term “objective examination” requires that an investigating authority’s examination “conform to the dictates of the basic principles of good faith and procedural fairness”, and be conducted “in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation”.<sup>3</sup>

Secondly, Article 3.1 sets out the content required to make a full and proper injury analysis.

This involves a consideration of:

*(i) the volume of subject imports; (ii) the effect of such imports on the price of like domestic products; and (iii) the consequent impact of such imports on the domestic producer of the like products.*<sup>4</sup>

According to the Appellate Body these three components set out the framework for any injury determination, and the other sub-Articles of Article 3 elaborate how these three components are to be assessed. Specifically, the Appellate Body has noted:

*[Article] 3.2 ...concern[s] items (i) and (ii) above, and spell[s] out the precise content of an investigating authority's consideration regarding the volume of subject imports and the effect of such imports on domestic prices. [Article] 3.4 ... together with [Article] 3.5 ...concern[s] item (iii), that is, the "consequent impact" of the same imports on the domestic industry. More specifically, [Article] 3.4...set[s] out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and [Article] 3.5...require[s] an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.*<sup>5</sup>

Therefore, Article 3.1 sets out the basic considerations involved in an injury determination, and the subsequent paragraphs in Article 3 elaborate how these considerations are to be determined.

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<sup>2</sup> Ibid. paragraph 192.

<sup>3</sup> Ibid. paragraph 193.

<sup>4</sup> *Report of the Appellate Body China - Countervailing and Anti-dumping Duties on Grain Oriented Flat Rolled Electrical Steel from the United States* (WT/DS414/AB/R) 18 October 2012, paragraph 127.

<sup>5</sup> Ibid.

Following on from this reasoning, the volume of the subject imports and the effect of the subject imports are to be determined in accordance with Article 3.2, which provides:

*with regard to the volume of the dumped imports, the investigating authority shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to the production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases which otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance.*

While the volume of the allegedly dumped imports is a factor for consideration, it should be clear from the foregoing that it is the existence of price effects which signal that the imports are having an effect on the domestic industry. An increase in imports will not in itself indicate the existence of any injury. If there is no price impact then it cannot be shown, nor logically asserted, that the imports have caused material injury. This is of relevance to the current investigation, because BlueScope has claimed that it started suffering injury in the form of reduced profit and profitability at the beginning of 2009-10.<sup>6</sup> However, in the Application, BlueScope only alleges that it has suffered price reductions in 2011-12.<sup>7</sup> Clearly, if there was no price effect, then the decrease in profit and profitability cannot have been caused by the allegedly dumped goods.

Once the price impact has been determined, the investigating authority can then proceed to ascertain the impact of this effect on the domestic industry. This determination must be undertaken in accordance with Articles 3.4 and 3.5. Article 3.4 sets out the economic factors that must be evaluated regarding the impact of the dumped imports on the domestic industry, and Article 3.5 requires that an investigating authority show that material injury actually is being caused by dumped imports, and not by any other factor.

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<sup>6</sup> Application, page 27.

<sup>7</sup> Application, page 28.

Article 3 of the AD Agreement sets out a clear and logical process for determining whether any relevant material injury has been suffered by a domestic industry. The Australian implementation of the Article – as set out in Section 269TAE of the Act - is not so well-structured. However, it is evident that the same logical process can and should be undertaken in its Application, to be consistent with the AD Agreement which the Section implements.

Like Article 3.1, the Section explicitly refers to the volume of the goods exported to Australia, and any increase in the volume of the goods exported to Australia during a certain period as being relevant considerations to the material injury analysis.<sup>8</sup> In this regard, it reflects the first consideration that the Appellate Body has identified as being relevant to the existence of material injury.

Secondly, Section 269TAE(d) identifies the export price paid for the subject goods as a relevant consideration. Section 269TAE(e) and (f) go on to identify:

- (e) *the difference between:*
  - (i) *the price that has been or is likely to be paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia; and*
  - (ii) *the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export and sold in Australia...*
- (f) *the effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia;*

Sections 269(d), (e) and (f) can therefore be seen to establish the second requirement identified by the Appellate Body, that is: *the effect of such imports on the price of like domestic products*. Although it does not specifically refer to price suppression, depression or restraint, Customs adopts these measurements in practice. Again, as a matter of logic, it is clear that the direct impact that dumping must be found to have had on the domestic industry is some form of price effect. If there is no price effect, then none of the other economic indicators (ie, revenue, profitability, reduced employment etc) can be linked or attributed to the imports.

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<sup>8</sup> Sections 269TAE (a) and (b).

Section 269TAE(f) and (g) identify:

- (g) *any effect that the exportation of goods of that kind to Australia from the country of export in those circumstances has had or is likely to have on the relevant economic factors in relation to the Australian industry*

Again, this clearly relates to the third consideration identified by the Appellate Body: *the consequent impact of such imports on the domestic producer of the like products*. The *relevant economic factors* are defined in Section 269TAE(3), which can be seen to be somewhat analogous with Article 3.4 of the AD Agreement.

Section 269TAE(2A) imposes upon Customs the requirement to consider injury factors other than dumped imports, in order to prevent the attribution of injury caused by such factors to the dumped imports. In that regard, it plays the same role as Article 3.5.

Finally, Section 269TAE identifies further factors that are considered to be relevant to the material injury determination, including the dumping margin and the effect of any change in the volume of goods imported or produced in Australia on the quantity of goods sold or consumed in Australia.<sup>9</sup> POSCO submits that these considerations are neutral in effect and are not indicative of any injury being caused by dumped imports. For example, the dumping margin itself cannot be considered to be a cause of injury or evidence of such injury. As has been noted, dumping duties can only be imposed on goods that have been found to be dumped, where that dumping has caused material injury. Any finding that a particular dumping margin indicates the existence of material injury would be an assumption - and therefore any conclusion drawn on this basis would not be supported by positive evidence. Resultantly any such conclusion would be otiose.

An injury determination in an anti-dumping investigation must take the form espoused by the Appellate Body. Therefore, the consideration must be based on the following three elements:

- consideration of the volume of the subject imports;

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<sup>9</sup> Sections 269TAE(aa) and (c) respectively.

- consideration of the effect of such imports on the price of like domestic products; and
- consideration of the consequent impact of that effect on the domestic producer of the like products.

This submission will follow the same format.

First, however, this submission considers the different types of plate steel exported to Australia during the period of investigation (“POI”), and the particular circumstances pertaining to one such type.

## C POSCO’s exports

During the POI, POSCO exported [CONFIDENTIAL TEXT DELETED - figure] grades of POSCO plate steel to Australia:

Grade	Quantity (MT)
[CONFIDENTIAL TEXT DELETED]	

The [CONFIDENTIAL TEXT DELETED]-grade steel plate is a general-use heavy steel plate. [CONFIDENTIAL TEXT DELETED]-grade steel plate is used for general structural purposes, such as building bridges and construction. Given the general nature of the [CONFIDENTIAL



TEXT DELETED] grade, it is most likely stocked and sold in Australia in spot sales to steel distribution centres.

In contrast the [CONFIDENTIAL TEXT DELETED] grade steel is what is known as a quench and tempered (“Q&T”) greenfeed product. POSCO manufactured the [CONFIDENTIAL TEXT DELETED] grades to order for one customer ([CONFIDENTIAL TEXT DELETED – customer details]) on the basis of confidential instructions provided by that customer.

The [CONFIDENTIAL TEXT DELETED] steel plate is an alloy steel, which means the plate requires different ingredients and additional processing in comparison to the [CONFIDENTIAL TEXT DELETED] grade. Resultantly, [CONFIDENTIAL TEXT DELETED] is a more labour intensive and expensive grade of steel plate to produce. This has the effect of increasing the price of the plate and the lead times needed to meet an order. The special nature of Q&T greenfeed means that it is only produced by a few steel manufacturers. POSCO is only aware of two other suppliers of Q&T greenfeed in the Australian market, being [CONFIDENTIAL TEXT DELETED] and [CONFIDENTIAL TEXT DELETED]. Having said that, POSCO is not aware if these other suppliers produce Q&T greenfeed with similar characteristics or chemical composition to the [CONFIDENTIAL TEXT DELETED] grade that POSCO has produced.

POSCO itself did not make any sales of [CONFIDENTIAL TEXT DELETED] after 21 August 2012. This is because, contrary to the general injury claims of BlueScope, [CONFIDENTIAL TEXT DELETED] started purchasing its desired Q&T greenfeed plate from [CONFIDENTIAL TEXT DELETED], rather than from POSCO. Because [CONFIDENTIAL TEXT DELETED] is the only consumer of Q&T greenfeed in the Australian market POSCO has not sold any [CONFIDENTIAL TEXT DELETED] since its final order from [CONFIDENTIAL TEXT DELETED – customer details]. POSCO therefore considers that there can be no finding that imports of [CONFIDENTIAL TEXT DELETED] into Australia have caused material injury to the Australian industry. We ask that it be excluded from any dumping notice, on the basis that it could not have caused material injury and in accordance with the Minister’s discretion in this regard as identified by the Trade Measures Review Officer in *Decision of the Trade Measures Review Officer: Hot Rolled Coil Steel – Review of a Decision to Publish a Dumping Notice*.

## **D The volume of the subject imports**

POSCO is unaware of the total level of the subject imports and, more importantly, is unaware of the proportion of those imports which are dumped. Therefore, POSCO does not intend to address this point in any great amount of detail.

However, as we have indicated, no assumption regarding injury can be drawn from a mere increase in imports. If those imports do not have an effect on the price of the domestically produced like good then it cannot be established that those imports have had any impact on the domestic industry at all. POSCO intends to show throughout this submission that no such link can be established.

Furthermore, POSCO would note that the information in the Application does not indicate that BlueScope has lost any substantial sales volume to any increase in imports. Rather, the increased volume of imports appears to have had no effect on BlueScope's sales. This issue is addressed in F below.

## **E The effect of imports of plate on the price of domestically produced plate**

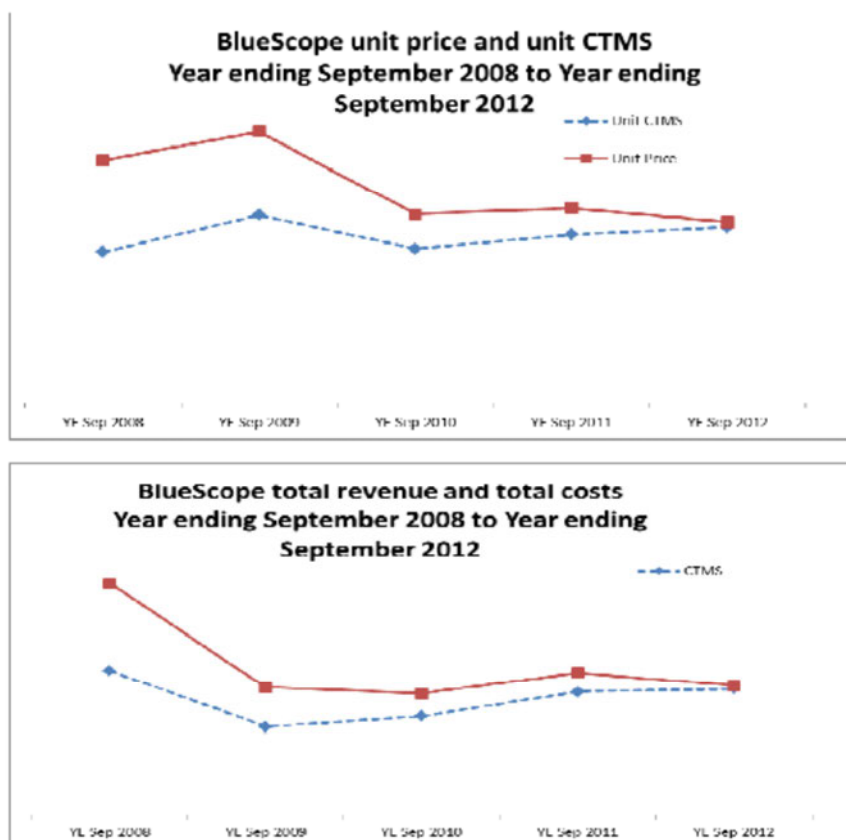
As noted above, the effect of imports on the price of the products sold by the domestic industry must be determined before any consideration of the economic impacts of the sales of the domestic industry can be considered. It is important to note that a causal link needs to be established before this can be achieved. In a recent dispute the Panel noted that an overall correlation between dumped imports and injury to the domestic industry was not dispositive of the causation question. Rather, the Panel mandated that some positive evidence was required to show that the former had caused the latter, in keeping with the requirements of Article 3.1.<sup>10</sup>

*In International Trade Remedies Branch Consideration of An Application for a Dumping Duty Notice and a Countervailing Duty Notice: Hot Rolled Plate Steel Exported from the People's Republic of China, Republic of Indonesia, Japan, The Republic of Korea and Taiwan report*

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<sup>10</sup> *Report of the Panel China – definitive anti-dumping duties on x-ray security inspection equipment from the European Union (WT/DS425/R)* 26 February 2013, paragraph 7.247.

(“the Consideration Report”), the alleged effect of the imports of plate on domestically produced plate is explained by the following graph:



Based on the information underlying these graphs, the Consideration Report concludes that:

*the graphs show that unit prices and total revenues have fallen over the five year period, while costs have been relatively more stable. This has resulted in a narrowing between revenue and costs, and between unit prices and unit costs. The graphs support BlueScope's claims of price depression and price suppression.<sup>11</sup>*

While the Consideration Report does not venture to advise where and when this price depression and suppression is evidenced, we note that the allegation in the Application was that BlueScope only suffered price depression and suppression in 2011/2012. Based on the above graphs, this would appear to be the most that is alleged. It is clear that both the unit

<sup>11</sup> Page 50.

price and unit CTMS reached their peak in 2009. The subsequent decrease in the unit price that took place between 2009 and 2010 is matched by a subsequent decrease in the unit CTMS. It is clear that BlueScope's pricing policy was, in the past, very much based upon the CTMS. However, it is in no way evident that there was any form of price depression or suppression. The only thing indicated by the graph is that BlueScope attempted to capitalise on the lower costs to make and sell, by lowering the price at which it sold its plate to the market.

The mere fact that BlueScope was unable to achieve pre-global financial crisis profit margins on sales of plate does not indicate price suppression or depression. Nor can this failure to achieve the same margins be attributed to the subject imports. BlueScope's Annual Report 2010 notes that the earnings of its Coated and Industrial Products Australia ("CIPA") segment of its business, responsible for the production of plate steel, *decreased significantly, primarily as a result of lower domestic selling prices across all commoditised products, lower export hot rolled coil and slab prices and a stronger Australian dollar.*<sup>12</sup> As was noted in an ASX Media release dated 17 August 2009, that year was *the most challenging year that BlueScope faced* and was typified by *a marked decline in economic and financial conditions in the developed world* and falls in domestic demand, and declines in sales volumes and prices, which eventually stabilised at low levels.<sup>13</sup>

Furthermore, POSCO is concerned with the accuracy of the information presented in the Application – specifically as it refers to costs. It is apparent from the above graphs that the costs to produce plate grew on a unit basis between September 2011 and 2012, and at the very least remained stable on a total cost basis during the same period. This information does not match POSCO's understanding of movements of the costs of inputs over the same period.

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<sup>12</sup> Page 6.

<sup>13</sup> <http://clients.weblink.com.au/clients/BlueScopeSteel2/article.asp?view=3321947>

In the period between August and November 2011, the price of coking coal and iron ore declined sharply. Based on the information in the Reserve Bank of Australia's *Statement of Monetary Policy*, prices did not fully recover, as shown in the below table.

	Change in price of iron ore (%)	Change in price of coking coal (%)
August 2011 – November 2011	-34%	-21%
November 2011 – February 2012	24%	-11%
February 2012 - May 2012	1%	-1%
May 2012 – August 2012	-19%	-8%
August 2012 – November 2012	3%	-21%

In POSCO's experience, the price of iron ore and coking coal represent up to 60% of the overall cost of producing plate, yet there is no reflection of the significant decreases in the price of these raw material inputs in the Application.

POSCO does not consider it likely that the decreases in the prices of coking coal and iron ore did not have an impact on BlueScope's business. Indeed, BlueScope has reflected that the decreased price of raw material inputs had a positive effect on its business in its *Interim Financial Report* for the six months until 31 December 2012. BlueScope notes that its earnings before interest and tax ("EBIT") for the portion of its business that produces plate - CIPA – had increased by \$176 million dollars when compared to the EBIT from the same period in the previous year. EBIT is a measure of operating profit, so the idea that total revenue fell in the twelve months from September 2011 is questionable at best. The increased EBIT was attributed in part to an improved spread that was driven by:

- *lower coal and iron ore purchase prices combined with favourable iron ore feed mix.*<sup>14</sup>

No reason is given in the Application as to why the lower costs of inputs were not reflected in the reported CTMS. In fact, according to the Application, BlueScope's costs rose dramatically during the POI:

	2007/08	2008/09	2009/10	2010/11	2011/12
Cost Variation	100	124.14	101.95	111.18	116.06
Price Variation	100	111.75	77.8	80.17	74.45
Sales Quantity	100	49.4	67.29	76.38	75.18

The level of input costs is common price determinant across producers of plate steel. BlueScope should have no expectation that, when its input costs go down, it can maintain its price at a level consistent with its previous price without there being some adverse impacts. Markets just do not work in that way, and the anti-dumping system is not meant to "lock in" higher prices for domestic industries where input costs have reduced. POSCO believes that BlueScope's inability to pass on the lower input costs is attributable to no other factor than BlueScope's business decisions, as we will now explain.

The increase in costs evidenced by BlueScope can only be interpreted as being an indirect and ongoing result of its "restructure" initiated in October 2011. This is supported by the *Interim Financial Report* which indicates that the increased EBIT was partly offset by:

*Higher per unit costs due to fixed conversion costs spread over lower production volumes as a result of the move to single blast furnace operations in October 2011.*<sup>15</sup>

In the same vein, BlueScope explains in its *Capital Raising Presentation* of 22 November 2011 that:

<sup>14</sup> *BlueScope Steel Limited: Interim Financial Report – 31 December 2012*, page 10.

<sup>15</sup> *Ibid.*

*Under normal business conditions, the Company operates its facilities at production levels at near capacity. Generally, high levels of production are important to the Company's financial results because they enable the Company to spread its fixed costs over a greater number of tonnes of production (provided the company can at least recover the variable costs of incremental production). The closure of some of the Company's steelmaking facilities as a result of the restructure will increase its reliance on its remaining facilities and will increase the average cost per tonne of its steel products as the reduction in fixed costs will not be directly proportional to the reduction in production capacity. That is, fixed costs will be spread over a lower steel production volume. As a result, the restructure may adversely impact the Company's cost structure and, consequently, its competitive position.*

POSCO notes that the Consideration Report explains that *"BlueScope has removed the costs associated with this closure from the cost data as presented in the application"*.<sup>16</sup> This, on our examination of the Application, is a fiction. If raw material costs went down, why is that not reflected in the cost data presented? Furthermore, simple "removal" of the costs is not a relevant or sufficient way of addressing the effect of dumping, unless the effect of non-dumping factors – eg, BlueScope's business restructure – is taken into account in a way which is appropriate to the AD Agreement requirement of non-attribution.

As indicated by the *Interim Financial Report* fixed conversion costs - a term which includes direct labour and manufacturing overheads - have not decreased as a result of the restructure. However, due to BlueScope's decision to exit the export market, it now produces a lower volume of products. POSCO understands that the restructure has reduced BlueScope's capacity at the Port Kembla facility from 5.3 million tons per year, to 2.6 million tonnes per year.<sup>17</sup> This is a dramatic decrease. Within the cost structure of the current 2.6 million tonne production capacity we would expect that there are, inevitably, fixed costs of a kind that were previously allocated over 5.3 million tonnes. Therefore, each unit produced must have higher fixed conversion costs than it would have if not for the restructure. The impact of this increase in costs cannot be attributed to the subject imports.

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<sup>16</sup> Page 54.

<sup>17</sup> BlueScope Steel Limited Director's Report for the year ended 30 June 2012, page 3.

These costs are costs that are specific to BlueScope's situation; none of its competitors are similarly constrained. As noted in the *Capital Raising Presentation*, these costs will have an adverse impact on BlueScope's competitive position, but not that of its competitors. Faced with the increase in fixed costs per unit of plate produced, BlueScope had two options: to leave the price of its plate at the market price and accept the decrease in profits to avoid losing market share; or increase the price of plate to cover the increased per unit fixed cost which, in a market where its competitors faced lower input costs to produce the same good, would mean a loss of market share.

During the POI, the cost of producing plate was 16.06% higher than 2007/08 costs, in comparison prices were 25.55% lower. On the basis of BlueScope's graph extracted above, we know that there was no evidence of price suppression or depression prior to the beginning of the POI, so the general downward trend cannot be linked to the alleged instances of dumping. Notably, during the period where-in the increased fixed cost per unit would be factored in – 2010/11 and 2011/12 – the data shows that BlueScope's sales are at the highest level since before the global financial crisis. This indicates that despite the higher costs it faces, BlueScope has decided to maintain its price at a level that will ensure it does not lose market share, and accordingly has suffered reductions in profit as a result.

Such injury cannot be attributed to dumped product. It is merely a function of a business decision made by BlueScope when faced with its own unprecedented increase in costs, which was a result of its business decision to restructure its business. This is the reason why BlueScope's revenue, profit and profitability have decreased.

## **F Consequent impact of that effect on the domestic producer of the like products**

Even if it could be shown that the imports of plate had an adverse impact on the price of BlueScope's steel plate – which has not been established – there is still the matter of whether that impact is severe enough to justify the imposition of dumping duties. As noted above, the AD Agreement deals with the determination of the extent of any injury caused to a domestic industry in Article 3.4.



Article 3.4 provides that the examination of the impact of dumped imports on the domestic industry shall include an evaluation of all relevant economic factors. The Article then goes on to provide a non-exhaustive list of what may be considered to be “relevant economic factors”. The Australian implementation of the Article is in Section 269TAE(1)(g) of the Act, with Section 269TAE(3) elaborating the concept of “relevant economic factors”.

However, examining the relevant economic factors is only one part of determining the impact of imports on the domestic industry. The second and equally important part is determining whether the injury has been caused by any other factors and, in so doing, preventing such injury from being attributed to the imports that are subject to the investigation. The non-attribution article of the AD Agreement is Article 3.5, which has been implemented in Australia in Section 269TAE(2A).

In addition to the price suppression and depression claims, the Consideration Report explained that the Application had provided reasonable grounds to support BlueScope’s claim that it had suffered the following “injury indicators” and “injury factors”:<sup>18</sup>

- loss of sales volume;
- loss of market share;
- reduced revenue;
- reduced profits;
- reduced profitability;
- reduced domestic revenues;
- declining return on investment; and
- reduction in employment levels.

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<sup>18</sup> Page 51. POSCO is not certain why the term “injury indicators” is used in one instance and “injury factors” in the other instance. It would appear that the Consideration Report treats the two concepts in the same way, so we will address the both the injury factors and injury indicators together.

If there is no price effect, then there can be no link between the “injuries” and the imports that are alleged to have been dumped. As the price effects were not alleged to have begun until 2010/11, this is the only period in which any of the claimed injury can be attributed to dumped imports, and is therefore the only period of relevance to the injury determination.

In relation to the loss of sales volume, we note that BlueScope provided the following information in its Application:

	2007/08	2008/09	2009/10	2010/11	2011/12
Australian market	100	49.4	67.29	76.83	75.18

In 2010/11 and 2011/12 – the periods when prices were supposedly depressed and suppressed - BlueScope’s sales of plate were higher than they had been at any point prior to the global financial crisis. While there was a marginal decrease in the sales volume between 2010/11 and 2011/12, based on the above figures, this was only equal to 2.1%. Such a decrease is not “material” and is most likely simply a result of the the normal ebb and flow of business.

As there has been no harm to BlueScope’s sales the idea that there has been some “injurious” loss of market share cannot be maintained. BlueScope has only lost market share because there are only two sources of plate steel in Australia: BlueScope plate steel, and imported plate steel. An increase in the latter (both those alleged to have been dumped and those that are not alleged to have been dumped on the basis of the information in the Application) has caused the market as a whole to grow. As BlueScope’s sales have not increased, its market share is now relatively smaller. To consider this to be “injury” is illogical. It has had no adverse impact on BlueScope’s business.

The reduction in revenue is simply a result of the fact that BlueScope is charging a lower price for its plate steel.<sup>19</sup> It should have been able to do so, and maintain profitability, because of reduced raw material input costs. But it could not, precisely because its costs increased as a

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<sup>19</sup> The Consideration Report also notes a “reduction in domestic revenue” as an injury factor. The distinction between the reduction in revenue and the reduction in domestic revenue is unclear. POSCO considers that the two are likely the same thing.

result of a restructure which was self-generated, self-managed, and self-executed. As we have shown above, BlueScope's fixed costs have risen, but it has chosen not to increase its price accordingly. As a result, its revenue has marginally decreased. In any regard, POSCO again questions whether the reduction in revenue could be said to be "material":

	2007/08	2008/09	2009/10	2010/11	2011/12
Revenue Variation	100	55.21	52.35	61.59	55.97

Again, the revenue is entirely in line with what it has been since the global financial crisis. There is no indication that anything has occurred other than the kind of changes one might expect in the normal ebb and flow of business.

Therefore, POSCO submits that the injury BlueScope alleges it has suffered is not material.

## **G Non-attribution of injury caused by other factors**

There are several other factors that need to be considered before the alleged injury can be linked to the subject imports, in accordance with Section 269TAE(2A) of the Act. Section 269TAE(2A) provides:

*(2A) In making a determination in relation to the exportation of goods to Australia for the purposes referred to in subsection (1) or (2), the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as:*

- (a) the volume and prices of imported like goods that are not dumped; or*
- (b) the volume and prices of importations of like goods that are not subsidised; or*
- (c) contractions in demand or changes in patterns of consumption; or*
- (d) restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or*
- (e) developments in technology; or*
- (f) the export performance and productivity of the Australian industry;*

*and any such injury or hindrance must not be attributed to the exportation of those goods.*

Clearly, the list of factors in Section 269TAE(2A) is non-exhaustive. It is equally as clear that the Section imposes upon the Minister the obligation to ensure that any injury caused by factors other than dumping should not be attributed to dumping. This is in accordance with the WTO

jurisprudence surrounding Article 3.5, which notes that *“if the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors”*.<sup>20</sup> Importantly, the obligation that the non-attribution provision imposes on investigating bodies is explained to be:

*in order to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.*<sup>21</sup>

As an initial point, POSCO has noted that the Consideration Report lists three factors that BlueScope has itself raised, being the costs of the restructure (which we have already mentioned), the softening global demand for steel and steel products and the high Australian dollar. BlueScope claims that none of these factors are injurious, or – in the case of the costs of restructure – have been “removed” from the information in the Application. The issues are not discussed elsewhere in the Consideration Report.

With respect, POSCO notes that it is not the role of the applicant to determine what has and has not caused injury. Certainly, an applicant can voice its opinion about the causes of its injury, but as indicated by the above extract from *US-Hot Rolled Steel* it is the investigative authority that must assess the injury caused by other factors, and then must separate and distinguish such injury from any injury caused by the subject imports. The factors raised by BlueScope in the Application are “known factors” Customs must now ensure any injury caused by them is not attributed to the subject imports. This is not achieved by their “removal”.

In addition to the factors raised by BlueScope in the Application, POSCO is aware of other factors that would have had a deleterious effect on BlueScope’s plate manufacturing operation.

## **1 Inability to pass on cheaper input costs to customers**

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<sup>20</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, paragraph 402.

<sup>21</sup> Ibid. paragraph 400.

As discussed above it is clear that BlueScope was unable to take advantage of the lower costs of iron ore and coal, as evidenced by information from the Reserve Bank of Australia's *Statement on Monetary Policy*. In fact based on the information in the Consideration Report and the Application, it is apparent that the per unit CTMS on plate increased at the same time as the cost of iron ore and coking coal dramatically decreased.

As we have explained above, POSCO believes this is a result of the allocation of the fixed costs of production over a relatively smaller volume of output, a notion that is supported by BlueScope's *Interim Financial Report* and *Capital Raising Presentation*. We do not believe that this increase in costs has been removed from the information in the Application, and in any regard, if it has, Customs must review the information with it included to determine what the effect of the restructure was.

BlueScope's costs rose when every other producer in the market faced lower costs. Rather than increase price, as BlueScope had done previously in line with increasing or decreasing costs, it chose to maintain its price. This is what has caused its reduction in profit and in profitability. These injuries cannot be attributed to the subject imports.

## 2 Closure of mining projects during the POI

As noted in the Consideration Report the three major sectors to which plate steel is sold are:

- mining, oil, and gas;
- infrastructure; and
- transport and equipment.

During the POI there were a number of large projects that were either shutdown or discontinued. Undoubtedly, these shutdowns have had an impact on the sales and demand for steel plate.

The biggest such example was the indefinite postponement of the expansion to the Olympic Dam site by BHP Billiton. The proposed expansion would have involved the creation of a new open pit mine, as well as the expansion of the existing smelter, the construction of new concentrator and hydrometallurgical plants as well as the construction of a desalination plant,

105 km rail line, a new airport and additional port facilities.<sup>22</sup> Clearly, the proposal bridged all three of the major segments identified in the Consideration Report.

POSCO understands that manufacturers and producers in Australia had begun building the equipment and resources required for the expansion, which required the purchase of a great deal of plate steel. Since the expansion was postponed in August 2012, these orders were no longer required. POSCO considers that, because BlueScope is by far the dominant source of plate steel in Australia, there can be no doubt that BlueScope was involved in the preparation for the expansion. Therefore the postponement would have had a desultory effect on BlueScope's plate production, and may have indeed caused injury.

The Olympic Dam expansion was not the only project that was halted throughout the investigation period. BHP Billiton also delayed its \$22 billion Port Hedland harbour expansion in August 2012,<sup>23</sup> closed its Bowen Basin coking coal mine,<sup>24</sup> Gregory mine and Norwich Park Mine during the POI among others.<sup>25 26</sup>

All of these closures would have an impact on BlueScope's sales of plate that have not been reflected in the Application. This effect must be taken into account and excluded from the injury analysis. POSCO requests that Customs investigates the effect of postponement of the Olympic Dam expansion and other mining projects on BlueScope's plate production and sales.

### 3 BlueScope distribution

As noted in the Consideration Report, BlueScope sells 70% of its plate steel through its related distributors and sells the remaining 30% directly to larger end-users and converters.<sup>27</sup>

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<sup>22</sup> <http://www.olympicdameis.sa.gov.au/>

<sup>23</sup> <http://www.abc.net.au/news/2012-08-23/bhp-delays-port-hedland-harbour-expansion/4217390>

<sup>24</sup> <http://www.theaustralian.com.au/business/mining-energy/more-coalmine-closures-on-cards/story-e6frg9df-1226474502141>

<sup>25</sup> <http://www.abc.net.au/news/2012-09-10/bhp-shuts-gregory-open-cut-coal-mine/4252808>

<sup>26</sup> <http://www.abc.net.au/news/2012-05-11/norwich-park-mine-workers-down-tools-for-good/4004848>

<sup>27</sup> Page 20.

Both the Application and the Consideration Report are bereft of details regarding the differences between these two sales channels. However, POSCO would note:

- At the very least, BlueScope's plate would be competing against itself in the market. Presumably the distributors will mark-up the price of plate to earn a profit, whereas direct sales from BlueScope will not need such a mark-up. This suggests that BlueScope's direct sales undercut the price offered by its distributors, which would have put downward pressure on the price offered by distributors, which would in turn incite those distributors to seek a lower price from BlueScope.
- Secondly, POSCO understands that BlueScope strictly prohibits its distributors from also taking supply from importers. Therefore, POSCO questions from which channel the price undercutting allegations arise from. If it only arises in relation to the direct sales then any conclusions drawn by Customs in relation to injury would have to reflect the fact that the alleged price undercutting was only in relation to 30% of BlueScope's output. Given the very nominal injury BlueScope is alleged to have suffered, POSCO considers no finding of materiality could be made.
- Finally, POSCO considers it possible that ongoing contractual relationships exist between BlueScope and its distributors, or BlueScope and the large-end users and converters. If so, Customs must determine to what degree these contracts would insulate BlueScope's sales (either in terms of price or volume) from any dumping that is determined to have occurred during the POI.

#### 4 Imports from other sources

Finally, based on the Application, it is clear that there has been a dramatic increase in imports of plate steel from countries other than those subject to the investigation.

	2007/08	2008/09	2009/10	2010/11	2011/12
Other imports	100	71.87	88.38	106.67	120.61
Subject imports	100	53.92	66.04	57.45	86.06
Total imports	100	56.57	67.34	64.72	91.16

Based on ISSB data, we understand this numbers are:

	2007/08	2008/09	2009/10	2010/11	2011/12
Other imports	29,366	21,106	25,995	31,324	35,420
Subject imports	169,435	91,355	111,851	95,338	145,808
Total imports	198,801	112,461	137,846	126,662	181,228

We note that ISSB data only provides a limited indication of the actual situation in the market, as it does not organise its data on the basis of HS codes. Therefore, we cannot be certain that these figures have not inflated the level of the subject goods imports during the POI. However, as this was the data which was relied upon in the Application, then we consider it raises some questions that Customs must answer as part of its non-attribution analysis. Namely:

- The imports from countries outside the investigation are the only source of plate steel that has increased above its pre-global financial crisis level. Why is this the case?
- Imports from other sources account for almost one-fifth of all imports of plate. What effect did these imports have on BlueScope?
- It would seem to be axiomatic that the price of those imports was competitive, if not cheaper (given the inroads made) than that of plate steel from the countries subject to this investigation. How then can the subject imports be “singled out”, and to what extent could any action against the subject imports possibly be considered to have any remedial effect?

## H Conclusion

In summary, POSCO submits that:

- The unique circumstances surrounding the sale of its [CONFIDENTIAL TEXT DELETED] grade steel mean that imports of that grade could not have caused material injury to the Australian industry.



- There is no evidence of the subject imports causing price suppression or depression. Rather, the evidence suggests that BlueScope was unable to take advantage of lower input costs throughout the POI.
- The injury evidenced in the Application and discussed in the Consideration Report was not material.
- In any regard, the claimed reduced revenues, profit, profitability, return on investment and reduction in employment levels are all attributable to BlueScope's increased costs arising out of its decision to restructure its business. Such injury is not attributable to the subject imports.
- Other injury causing factors, including the high Australian dollar, the direct impacts of the restructure, the indirect impacts of the restructure, the closure of mining projects, BlueScope's distribution practices and imports from other sources have been raised with Customs and their existence is supported by evidence. To fulfil the Minister's obligation under Section 269TAE(2A) of the Act and Australia's obligation under Article 3.5 of the AD Agreement Customs must make an appropriate assessment of the injury caused to BlueScope by these factors, and must separate and distinguish any injurious effects of the subject imports from the injurious effects of these other factors.

POSCO submits that the plain fact of the matter is that BlueScope has not been materially injured by imports of plate steel from the subject countries. Any other interpretation would be inconsistent with fact, law and reason. We expect that the Australian industry has an expectation that further protection will now be afforded to it in relation to this product, as it has in relation to other steel products in investigations which have preceded this one.

A decision that material injury has been caused by imports would confirm to our client, and to BlueScope's competitors, that the Australian Government has made certain political promises to BlueScope and its unions that are being carried out by way of a loose, unprincipled and ultimately invalid application of Australian anti-dumping law.

Alistair Bridges  
Solicitor