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25 November 2015

Mr R Maevsky
Case Manager
Operations 2
Anti-Dumping Commission
Level 35, 55 Collins Street
Melbourne
Victoria 3000

By email

Dear Roman

Dalian Steelforce Hi-Tech Co., Ltd
Response to Statement of Essential Facts 291

We write on behalf of Dalian Steelforce Hi-Tech Co., Ltd. ("Dalian Steelforce") in relation to this matter.

Dalian Steelforce notes the content of Statement of Essential Facts No. 291 ("SEF 291"). Specifically, Dalian Steelforce recognises that the preliminary findings of the Anti-Dumping Commission ("the Commission") are:

- an anti-circumvention activity, in the form of importation of "slightly modified goods", has occurred;
- in order to respond to this occurrence, the Commission proposes extending the Section 269TG(2) notice and the Section 269TJ(2) notice (as may be applicable to some exporters) to cover what has been referred to as the "circumvention goods"; and
- the extended operation of these measures should be backdated to the day on which the anti-circumvention inquiry was initiated, being 11 May 2015.

In response, Dalian Steelforce wishes to make the following submissions in this letter:

- there has been no slight modification of the goods;
- there can be no finding that the relevant circumvention activity has occurred prior to 1 April 2015; and
- the proposed amended notices should not be applied retroactively.

Before delving into the substance of these submissions, we need to emphasise clearly and strongly that Dalian Steelforce and its related companies have not done anything that was illegal or proscribed in any manner. All imports have been entered correctly, using correct tariff classifications and country of origin information and all duty liability, whether normal duty, or anti-dumping or countervailing duty, has been paid.

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There is no ambiguity in this. The goods under consideration in this inquiry were not, and have never been, the subject of anti-dumping or countervailing measures. There is no finding that those goods have been dumped. There is no finding that those goods have been subsidised. There is no finding that those goods have caused injury to the Australian industry.

A There has been no "slight modification" of the goods

The relevant "circumvention activity" that is alleged to have occurred is "*slight modification of goods exported to Australia*".

According to Sub-regulation 48(2) of the *Customs (International Obligations) Regulations 2015* ("the Regulations") this will occur where:

> *(2) The circumstance is that all of the following apply:*
>
> *(a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice applies;*
>
> *(b) before that export, the circumvention goods are slightly modified;*
>
> *(c) the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified;*
>
> *(d) had the circumvention goods not been so slightly modified, they would have been the subject of the notice;*
>
> *(e) section 8 or 10 of the Customs Tariff (Anti-Dumping) Act 1975, as the case requires, does not apply to the export of the circumvention goods to Australia.*

The Regulation is set out in a peculiar manner; however it is clear that the key elements are these:

1 goods subject to an anti-dumping or countervailing notice exist;

2 those goods are "slightly modified";

3 as a result of that slight modification, those goods fall outside the description of the goods subject to the notices; and

4 those goods are then exported to Australia.

In this regard we note that a common definition of the term "modify" is:

> *make partial changes in; make different…*[1]

Clearly then, Sub-regulation 48(3) requires that the goods covered by the dumping and/or countervailing notice actually be *changed* in some manner, and as a result of that change, are no longer subject to those notices. Whether this has occurred is a question of fact. It is not sufficient to have a set of goods that are similar to the goods the subject of the notice, but which are not themselves modified versions of the goods the subject of the notice. This is clear on the express terms of Sub-regulation 48(2).

We note that Sub-regulation 48(3) sets out a non-exhaustive list of factors that may be considered by the Commissioner when determining whether the circumvention goods have been "slightly modified".

[1] *Australian Concise Oxford Dictionary* (Fifth Edition) 2009

These factors appear to be targeted at identifying the purpose of the "circumvention goods" and their relationship to the goods subject to the relevant notices. However, these factors are not determinative of the question of whether the circumvention goods have been slightly modified, nor should they obfuscate the task of the Commission, which, again, is determining whether the goods subject to the measures have actually been slightly modified. If, irrespective of the consideration of the Sub-regulation 48(3) factors, it cannot be asserted that those goods have actually been slightly modified, then no such circumvention activity can be found to have occurred.

Dalian Steelforce respectfully submits that its goods have not been slightly modified. In SEF 291, the "modification" that has been found to have occurred is described as follows:

> *…the Commission has found that a slight modification has been made to the circumvention goods exported by Dalian Steelforce through the use of alloyed (boron-added) HRC in its manufacturing process of HSS (as opposed to using non-alloyed HRC). The use of boron-added HRC results in the production of alloyed HSS.*[2]

HRC, referencing "hot rolled coil", is one of the primary inputs for HSS. We could question whether the use of different HRC in production processes could be considered to be a *slight* difference; however that point is really academic. The real issue is that the use of different HRC – in this case, HRC including boron – in the production of a different product to the goods subject to the measures is not and cannot be considered to be a modification of the goods subject to the measures in any degree. HRC is fundamental to the HSS production process. As noted by Dalian Steelforce in its Exporter Questionnaire response, HRC is used to produce HSS in the following manner:

> *Dalian Steelforce's range of HSS is manufactured utilising electric resistance welding (ERW) technology. ERW HSS is manufactured by cold-forming a sheet of slit coil into a cylindrical shape. Current is then passed between the two edges of the coil to heat the steel to a point at which the edges are forced together to form a bond without the use of welding filler material. This in-line cylindrical length of steel is then formed by rollers into circular, square, rectangular or oval shapes. A protective coating such as paint is applied and the HSS is then cut to length and bundled into packs for export in containers.*[3]

Alloy HRC is not used to produce the goods subject to the relevant notices ("carbon HSS"). Only alloy HSS is produced from alloy HRC. You cannot produce carbon HSS and then slightly modify it to be alloy HSS. Likewise, at no point in its existence is alloy HSS capable of falling within the scope of the Section 269TG(2) and 269TJ(2) notices.

Therefore, Dalian Steelforce has not slightly modified its carbon HSS. It still produces and exports carbon HSS in addition to the alloy HSS the subject of this inquiry. That carbon HSS remains subject to the relevant dumping measures. Alloy HSS, which is not, and cannot be found to be, a slightly modified form of carbon HSS, is also produced and exported, and in accordance with the scope of the notice that imposed the anti-dumping measures, does not accrue any anti-dumping liability.

HSS made from alloy HRC was never within the description of the goods under consideration. Carbon HSS, being the goods that are subject to the notice, cannot be transformed into alloy HSS. Simply put, the law does not allow the Commission to find a circumvention activity has occurred in these circumstances. Accordingly, the inquiry should be terminated.

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2 Page 35.

3 Page 20.

B There can be no finding that the relevant circumvention activity has occurred prior to 1 April 2015

Without detracting from the above submission, which is that the Commission cannot find that the "circumvention goods" have been "slightly modified", Dalian Steelforce also submits that it is incorrect to consider that acts of circumvention occurred before any such circumvention activity was recognised under Australian law.

The period of investigation is the period 1 July 2010 to 31 March 2015. Regulation 48 of the Regulations was originally implemented as Regulation 183 of the *Customs Regulations 1926,* via the *Customs Amendment (Anti-Dumping Improvements) Regulation 2015* ("the Amendment Regulation").The Amendment Regulation states:

(a) that it sets out certain circumstances (those in Sub-regulation 48(2) as set out above) which are prescribed for Subsection 269ZDBB(6), the latter of which allows for further circumstances – in addition to those that were included in the Act - to be prescribed as a "circumvention activity"; and

(b) that it commences on the 30th day after it was registered. The Amendment Regulation was registered on 2 March 2015, and therefore commenced on 1 April 2015 (this, incidentally, is the same day as the Regulations commenced).

So, the circumstances that are said to constitute the alleged "circumvention activity" were not prescribed until 1 April 2015. Prior to this time, those acts were not recognised as acts of circumvention.

This has major implications for the inquiry. The period of inquiry was 1 July 2010 to 31 March 2015. At no point during this period were the acts capable of being considered as being acts of circumvention, because there simply was no law stating that to potentially be the case. The conduct found to have occurred was not conduct recognised at law as an anti-circumvention activity, and therefore cannot now be found to be a "circumvention activity" for the purposes of Division 5A of the *Customs Act 1901*.

In case there is any doubt surrounding this conclusion, we remind the Commission that the *Explanatory Memorandum* for the Amendment Regulation confirms that the Amendment Regulation is a legislative instrument, and that its operation therefore must be governed by the *Legislative Instruments Act 2003* ("LIA"). Section 12 of the LIA states the following with regard to the operation of legislative instruments:

> *(1) Subject to subsection (2), a legislative instrument that is made on or after the commencing day, or a particular provision of such an instrument, takes effect from:*
>
> *(a) the day specified in the instrument for the purposes of the commencement of the instrument or provision; or*
>
> *(b) the day and time specified in the instrument for the purposes of the commencement of the instrument or provision; or*
>
> *(c) the day, or day and time, of the commencement of an Act, or of a provision of an Act, or of the occurrence of an event, that is specified in the instrument for the purposes of the commencement of the instrument or provision; or*
>
> *(d) in any other case--the first moment of the day next following the day when it is registered.*

The position under LIA is simple – the relevant legislative instrument commences at the day specified in the instrument. The Amendment Regulation commenced 1 April 2015. The effect of the commencement was to prescribe the activities identified in Regulation 183 (now Regulation 48) as circumvention activities. Prior to the commencement date of the Amendment Regulations, those activities were not prescribed, and therefore could not constitute a "circumvention activity".

Steelforce reminds the Commission that there is a difference between legislative instruments and legislation. For example, Dalian Steelforce recognises that Item 15 of the *Customs Amendment (Anti-dumping Improvements) Act (No.3) 2012* ("the Amendment Act") – the Act which amended the *Customs Act 1901* to include the initial circumvention activities – states as follows:

> *(2) Division 5A of Part XVB of the Customs Act 1901, as inserted by this Act, applies in relation to:*
>
> > *(a) conduct constituting circumvention activity occurring wholly after the commencement of this item; and*
> >
> > *(b) conduct constituting circumvention activity occurring wholly before the commencement of this item; and*
> >
> > *(c) conduct constituting circumvention activity occurring partly before and partly after the commencement of this item.*

There were four circumvention activities inserted into the *Customs Act 1901* by operation of the Amendment Act – assembly of parts in Australia, assembly of parts in a third country, exports of goods through one or more third countries and arrangements between exporters. Although the Amendment Act did allow for the prescription of further circumstances as circumvention activities, such prescription cannot be considered to be covered by Item 15, as such prescription expands the Commissioner's jurisdiction to investigate activities under Division 5A. Therefore any circumvention activities prescribed by regulation do not form part of Division 5A *as inserted* by the Amendment Act. Further prescription of circumvention activities therefore falls outside the operation of Item 15.

Therefore any "conduct" that the Commission evidently thinks – as explained in SEF 291 – could be considered as "constituting" the "slight modification" activity prior to the commencement of the Regulation Amendment cannot be so considered.

This may seem odd to the Commission, but it is consistent with the way in which legislative instruments are to be interpreted under Australian law. It is accepted in Australian law that there is nothing preventing the Parliament from passing legislation which has retrospective effect, despite the potential for injustice and unfairness. However, this is not the case for legislative instruments which are, after all, created solely by the Executive Government and are therefore not subject to the same democratic checks and balances as legislation.

The Amendment Regulation expressly stated the day on which it would come into effect (i.e. the day on which the relevant conduct was prescribed as constituting a circumvention activity) which, consistent with Section 12(1)(a) of the LIA, is legally the date it is taken to have commenced. Prior to this date, no such circumstances were prescribed.

The seriousness of this is underscored by Subsection 12(2) of the LIA, which the operation of Subsection 12(1) is "*subject to*". Specifically, Subsection 12(2) of the LIA states as follows:

> *(2) A legislative instrument, or a provision of a legislative instrument, has no effect if, apart from this subsection, it would take effect before the date it is registered and as a result:*

> *(a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration would be affected so as to disadvantage that person; or*
>
> *(b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.*

Subsection 12(2) renders a legislative instrument *ineffective* if it was designed to have effect before the date it was registered (i.e its date of commencement is stated to be the date before registration) and, as a result of that commencement the rights of a person as at the date of registration would be affected so as to disadvantage that person, or liabilities would be imposed upon a person in respect of anything done or omitted to be done before the date of registration. In effect, Subsection 12(2) states that despite what was said in the legislative instrument regarding its commencement, the earliest it can commence is the day of registration.

However, Subsection 12(2) is technically not relevant to the circumstance of the Amending Regulation, because the Amending Regulation expressly began operation 30 days after its registration. The subsection is important to this discussion, however, because, it illustrates the seriousness with which Australian law treats the potential for legislative instruments to disadvantage people and impose liabilities retrospectively. Simply put, they cannot. It is not possible for the activity of "slight modification", being an activity that took place before the legal concept of "slight modification" had been articulated, to be found to be "slight modification" that could then be a claimed justification for putting a person to a disadvantage.

Finally, we would be remiss if we did not mention that Regulation 12(3) of the LIA indicates that Regulations (1) and (2) apply only to the extent that a contrary intention is not evident:

> *(3) The effect of subsections (1) and (2) on a legislative instrument is subject to any contrary provision for commencement of the instrument in the enabling legislation for the instrument if the enabling legislation is an Act or a provision of an Act.*

The contrary intention can only be found in the *enabling legislation.* The LIA defines enabling legislation to be:

> *… in relation to a legislative instrument, means the Act or legislative instrument, or the part of an Act or of a legislative instrument, that authorises the making of the legislative instrument concerned.*

As per the *Explanatory Memorandum* for the Amendment Regulation, the authorising Act is the *Customs Act 1901*. Therefore it is the *Customs Act 1901* which is the enabling legislation. The power to make regulations under the *Customs Act 1901* is granted at Section 270 which states generally that the Governor-General is entitled to:[4]

> *…make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act…*

There is no contrary provision for commencement of legislative instruments under the *Customs Act 1901*. Accordingly, the Amendment Regulation is taken to have effect as of the date of

[4] This also precludes a contrary intention being drawn from the Amendment Act, because the Amendment Act is not the Act which authorised the creation of the Amendment Regulation. Therefore, Item 15 of the Amendment Act cannot oust the operation of Section 12 of the LIA.

commencement. Prior to this date, the circumstances included in Regulation 43 were not considered to be, and did not constitute, a circumvention activity.

In conclusion:

- the "slight modification" circumvention activity did not exist prior to the commencement of the Amendment Regulation;
- accordingly, any conduct that occurred prior to the commencement of the Amendment Regulation cannot be found to be "circumvention activity"; and
- the Amendment Regulation cannot legally be found to have effect prior to its commencement.

Therefore, we respectfully submit that the only option available to the Commissioner is to terminate the inquiry under Section 269ZDBEA(1) of the Act, because no circumvention activity can be found to have occurred during the period of inquiry.

C Any amendment to the notices should not have retroactive effect

Dalian Steelforce notes that SEF 291 proposes that the Commission will recommend that the Minister declare that any amended notices arising from this inquiry have effect from the date that the inquiry was initiated. Without prejudice to its primary position, which is that no circumvention activity can be legally found to have occurred, for either and both of the reasons already explained, Dalian Steelforce respectfully requests that the Commissioner reconsider its position with regard to the retrospectivity of the amended notices.

Dalian Steelforce notes that the power to back-date the amended notice is a discretionary power that resides with the Minister, however that discretion should not be exercised in this instance.

Firstly, the only reasoning for the exercise of this discretion is *"to provide an effective remedy to the injurious effects caused by circumvention behaviour"*. With respect, there is no evidence or analysis to suggest that these imports have caused the Australian industry injury. The term "*injury*" is not used in SEF 291. The term "*injurious*" is used once, to justify the retrospective application of the amended notice. Accordingly, no consideration appears to have been given to the proposition that there was injury caused by "circumvention", and it is not apparent that there is anything to remedy in the circumstances. This cannot therefore be a ground for the exercise of the discretion that the Commission proposes the Minister should exercise.

Dalian Steelforce notes that the power to retrospectively amend the notices was included in the Amendment Act. As discussed elsewhere in this letter, that Act included four types of circumvention activity, being assembly of parts in Australia, assembly of parts in a third country, exports of goods through one or more third countries and arrangements between exporters. Of these, the latter relates to an activity which is described as "transhipment". This involves the re-routing of the goods subject to measures through another country, without changing them at all. This practice relates to goods that have already been found to have been dumped (or subsidised) and arguably would also involve a misstatement in an entry form on importation into Australia as to either the origin of the goods or their place of export. We submit that this activity would more naturally and perhaps inexorably involve some degree of underhandedness, wherein the exporter would contrive the circumstances through which the goods were transported and entered into Australia. It seems to us that this is a kind of practice to which retrospective action would be well-suited.

That is not the case for Dalian Steelforce. The goods which have been called circumvention goods have been imported into Australia in a completely open and transparent manner. The goods were not

and are not currently the subject of any anti-dumping or countervailing measures, and it was completely legal and proper that they be imported without incurring dumping and countervailing duties. Notwithstanding the "witch hunt" that the Australian industry has mounted to complain about such a practice, the conduct was normal commercial behaviour. Indeed, SEF 291 clearly states that the alloy goods were *not* subject to the dumping measures.

Moreover, it was not apparent that the importation of the subject goods was or could be considered to be a circumvention activity until this inquiry was initiated and, with respect, given that the inquiry is considering a new form of circumvention activity, it is even now not apparent that the activity can be found to have occurred. In this submission, Dalian Steelforce has highlighted two legal impediments to finding that the "slight modification" activity has occurred during the period of inquiry. Because of this overriding uncertainty, it is highly unreasonable to expect that importers would adjust their business practices at the time the inquiry was initiated, and now to punish them for not doing so.

Given these factors, we respectfully submit that if the Commission is of the view that the relevant circumvention activity has occurred, any amendment to the Section 269TG(2) and 269TJ(2) notices only have a prospective effect.

D Conclusion

In conclusion, Dalian Steelforce submits:

- alloy HSS is not a slightly modified form of carbon HSS, accordingly, there can be no finding that the "slight modification" circumvention activity occurred;
- conduct occurring prior to 1 April 2015 cannot be found to be the "slight modification" circumvention activity; and
- without prejudice to the first two points, if the Section 269TG(2) and 269TJ(2) are to be amended, that amendment should not have a retrospective effect.

Yours sincerely

Alistair Bridges
Senior Lawyer