

10 July 2015

Ms Joanne Reid
Director Operations 2
Anti-Dumping Commission
Industry House
10 Binara Street
CANBERRA ACT 2601

Cc: *Dale Seymour*
Commissioner

For Public File

Dear Ms Reid

Investigation No. 285 – Submission by Dalian Steelforce Hi-Tech Co., Ltd date 15 June 2015

Introduction

I refer to the submission made on behalf of Dalian Steelforce Hi-Tech Co., Ltd (“Dalian Steelforce”) of 15 June 2015 that addresses matters impacting the determination of the variable factors applicable to Dalian Steelforce in the review investigation involving hollow structural sections (“HSS”) exported from the People’s Republic of China (“China”).

Austube Mills Pty Ltd (“ATM”) takes this opportunity to comment on matters raised on behalf of Dalian Steelforce.

Conflict of Interest

ATM notes that Dalian Steelforce has [ATM’s concern that the delegate in Investigation No. 203 is the nominated representative on behalf of the applicant in Review Investigation No. 285]

in matters involving the measures applicable to HSS that evolve from the original investigation No. 177 (and *Re-investigation No. 203*).

Dalian Steelforce representations

(i) *Normal value*

Dalian Steelforce has sought to exclude goods which it claims “fall outside the definition of the goods the subject of the dumping and countervailing notices” as not being like goods for the purposes of the review of normal values.

ATM requests the Commission to require Dalian Steelforce to provide product specification data sheets for the claimed excluded goods. This will enable the Commission to decide whether to exclude the goods from normal value consideration.

(ii) *Determination of profit*

The submission by Dalian Steelforce relies on a significant error of fact contained in *Report No. 203 - Reinvestigation of certain findings in Report No. 177* (“*Reinvestigation No. 203*”).

Reinvestigation No. 203 concluded that:

“the **low volume of domestic sales by Dalian Steelforce was found to not be in the ordinary course of trade due to the nature of those sales**. The reinvestigation is satisfied that there were sufficient grounds for the CEO to conclude that those remaining domestic sales were not in the ordinary course of trade.”¹ (**emphasis added**)

This conclusion sits oddly with the evidence before Customs and Border Protection in the original *Dumping Investigation No. 177* :

“Dalian Steelforce’s domestic sales of like goods are not sufficient for use in determining a normal value under subsection 269TAC(1). **An ordinary course of trade test has not been undertaken** on Dalian Steelforce’s domestic sale of like goods.”² (**emphasis added**)

It was on the basis of the conclusion that “the **remaining domestic sales** were not in the ordinary course of trade” that *Reinvestigation No. 203* did not determine an amount for profit under sub-regulation 181A(2) of the (then) *Customs Regulations 1926*, but rather proceeded to employ one of the other methods provided in paragraphs (a) – (c) of sub-regulation 181A(3).

Notwithstanding the accuracy or otherwise of the conclusion on this issue in *Reinvestigation No. 203*, it cannot be automatically assumed, for the purpose of this *Review of Measures Case No. 285*, that there is no volume, whatsoever, of domestic sales of like goods in the ordinary course of trade. Therefore, it is necessary for the Commission to test whether or not any of Dalian Steelforce’s domestic sales of like goods are profitable and within the ordinary course of trade. If such profitable sales are found, albeit in low volumes, then an amount for profit may be determined using the new sub-regulation 45(2) of the *Customs (International Obligations) Regulation 2015* (“*the 2015 Regulations*”). The fact that an amount for profit may be determined from even a low volume of domestic sales of the like goods was upheld by the Appellate Body in *EC — Tube or Pipe Fittings*.³

If, after considering whether or not any domestic sales of like goods by Dalian Steelforce are profitable and in the ordinary course of trade, then, as the Appellate Body in *EC — Tube or Pipe Fittings* concluded, the Commission may proceed to determine an amount for profit under any one of the other methods available under sub-regulation 45(3) of the *2015 Regulations*:

“Examining the text of the chapeau of Article 2.2.2 [of the Anti-Dumping Agreement⁴], **we observe that this provision imposes a general obligation (‘shall’) on an investigating authority to use ‘actual data pertaining to production and sales in the ordinary course of trade’ when determining amounts for SG&A and profits. Only ‘[w]hen such amounts cannot be determined on this basis’ may an investigating authority proceed to employ one of the other three methods provided in subparagraphs (i)–(iii)**. In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the ‘actual data pertaining to production and sales in the ordinary course of trade’. **If actual SG&A and**

¹ International Trade Remedies Branch, *Report to the Minister No. 203: Reinvestigation of certain findings in Report No. 177* (Certain Hollow Structural Sections exported from China et Ors), 15 April 2013, p. 30.

² International Trade Remedies Branch, *Dalian Steelforce Visit Report: Dumping Investigation No. 177* (Certain Hollow Structural Sections exported from China et Ors), February 2012, p. 32.

³ Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 22 July 2003.

⁴ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “Anti-Dumping Agreement”)

profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.”⁵ (emphasis added)

The submission of Dalian Steelforce suggests the existence of domestic sales of goods it considers not to be like goods on the basis that “they are considered to not have characteristics closely resembling the goods exported to Australia during the review period”. It is important to note, that this is Dalian Steelforce’s view only and the Commission will assess whether the goods are alike or not. However, given that Dalian Steelforce is currently the subject of *Circumvention Inquiry No. 291* in relation to the goods the subject of this review, then ATM, submits that it is incumbent upon the Commission to closely examine these domestic sales to determine whether or not they constitute “the same general category of goods” for the purpose of paragraph 45(3)(a) of the *2015 Regulations*. In this respect, ATM submits that any domestic sales of goods that may fall within the category of minor modified goods, if not otherwise currently construed as “like goods”, should, in the alternative, be construed as “the sale of the same general category of goods”. This interpretation is consistent with the view of the Panel in *Thailand – H-Beams*⁶ which concluded that the term “same general category of products” under Article 2.2.2(i) of the Anti-Dumping Agreement permits a narrow view of goods that may be assessed for the purpose of determining an amount for profit.⁷ Quite reasonably, domestic sales of minor modified goods fall within this narrower scope. Therefore, ATM submits that the Commission ought properly to test the profitability of domestic sales in the same general category of goods. Again, the Commission is able to consider profitable sales of “the same general category of goods” even if they occur in low volumes.

In the event that no amount for profit may be determined under paragraph 45(3)(a) of the *2015 Regulations*, ATM submits that the Commission ought not to accept the findings of *Reinvestigation No. 203* that the relevant sales of other exporters or producers were at a loss during the investigation period for *Dumping Investigation No. 177*, and impute a zero rate to this review. As this *Review of Measures Case No. 285* is limited to the exports of Dalian Steelforce, it would offend against the language of Article 2.2.2(ii), which requires that the method applied under paragraph (b) of the *2015 Regulations* must be “the weighted average of the actual amounts incurred and realized by other exporters or producers **subject to investigation**” in this case subject to *Review of Measures Case No. 285*, of which no other exporters or producers are subject.

Notwithstanding that paragraph 45(3)(b) of the *2015 Regulations*, is not available to the Commission for the purpose of this *Review of Measures Case No. 285*, it may nevertheless be possible for the Commission to consider the contemporaneous amount of profit normally realised by other exporters or producers on sales of good of the same general category in the Chinese domestic market, under paragraph 45(3)(c) of the *2015 Regulations*. This approach would not offend against the requirement that the approach must be “any other reasonable method” under paragraph 45(3)(c) of the *2015 Regulations*, as it effectively prescribes the caveat contained in sub-regulation 45(4) of the *2015 Regulations*, to which paragraph (c) is subject to. Indeed, the Commission has recently conducted a review inquiry in respect of exports of HSS by Tianjin Youfa Steel Pipe Co., Ltd (“Tianjin Youfa”) and may therefore examine profitable sales achieved by this exporter on its sales of like goods, as being relevant on “any other reasonable method basis”.

Therefore, ATM submits that the Commission ought properly to consider Chinese domestic sales of goods of the same general category, by other exporters or producers, and regard may quite appropriately be had to evidence before *Circumvention Inquiry No. 291*. Again, the Commission is entitled to consider profitable sales of goods of the same general category, even if they occur in low volumes.

⁵ *Ibid.*, paras .97-98.

⁶ Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 12 March 2001.

⁷ *Ibid.*, paras. 7.114 – 7.115.

(iii) *Adjustment for HRC purchases*

For the purposes of adjusting Dalian Steelforce's HRC purchase price(s) during the investigation period, ATM refers the Commission to actual domestic HRC prices available to it from the recent HSS review of measures for Kukje Steel Co., Ltd ("Kukje"). The Commission can adjust for movements in HRC pricing for Dalian Steelforce for black and pre-gal HRC by referencing Kukje's movement in HRC prices for the investigation period versus the 2010/11 investigation period in *Investigation No. 177*.

ATM can also provide the Commission with domestic HRC prices for the review investigation period for Japan from an independent industry specialist reporting newsletter.

(iv) *Subsidisation*

Dalian Steelforce is seeking an adjustment for delivery expenses associated with its HRC supplies once the Commission surrogates the benchmark HRC for Dalian Steelforce's artificially low actual HRC cost. ATM rejects this request for adjustment as the benchmark prices are delivered prices into the producer's premises (i.e. for the Korean producer Kukje).

The benchmark HRC price, therefore, is already at the same level as Dalian Steelforce's HRC price.

Dalian Steelforce's request for additionally including scrap in the total production volume of goods produced will result in double counting of goods for volume purposes. Dalian Steelforce's claim for a further adjustment should therefore be rejected.

It is also noted by ATM that Dalian Steelforce is refuting the inclusion of certain countervailable benefits received in the investigation period on the grounds it "did not apply or complete any applications" for the grants and/or awards. The test for receipt of the benefit by the exporter is whether it has been received and not whether the exporter made an application for the benefit.

Concluding remarks

It is submitted that Dalian Steelforce's normal value will be determined in accordance with requirements of section 269TAC. The Commission will examine the level of profit on like goods sold profitably in the ordinary course of trade by Dalian Steelforce (for like or similar goods) including those profitable sales below the minimum sales volume threshold for ordinary course of trade purposes under subsection 269TAC(1) purposes, or by other Chinese pipe and tube producers (i.e. Tianjin Youfa), to arrive at a suitable profit to apply to Dalian Steelforce's normal value.

An adjustment for Dalian Steelforce's claimed delivery expenses on HRC is not warranted as the surrogate HRC cost is a delivered cost. The inclusion of scrap volumes in the total production volume for apportioning the countervailing benefit received from HRC would result in double counting of the production volumes and should be denied.

Finally, the Commission is required to examine all countervailable benefits received by the exporter Dalian Steelforce during the investigation period (including whether the exporter made an application for the benefit(s) or otherwise).

If you have any questions concerning this submission please do not hesitate to contact ATM's representative Mr John O'Connor on (07) 3342 1921 or Mr Matt Condon on (02) 8424 9880.

Yours sincerely



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