

18 February 2013

Mr J Bracic
Director, Operations 1
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Australian Customs and Border Protection Service
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Canberra
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commercial+international

By email

Dear John

**Certain hollow structural sections exported from China
Reinvestigation of certain findings
Submission of Dalian Steelforce Hi-Tech Co., Ltd**

We are the lawyers for Dalian Steelforce Hi-Tech Co., Ltd ("Dalian Steelforce").

A Introduction

We refer to Australian Customs Dumping Notice No. 2013/07 ("the ACDN"), which invited submissions from interested parties in relation to the reinvestigation by the Australian Customs and Border Protection Service ("Customs") of certain findings regarding hollow structural sections ("HSS") exported from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan.

Our client appreciates the clearly stated opportunity which Customs has given to interested parties to lodge submissions, noting that this departs from previous practice.

We note that the ACDN requested that submissions be made before 8 February 2013. This submission is being lodged after that date. In view of:

- the fact that the ACDN only allowed 8 working days from the date of its publication for submissions to be lodged;
- the fact that the final report is not due to be given to the Minister until 15 April 2013;
- the fact that there is no statutory deadline for such submissions;
- the significant length, coverage and detail of the report of the Trade Measures Review Officer ("the TMRO") that has led to this reinvestigation; and
- accepted principles of administrative fairness,

we respectfully request your full and careful consideration of our client's submission despite its late lodgement. It certainly seems to us that there is no practical or legal reason why this

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submission should not be so considered.

B Dalian Steelforce supports the TMRO's recommendations

In a broad sense Dalian Steelforce supports the recommendations made by the TMRO in his report of 14 December 2012 ("the TMRO Report")¹ for certain matters to be reinvestigated. At the same time, our client wishes it to be known that it does not support the TMRO's recommendations not to reinvestigate the other matters which were also raised by Dalian Steelforce as grounds of review in its application to the TMRO. Nonetheless we acknowledge that the matters that are to be reinvestigated are those which naturally fall within the scope of the TMRO's recommendations, as it was those recommendations that the Minister directly repeated in the direction to Customs which now forms the basis of this reinvestigation.

We also do not want it to be thought that Dalian Steelforce's support for the TMRO's recommendations means that it accepts all aspects of the reasoning underpinning those recommendations.

This submission comments on these reinvestigation topics:

- the finding that there was a particular situation in the Chinese iron and steel market such that sales in that market were not suitable for use in determining a normal value;
- the calculation of the benchmark used to construct a normal value for Chinese HSS producers, including Dalian Steelforce; and
- the findings that State-invested enterprises that provided hot rolled coil steel to HSS producers under Program 20 are "public bodies", and that hot rolled coil supplied under Program 20 was provided for less than adequate remuneration.

C "Particular market situation" finding

The TMRO's findings in relation to the "particular market situation" and the reasoning supporting them clearly and strongly contradict those of Report No 177.² The TMRO states:

- that based on the legislative history, a court might reach the conclusion that a "particular market situation" is legally incapable of application to a market economy such as China; and
- that based on Federal Court authority, unsuitability of domestic prices for normal value determination will not be brought about by any factor that simply depresses or inflates domestic prices.

The TMRO also provided examples of situations in which a "particular market situation" might arise. Each example focuses on a distortion which affects the *comparison* of a domestic price with an export price, in the sense that the distortive feature of the domestic market affects domestic sales *differently* to the export sales.

He said that the commercial activities of market participants – decided upon by themselves - would simply reflect normal profit maximisation operations of an open market even if those activities achieved policy objectives of a government.

¹ *Report of the Trade Measures Review Officer - Hollow Structural Sections – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice* (14 December 2012)

² *Report to the Minister 177 – Certain Hollow Structural Sections Exported from the People's Republic of Korea, Malaysia, Taiwan and the Kingdom of Thailand* ("Report 177").

The TMRO said that a “particular market situation” would not necessarily arise where a government exercised ordinary functions of government such as by imposing regulatory controls on market participants which may affect their costs.

He concluded that there was no evidence to establish that the policies and plans of the Government of China are being implemented and enforced in such a manner as would support a “particular market situation” finding. On that basis – that there was no evidence – the TMRO considered that Customs could not make a “particular market situation” finding on reinvestigation, because even if evidence supporting such a finding did exist it could not now be relied upon by Customs in its reinvestigation.

In terms of outcome, Dalian Steelforce will be satisfied with the overturning of the “particular market situation” finding that the TMRO indicated would inevitably flow from his rejection of Customs’ findings in that regard. However, at the same time, we wish to make these points absolutely clear:

- The kind of distorting factor which can potentially cause the condition of a “particular market situation” to arise is one which affects the *comparison* of the domestic selling price with the export price. The TMRO supported this principle. The effect that Customs wrongly presumed Chinese government policies had – of creating an “artificially low price” of an input – could not affect that comparison in any event.
- It must be recalled that the relevant “market” whose “situation” must be considered is the market referred to in Section 269TAC(1) of the *Customs Act 1901* (“the Act”). In this case that market is the Chinese domestic market for HSS.

Dalian Steelforce submits that, based on the TMRO’s views, the outcome of the reinvestigation on this point must be that there is no “particular market situation” in the Chinese market for HSS, and that domestic selling prices are therefore appropriate for comparison with export prices of the same products. We submit that Customs should not – and indeed cannot – deviate from the very clear legal advice provided by the TMRO.

D Finding concerning the benchmark used to construct normal value

The TMRO recommended that the calculation of the benchmark used to construct a normal value for Chinese HSS producers under Section 269TAC(2)(c) of the *Customs Act 1901* (“the Act”) be reinvestigated. Superficially the recommendation suggests that the TMRO advocated a reinvestigation of the actual calculation of the benchmark hot rolled coil (“HRC”) cost used to construct the normal value. However, upon a holistic review of both Report 177 and the TMRO Report, we understand that the finding that must be reinvestigated is the finding that a benchmark is required at all.

Inexorably, this will entail an investigation of whether the costs of HRC recorded by producers and exporters of HSS “reasonably reflect competitive market costs” in the terms of Regulation 180(2)(b)(ii) of the *Customs Regulations 1926*. To expand upon this, we note that Report 177 explained that:

...in the course of making its market situation assessment for China, Customs and Border Protection noted that the Government of China has significantly influenced the Chinese iron and steel industry, and this influence is likely to have materially distorted competitive conditions and affected supply in the industry.³

³ Report 177, page 44

Report 177 goes on to further explain that Customs:

...has formed the view that the GOC influence in the iron and steel industry is most pronounced in the parts of that industry that might be described as upstream from HSS production. In particular, Customs and Border Protection considers that GOC-driven market distortions have resulted in artificially low prices for the key raw materials used in HSS production in China – HRC and narrow strip.

The supposed distortion of competitive conditions is not mentioned in the Report other than in the context of the “particular market situation” analysis. No analysis, beyond that which lead to the “particular market situation” finding, is cited in support of the finding that the costs of HRC did not reasonably reflect competitive market costs. Therefore, it is evident that the Regulation 180(2)(b)(ii) finding in respect of HRC costs was based entirely upon the “particular market situation” finding. The TMRO acknowledges this parasitic relationship between the two findings in his report.⁴

In finding that there was no evidence to support the “particular market situation” conclusion, the TMRO also negated Customs’ finding that the financial records of HSS producers did not “reasonably reflect competitive market costs” in the case of HRC. We point out that the TMRO’s formulation of his “particular market situation” finding represents a reversal of that finding in respect of what was called the whole “iron and steel market” in Report 177, incorporating the market for HSS and that for HRC.

It is therefore clear that the benchmark calculation recommendation requires a determination of whether there are grounds - besides those that were relied upon in the original investigation - on which a Regulation 180(2)(b)(ii) finding can be made. Dalian Steelforce submits that there are none.

To better understand this submission, one must consider what is required by Regulation 180(2). Specifically, it requires that the records kept by an exporter or producer of like goods:

reasonably reflect competitive market costs associated with the production or manufacture of like goods

It is apparent that Customs interprets the regulation to require that the costs recorded by producers and exporters be derived from a market in which competitive conditions have not been affected by government policy.⁵

The language used in the regulation does not support such an interpretation. Nowhere in the text of the regulation is the concept of government influence expressed, implied, intimated or broadly hinted at. What the regulation requires is that the records “reasonably reflect competitive market costs”. A competitive market is one which evidences competition. Provided

⁴ For example, in para 127:

Regulation 180(2) therefore does direct attention to the domestic industry under consideration. However, because it had made the market situation finding, Customs determined that the records kept by Chinese HSS producers could not reflect competitive costs in China. Customs therefore did not determine the cost of production or manufacture in China by reference to the records kept by Chinese HSS producers. [underlining supplied]

⁵ Although, as noted above, Dalian Steelforce does not accept that sufficient information was available to conclude that “competitive conditions” had been affected by the policies of the Chinese Government, nor does Dalian Steelforce accept that such conditions are in reality affected by the policies of the Chinese Government.

the records of the producer concerned accurately record its costs of input products acquired in a competitive market, then Regulation 180(2)(b)(ii) will be satisfied.

Under market conditions, it will not usually be difficult for the financial records of a producer to satisfy Regulation 180(2)(b)(ii). The prospect that the Regulation might be enlivened would arise most strongly in cases involving a vertically integrated producer which itself produces an input to the goods under consideration, and where such input is accounted for in a way which does not represent its actual cost. In such a scenario, it would be open to Customs to consider whether the cost of that input as recorded in the producer's records was appropriate under the Regulation. Not having been acquired under competitive market conditions, the Regulation would allow Customs to ask whether the cost as recorded reasonably reflected its competitive market cost. In order to determine whether an internal transfer price or other internal accounting-purpose price reasonably reflected a competitive market cost, the Minister would be at liberty to compare the recorded cost of the self-produced input to the cost of that input as actually experienced by other producers in the market. If the competitive market cost was markedly different to the recorded cost, such that it was not a reasonable reflection of the market cost, then the Minister would be able to substitute the market cost. This prevents any cost manipulation and ensures that costs used are "fully absorbed" for the purposes of carrying out ordinary course of trade tests and working out normal values on a cost construction basis.

The thinking adopted in Report 177 is that the costs generated in an industry that is affected by laws and government policies will not be competitive market costs. To interpret Regulation 180(2)(b)(ii) in a manner consistent with this thinking would be to render it ineffective. If the only competitive market acceptable for the purposes of the Regulation was one that is not influenced by government policy, then Customs would be required to reject the costs of producers from every market in the world. Regulation 180(2)(b)(ii) is concerned only with ensuring the soundness of the costs recorded by producers in their financial records, particularly as to whether those costs are generated under the conditions of competition. The regulation does not allow for a consideration of government policy or any other broad macro-economic concerns as a way to reject costs otherwise generated in a competitive market.

Report 177 found that "*certain factors of competition within the Chinese market may have existed (e.g. multiple competing suppliers)*" during the period of investigation. On any view this mild acknowledgement of competition in the HRC market is a huge understatement of the competitive conditions which are clearly evidenced in the information obtained from Dalian Steelforce during the investigation, and no doubt from every other Chinese producer of HSS as well. But it is nonetheless sufficient to indicate that competitive market conditions exist and can therefore justify costs generated in that market for the purposes of Regulation 180(2)(b)(ii).

Dalian Steelforce submits that, based on the TMRO's views and the correct application of Regulation 180(2)(b)(ii), the outcome of the reinvestigation on this point must be that there are no grounds to reject Dalian Steelforce's HRC costs on the alleged basis that the costs as recorded do not reasonably reflect competitive market costs. Those costs accurately reflect Dalian Steelforce's costs of HRC on the domestic market for HRC.

E "Public bodies" and "less than adequate remuneration" findings

Customs concluded that there was a program in China whereby State-invested enterprises ("SIEs") provided HRC and narrow strip to HSS producers for less than adequate remuneration ("Program 20"). Dalian Steelforce has not seen any evidence that would suggest the existence of such a program, and certainly has not benefited from such a program. Our client therefore welcomes the TMRO's rejection of those findings, and his recommendations that they be

reinvestigated. These recommendations are based on the TMRO's legal opinions:

- that the evidence fails to establish that SIEs that produce or supply HRC and/or narrow strip to HSS producers are public bodies for the purposes of the definition of "subsidy" in Section 269T of the Act; and
- that the concept of "less than adequate remuneration" requires a consideration of the adequacy of the difference between the cost and the price of the allegedly subsidised product, and that there was no evidence of the rates of return of HRC producers such as might support the proposition that their remuneration was less than adequate.

With the greatest respect, our client submits that the TMRO's legal advice must now lead to the overturning of the Program 20 allegation. Dalian Steelforce considers this to be the absolutely correct outcome, because no such Program exists. Dalian Steelforce purchases its HRC from a range of suppliers, both government invested and not, all of whom operate highly commercially. It is not Dalian Steelforce's experience that SIE prices are consistently lower than those offered by other enterprises. As one would expect from a competitive market, prices are set by negotiation based on the market conditions at the time. This leads to price variability between suppliers, and at different times.

F Conclusion

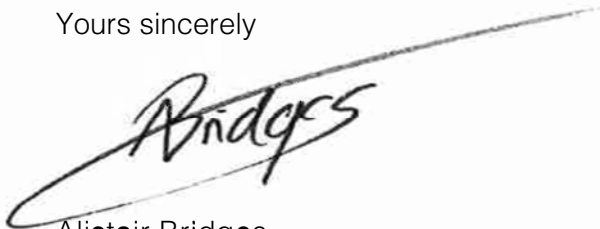
On the basis of the TMRO Report, we submit that the reinvestigation into HSS exported from China must conclude that:

- there is no particular market situation in the Chinese domestic market for HSS;
- the costs of HRC recorded in Dalian Steelforce's accounts reasonably reflect competitive market costs for the purposes of Regulation 180(2) (b)(ii); and
- there is no "Program 20".

On the basis of these conclusions, Dalian Steelforce cannot be found to have engaged in any dumping of HSS on the Australian market, nor have its exports been subsidised in anything other than a trivial way.

Our client requests that Customs report to the Minister – as a result of this reinvestigation - that the notices published under Sections 269TG(1) and (2) and Section 269TJ(2) should be revoked.

Yours sincerely



Alistair Bridges
Solicitor