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Ms Joanne Reid
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**REVIEW OF MEASURES – HOLLOW STRUCTURAL SECTIONS EXPORTED FROM
THE PEOPLES REPUBLIC OF CHINA BY DALIAN STEELFORCE**

Dear Joanne,

This submission is made by Dalian Steelforce Hi-Tech Co., Ltd. (Dalian Steelforce) to the current review of anti-dumping and countervailing measures applying to its exports of hollow structural sections (HSS).

Dalian Steelforce is currently subject only to a countervailing duty following the Anti-Dumping Commission's (the Commission) findings in the original HSS investigation (REP 177) and subsequent HSS reinvestigation (REP 203), in which it was concluded that Dalian Steelforce received benefits in the form of hot rolled steel provided by government at less than adequate remuneration. Therefore the sole focus of this submission is on this particular program.

Scope of review

Following a request for clarification, the Commission advised by email correspondence on 23 April 2015 that:

...the review will not examine certain issues that would apply to exporters beyond the exporter the subject of the review. For example, the Commission will not reassess whether there was a situation in the Chinese domestic market for HSS such that the sales of HSS in that market were unsuitable for normal value (market situation assessment). The Commission will also not reassess whether the costs incurred by Dalian Steelforce for purchases of primary raw material such as hot rolled coil or narrow strip reasonably reflect competitive market costs (in terms of regulation 180(2) of the Customs Regulations 1926). Pertaining to your query in

particular, the Commission does not intend to re-examine its previous findings in respect of public bodies in relation to subsidies provided in relation to the manufacture of HSS.

In the case of the first two issues outlined in the Commission's response, Dalian Steelforce accepts that it would be difficult for the Commission to revisit the issues of market situation and competitive market costs in a single exporter variable factor review, as both of these issues require a broader analysis and examination of market factors affecting a particular sector, industry or market.

Further, in the context of Dalian Steelforce's particular circumstances, we submit that the market situation provision is not relevant in any case, given the Commission's findings in REP 177 and REP 203 that Dalian Steelforce's profitable sales of like goods on the domestic market were not sold in the ordinary course of trade.

With regard to the determination of costs in terms of Regulation 180(2) of the *Customs Regulations 1926*, Dalian Steelforce continues to submit that it purchases its raw material requirements in a competitive market unaffected by Government policies. Nevertheless, it recognises that revisiting this issue requires a broad macro-economic assessment of the hot-rolled steel market in China by the Commission.

In effect then, the application, initiation and investigation of the variable factor review into Dalian Steelforce's exports of HSS during the review period is a limited partial review, in that it is limited to a single exporter and will only be reviewing the variable factors relevant to Dalian Steelforce. Market situation, competitive market costs, material injury considerations in the context of revocation and the variable factors of other Chinese exporters are clearly not within scope of this review.

The only remaining matters then that are clearly within scope of this review are the specific variable factors relevant to the determination of duty payable on HSS exported by Dalian Steelforce.

Subsection 269T(4D)(b) of the *Customs Act 1901* (the Act) defines variable factors relevant to a countervailing duty notice as:

- (i) to the amount of countervailing subsidy received in respect of the goods; and*
- (ii) to the export price of the goods; and*
- (iii) to the non-injurious price of the goods.*

In contrast to the issues of market situation and competitive market costs, the variable factor determinations listed above are specific to an individual exporter and ought to be based on relevant information submitted by an exporter and gathered by the Commission in conducting its inquiries. This is confirmed by subsection 269TDA(2) of the Act which requires termination of an original investigation where an exporter received no countervailable subsidy or received a countervailable subsidy that did not exceed negligible levels.

Further, Article 21.1 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement) requires that '*A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.*' Article 21.2 of the SCM further adds that '*Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization...*'.

It is unclear then on what basis the Commission has determined that a re-examination of findings in respect of public bodies related to the amount of countervailable subsidy received by Dalian Steelforce is unwarranted. A countervailable subsidy is a 'subsidy' that is specific in accordance with section 269TAAC of the Act. Section 269T defines subsidy as a financial contribution that confers a benefit in relation to the goods exported to Australia. Therefore, in establishing the amount of countervailable subsidy received for the purposes of this review, Dalian Steelforce submits that the Commission is required to make determinations in respect of financial contribution and benefit after having regard to the application, this submission and any other relevant information presented to the review.

For example, if Dalian Steelforce purchased hot rolled coil from a private enterprise during the review period, the Commission would be under an obligation to be satisfied of entrustment or direction by the Government of China before it could determine that a financial contribution was received and relevant transactions included in its calculation of the amount of countervailable subsidy received. Therefore for those particular transactions, the Commission must make a determination as to whether a financial contribution as defined exists.

Likewise if a supplier of hot rolled coil that was a wholly-owned state enterprise during the original investigation period, changed its status in the intervening period to a listed public corporation with the Government of China now holding only a significant minority stake. In that scenario, Dalian Steelforce submits that the Commission would be under an obligation to review whether the enterprise did indeed exercise governmental authority during the period of review.

Dalian Steelforce's contention that relevant elements of countervailable subsidy (being financial contribution and benefit) are required to be examined in the context of this review are supported by the ruling of the Appellate Body (AB) of the WTO in the case *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*.

In interpreting paragraph 2 of Article 21, the AB¹ found that:

the authorities of a Member applying a countervailing duty must, where warranted, "review the need for the continued imposition of the duty". In carrying out such a review, the authorities must "examine whether the continued imposition of the duty is necessary to offset subsidization" and/or "whether the injury would be likely to continue or recur if the duty were removed or varied". Article 21.2 provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1 of the SCM Agreement, which stipulates:

A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

Setting aside the issue of injury, which does not arise in this case, we note that in order to establish the continued need for countervailing duties, an investigating authority will have to

¹ United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom: WT/DS138/AB/R; para 53, page 19

make a finding on subsidization, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be any need for a countervailing duty.

It is worth noting that the AB² distinguished between an original investigation and an administrative review and concluded:

In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties...

Therefore in applying to have its variable factors reviewed, Dalian Steelforce provides relevant information in the next section of this submission that it considers demonstrates that it did not receive any amount of countervailable subsidy during the nominated review period 1 January 2014 to 31 December 2014. As such, Dalian Steelforce requests the Commission to undertake a proper review of its variable factors and in particular, investigate whether a financial contribution exists and as a consequence whether a countervailable subsidy was received by Dalian Steelforce during the period of review.

Finally on the issue of scope, it is worth noting that the EU administering authority conducts regular partial interim reviews³ into goods exported by a single exporter. In each such partial interim review, the EU authority routinely re-examines each of the required elements of a countervailable subsidy in order to ascertain whether and at what level countervailing duties are to be imposed.

Financial contribution – public bodies

A subsidy shall be deemed to exist according to s.269T of the Act if there is a financial contribution by a government, public body or private body entrusted or directed by that government or public body that involves:

- a direct or potential direct transfer of funds or liabilities; or
- forgoing or non-collection of revenue; or
- provision of goods or services or purchase of goods.

In March 2011, the AB issued a ruling in the case *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China (DS379)*, which examined the question of whether the Panel had correctly defined the term ‘public body’ in the SCM Agreement as meaning “any entity controlled by a government.” In reversing the Panel’s finding, the AB drew a distinction between entities merely owned or controlled by a government and entities that exercise some degree of “governmental authority.” According to the AB, “[a] public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.”

² *Ibid.*, para 63.

³ Polyethylene terephthalate film originating in India, OJ L 236, 2006; Polyethylene terephthalate film originating in India, OJ L 255, 2007; Certain electronic microcircuits known as DRAMs originating in the Republic of Korea, OJ L 96, 2008; Certain graphite electrode systems originating in India, OJ L 350, 2008; Polyethylene terephthalate film originating in India, OJ L 168, 2010; Polyethylene terephthalate film originating in India, OJ L 58, 2011; Polyethylene terephthalate originating in India, OJ L 232, 2011; Polyethylene terephthalate originating in India, OJ L 168, 2012;

Dalian Steelforce submits that it did not receive any amount of countervailable subsidy during the review period on the basis that it considers that none of its ■ suppliers of hot rolled steel, meet the definition of a public body as outlined by the AB. Further, Dalian Steelforce considers that information gathered and relied upon by the Commission in REP177 and REP203 which led to the imposition of the original countervailing duties, was not sufficient to demonstrate that those entities possessed, exercised or were vested with governmental authority.

This view is supported by the recent finding of the Anti-Dumping Review Panel (ADRP) in its review of decisions regarding countervailing duties imposed on zinc coated (galvanised) steel and aluminium zinc coated steel exported from the People's Republic of China. In examining the issue of public bodies, the ADRP noted that the findings in that particular investigation (REP 193) relied on the 'analysis and findings in Report 203 on the issue as to whether or not these indicia were met.' As a result the ADRP considered the findings of REP 203 'in order to understand the basis upon which Customs considered that the SIEs were public bodies.'

Given that the reinvestigation stemmed from a review by the then Trade Measures Review Officer (TMRO) into findings and recommendations contained in REP 177, the ADRP considered 'it is necessary to also have regard to the findings in Report 177 and the TMRO's conclusion in respect to them.'

In summary, the ADRP found that the material and information relied upon by the Commission to support its finding that state-invested enterprises (SIEs) are public bodies was not sufficient evidence of the exercise of governmental authority. The ADRP concluded that:

103. There is no material in the HSS reinvestigation or which is relied upon by Customs in Report 193 which demonstrates that there has been a delegation of governmental authority to the SIEs to impose State-mandated policies on participants in the iron and steel industry in China. The material also does not, in my view, support a finding that the control exercised over the SIEs by the GOC was such that they were "instruments" of the GOC. [emphasis added]

Finally, the ADRP stated in its report:

108. For the reasons set out above, I do not agree that indicia two and three were satisfied. The fact that the HRC suppliers are complying with the GOC's policies, plans and measures cannot of itself meet the criteria for finding that they are public bodies.

It is further noted that the then Parliamentary Secretary 'considered and accepted the findings of the ADRP Report, including all material findings of fact and law, in relation to the grounds for review of the decision to publish the countervailing duty notices.'⁴ It would be an absurd outcome now if the Commission presented the current Parliamentary Secretary with findings and recommendations based on past evidence gathered and relied upon in REP 177 and REP 203, and which was ultimately found by the ADRP and accepted by the previous Parliamentary Secretary as not satisfying the required legal threshold test.

⁴ <http://www.adreviewpanel.gov.au/PastReviews/Documents/ChinaZMNotice-Final.pdf>

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Therefore, Dalian Steelforce submits that the Commission is under an obligation to undertake an investigation in this partial variable factor review, as to whether the [REDACTED] suppliers of hot-rolled steel to Dalian Steelforce during the review period, meet the definition of public bodies and exercised governmental authority. If the Commission is unable to gather sufficient evidence to demonstrate the legal threshold tests outlined by the AB in DS379, then it is required to conclude that Dalian Steelforce received no amount of countervailable subsidies during the review period and accordingly recommend that the notice be altered and a zero countervailing duty rate be ascertained in respect of the goods exported by Dalian Steelforce.

If after considering this submission the Commission continues to hold the view that financial contribution will not be re-examined in the context of this review, Dalian Steelforce requests that the Commission clearly outline in its preliminary report and final report to the Parliamentary Secretary, all of the relevant evidence from REP 177 and REP 203 that it had regard to in continuing to find that SIEs are exercising governmental authority.

Yours sincerely

John Bracic