

10 February 2016

Mr Roman Maevsky
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Dumping Operations 2
Anti-Dumping Commission
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Public File

Dear Mr Maevsky

Re: Anti-Circumvention Inquiry No. 291 – Hollow Structural Sections exported from P R China, Korea and Malaysia

Introduction

I refer to the recent independent report of Emeritus Professor Druce Dunne of the University of Wollongong placed on the public file on 8 January 2016. Austube Mills Pty Ltd (**ATM**) takes this opportunity to comment on aspects of Emeritus Professor Dunne's report and the evidence of Qingdao XiangXing Steel Pipe Co., Ltd (**Qingdao**) and its Australian importer of the circumvention goods, Senturion Steel Supplies Pty Ltd (**Senturion**).

Background

The evidence before the Commission is that supply of alloyed HSS by Qingdao to Australia "commenced at the beginning of the 2011 calendar year"¹. By way of background *Dumping and Subsidy Investigation No. 177* was initiated in mid-2011. The exports of the circumvention goods are clearly within the inquiry period (1 July 2010 to 31 March 2015), but the timing of the commencement of the export of the circumvention goods also has probative value in terms of satisfying the requirement under paragraph 48(2)(c) of the *Customs (International Obligations) Regulation 2015 (the Regulations)*:

"the use or purpose of the circumvention goods is the same before, and after, they are so slightly modified"

In essence the correlation between the timing of the commencement of the export of the circumvention goods and the initiation of *Investigation No. 177* supports a consideration of the *mala fides* of the exporter. The comparable, and longer standing provisions of the European Union, with which the Australian provisions share some functional similarities, expand this concept further in Article 13.1 of the European Union's *Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community*² (**the EU Regulations**):

"...Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work **for which there is insufficient due cause or economic justification other than the imposition of the duty**, and where there is evidence that the remedial effects of the duty are being undermined in terms of

¹ SEF No. 291, p.37.

² Official Journal L 056 , 06/03/1996 P. 0001 - 0020

the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

“The practice, process or work referred to in the first subparagraph includes, inter alia, the slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics, the consignment of the product subject to measures via third countries, the reorganisation by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the Community through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers...”

Indeed, the EU Regulations explore the question of timing further in Article 13.2 of the EU Regulations in relation to their equivalent provisions to subsection 269ZDBB(3) of the *Customs Act 1901 (the Act)* relating to the so-called “assembly of parts in third country” circumvention activity. In that case, the EU Regulation provides explicit guidance to the question of timing of the commencement of the circumvention activity:

“An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:

*(a) **the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation** and the parts concerned are from the country subject to measures...” [emphasis added]*

Applied to the circumstances of this case, it is clear that the commencement of the circumvention activity prior to the initiation of *Investigation No. 177* is satisfied.

To assess whether or not the circumvention goods have been slightly modified, reference is made to the non-exhaustive list contained in subsection 48(3) of the Regulations. Each criterion is considered in light of the evidence available for Qingdao below:

(a) each good’s general physical characteristics

On the evidence, the only truly modified physical characteristic to the circumvention goods is the amount of boron contained in the feed material used to produce the goods, specifically, an amount in excess of 0.0008% (the amount required to be classified in the tariff schedule as an ‘alloy steel’).

There is no evidence to support Senturion’s claim that this addition of boron would deliver a “lighter and stronger” product than standard (non-alloyed) HSS³.

The Commission has erred in considering the “high tensile strengths” reported in the test certificates submitted by Senturion and Qingdao as a measure of the lightness and strength of the alloyed HSS. This is inconsistent with Qingdao’s evidence in its response to exporter questionnaire, specifically that both “alloyed” and “non-alloyed” HSS exported to Australia were produced to the following standard:

“ASTM A 500 C350”⁴

The Commission has further erred in comparing test certificate results with “the minimum tensile strengths that ATM supplies its non-alloyed HSS to”⁵. The standard grade ASTM A 500 C350 specified

³ SEF No. 291, p.40.

⁴ EPR 291/018, p.25

⁵ SEF No. 291, p.40.

references the minimum yield strength required, i.e. 350 MPa. As CONFIDENTIAL ATTACHMENT A demonstrates, in order to achieve a required minimum yield strength of 350 MPa, the average actual (not minimum) yield strength is typically between [REDACTED] MPa to [REDACTED] MPa across a sample population (tested for the purposes of certification and quality assurance). In other words, higher yield strengths possibly observed in the submitted (not necessarily selected by the Commission) test certificates are a function of a typical test certificate range of values regardless of whether or not the HSS was alloy or non-alloy.

Indeed, in support of this assertion, as per Professor Dunne's Report, for the addition of the alloy to be effective as a strengthening agent, the alloy HSS will need to be quenched and tempered, and would then be expected to demonstrate:

"yield strengths typically above about 700 MPa and can be 1800 MPa or higher"⁶

Further, the Emeritus Professor states:

"Alloying with boron is only a valid strategy if it leads to a verifiable improvement in the properties of the steel. **This is unlikely to be the case for low C structural steels of moderate strength levels (yield strengths of 250-350 MPa)**, which exhibit excellent ductility and weldability. **Addition of boron will not increase the strength unless a QT type heat treatment is applied ...**" **[emphasis added]**

The evidence accepted by the Commission is:

"that the alloyed steel exported by Qingdao **is unlikely to be quenched and tempered**".⁸
[emphasis added]

Therefore, the conclusion is inescapable that the addition of boron would have no effect on the strength of the alloyed HSS as claimed by Senturion.

Furthermore, the expert opinion of Professor Dunne agrees with ATM, that the "strength" levels of the product are measured by their yield strength, not tensile strength as asserted by Senturion.

Clearly, it is not open to the Commission to conclude that the addition of boron has changed the good's general physical characteristics in any material, or relevant sense.

(b) each good's end use

There is no evidence before the Commission that there has been any change in the good's end use.

(c) the interchangeability of each good

Based on evidence considered by the Commission, the Commission considers that "both alloy and non-alloyed HSS exported by Qingdao XiangXing is likely to be used for the same end use of rural applications and there is a degree of interchangeability of that HSS."⁹

⁶ EPR 291/031, p. 7.

⁷ EPR 291/031, p. 12.

⁸ SEF No. 291, p. 40.

⁹ SEF No. 291, p. 42.

(d) differences in the processes used to produce each good

The evidence currently before the Commission is that the production processes are exactly the same for alloy and non-alloy HSS, and that the only modification is the addition of an amount of boron to the feedstock material.

(e) differences in the cost to produce each good

The evidence before the Commission is there is no “price or cost difference between the alloyed and non-alloyed HSS”.¹⁰

(f) the cost of modification

The evidence before the Commission is there is no “price or cost difference between the alloyed and non-alloyed HSS”.¹¹

(g) customer preferences and expectations relating to each good

There is no evidence supplied other than the mere unsubstantiated assertions of Senturion.

(h) The way in which each good is marketed

There is no evidence supplied other than the mere unsubstantiated assertions of Senturion.

(i) Channels of trade and distribution for each good

There is no evidence of any change in channels of trade and distribution.

(j) Patterns of trade for each good

Given that “the company did not provide a detailed sales listing **as requested**”¹² and exports from Qingdao “indicate that the goods, may be non-alloyed HSS resulting in a potential tariff misclassification”, the Commission cannot reliably make an assessment of patterns of trade.

(k) Pricing of each good

The evidence before the Commission is there is no “price or cost difference between the alloyed and non-alloyed HSS”.¹³

(l) Changes in the export volumes for each goods

The evidence supports the view that just prior to and since the commencement of *Investigation No. 177*, the pattern of trade for alloyed HSS has increased.

(m) Tariff classification and stat code for each good

¹⁰ SEF No. 291, p.40.

¹¹ SEF No. 291, p.40.

¹² SEF No. 291, p.38

¹³ SEF No. 291, p.40.

Non-alloy HSS (subject of the original notice) is classified to:

- 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37);
- 7306.61.00 (statistical codes 21, 22 and 23); and
- 7306.69.00 (statistical code 10).

Alloyed HSS is classified to:

- 7306.50.00 (statistical code 45) – circular; and
- 7306.61.00 (statistical code 90) – rectangular/square

Summary

The Commission's proposed conclusion in relation to Qingdao is based on a misunderstanding of the mechanical properties as they relate to specifications and the normal distribution of actual test results. It is clear that the use of alloys such as boron by Qingdao is not to provide a differentiated product from an end-use perspective but is commercially motivated to evade duties and is a circumvention activity.

If you have any questions concerning this letter, please do not hesitate to contact Mr Brett Willcox on (07) 3909 6130.

Yours sincerely



Brett Willcox