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Director Operations 4
Anti-Dumping Commission
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Review of measures applying to hollow structural sections exported by Dalian Steelforce from the Peoples Republic of China

This submission is made collectively on behalf of Dalian Steelforce Hi-Tech Co., Ltd., Steelforce Trading and Steelforce Australia, in response to the Anti-Dumping Commission's preliminary findings outlined in its Statement of Essential Facts Report No. 419 (SEF 419). Unless otherwise stated, these companies are collectively referred to as Steelforce throughout this submission.

1. Determination of profit

For the reasons outlined below, Steelforce rejects the Commission's preliminary finding that domestic sales of like goods in the ordinary course of trade existed to enable profit to be determined pursuant to subsection 45(2) of *Customs (International Obligations) Regulation 2015* (Regulation).

In constructing a normal value for the goods exported by Steelforce pursuant to 269TAC(2)(c) of the *Customs Act 1901* (the Act), subsection 269TAC(2)(c)(ii) of the Act requires that the constructed normal value include:

> '*on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export – such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale*'.

Subsection 45 of the Regulation outlines the methods to be followed in determining an amount of profit to be added to the constructed normal value. Subsection 45(2) of the Regulation provides:

> *The Minister must, if reasonably practicable, work out the amount by using costs relating to the production and sale of like goods by the export or producer of the goods in the ordinary course of trade.*

Given then that subsection 269TAC(2)(c)(ii) specifically operates under the assumption that the goods were sold for home consumption in the ordinary course of trade, to calculate a profit under subsection 45(2) of the Regulation, the following conditions must be satisfied:

1. the profit must relate to sales for home consumption in the country of export;
2. the profit must relate to sales of like goods; and
3. the profit must relate to sales made in the ordinary course of trade.

This interpretation is confirmed by the Commission in its submission to the Anti-Dumping Review Panel:

> *Subsection 269TAC(2)(c)(ii) requires,…, assumption to be made that the goods have been sold for home consumption in OCOT in the country of export.*

Further,

> *… the Commission reiterates that when constructing normal value, the Act mandates an assumption that the goods have been sold for home consumption in OCOT in the country of export…*

1.1 Sales for home consumption

Sales that are not for home consumption are not relevant to subsection 269TAC(2)(c)(ii) and therefore cannot be used as a basis for determining profit under Regulation 45(2).

The concept of "home consumption" is widely used in the Act but it is not defined. However, it has been considered in a number of Court cases, the most relevant of which is, O'Connor J's judgment in *R v Lyon*[1]. His Honour considered the meaning of this term in the context of a provision of the Act that dealt with customs control over goods, where such provision used the words "until delivery for home consumption or exportation". In this regard, he concluded that:

> *The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them.*

The concept that "home consumption" means "circulation" has been expanded upon in a number of cases. For example, in Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation[2] Sundberg J said:

> *…Justice O'Connor's reference to going into circulation was used to explain how effective security over goods is lost once they have entered home consumption. His Honour was not there describing the concept of delivery nor, more importantly, intending to limit its scope. He was drawing attention to the policy of the customs legislation and*

[1] R v Lyon, [1906] HCA 17; 3 CLR 770
[2] Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation, [2008] FCA 1951, para 143.

> *the importance of the customs authorities' having a form of security over imported goods to ensure the payment of duty. I agree with the Commissioner that Caltex's dedication of the residual oils for consumption by it at its premises is sufficient, in the sense O'Connor J had in mind, for the oils to "go into circulation".*

There is therefore a distinction between sales for "home consumption" - being sales into "circulation" - and sales that deliver goods into the control of customs.

This distinction is implicit in the architecture of the Act. This is evident in section 68(2) of that Act, dealing with importation of goods, which treats the entry of goods "for home consumption" and the "warehousing" of goods as separate and distinct concepts. A warehouse is essentially a bonded warehouse in which goods may be blended, packaged, manufactured or otherwise, subject to the terms of a warehouse licence. Goods that have been warehoused may then be entered for home consumption or exported.[3] Import duty is only payable on the goods when they are entered for home consumption. From this, it is clear that while goods are in the warehouse, they have not been entered for home consumption.

Applying the interpretation of home consumption where sales enter into circulation, in the context of Steelforce's sales, it is clear that they are not sales for home consumption.

As verified by the Commission, the relevant sales were made to a corporation located in the "Free Trade Zone" in [redacted], part of the larger [redacted]. The Free Trade Zone is more accurately described as an Export Processing Zone ("EPZ"). The primary law governing such areas is the Interim Measures of the Customs of the People's Republic of China on Supervision and Control of Export Processing Areas.[4] Of relevance are the following aspects of these measures:

- Article 27 deems goods that enter an EPZ from other areas of China to be exports, and requires them to undergo export declaration formalities and processes.
- Article 20 provides that goods manufactured by enterprises within the EPZ are to be exported out of China. Furthermore, they can only be transported to areas outside EPZ within China in "special circumstances".
- Article 17 deals with the treatment of goods imported into the EPZ. Article 17(3) provides that raw materials, spare parts, components, packing materials and material for productive consumption, which are needed for the production of the enterprises within the areas, shall be treated as "bonded goods".

This is analogous to the situation where goods are entered into a warehouse in Australia. It may be geographically located in Australia, however at the point of entry the goods have not been entered for home consumption. Similarly, goods that are sold to entities within an EPZ are not sold for home consumption but are instead legally recognised as exports.[5]

In addition, the following evidence verified by the Commission further confirms that the goods are recognised as export sales:

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[3] Section 99 of the Act.

[4] Interim Measures - Supervision and Control of Export Processing Areas

[5] The Xiamen Fengtai Bus and Coach International Co., Ltd website notes that it aims at international markets only, including Australia, New Zealand, Canada and the USA (http://ftbcibus.com/about/about.aspx).

- the sales into the Free Trade Zone are treated in the same way as exports to Australia and New Zealand by China Customs which is demonstrated by the requirement to prepare and submit all necessary export declarations and associated customs clearance processes, and incur a residual 'export' VAT of 8%;
- in order to sell into the Free Trade Zone, Steelforce is required to hold an applicable export licence, whereas other Chinese HSS producers that don't hold a similar export licence are unable to offer or sell their products into the Free Trade Zone; and
- sales to the customer in the Free Trade Zone are denominated in US dollars reflecting the export nature of the transactions. This contrasts to normal domestic sales which are required under Chinese law to be denominated in Renminbi.

For the reasons outlined above, Steelforce does not consider that its sales to the Free Trade Zone are sales for home consumption in China. Therefore, they are required to be excluded from the calculation of profit under subsection 45(2) of the Regulation.

1.2 Sales of like goods

Steelforce agrees with the Commission's preliminary finding that sales to the Free Trade Zone were like goods to the goods exported to Australia. The goods were prime quality HSS specified to the Australian standard AS1163.

1.3 Sales made in the ordinary course of trade.

Steelforce disagrees with the Commission's preliminary finding that sales into the Free Trade Zone were sales made in the ordinary course of trade.

The concept of OCOT is explained in section 269TAAD of the Act, which provides as follows:

> *(1) If the Minister is satisfied, in relation to goods exported to Australia:*
>
> *(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:*
>
> *(i) for home consumption in the country of export; or*
>
> *(ii) for exportation to a third country;*
>
> *at a price that is less than the cost of such goods; and*
>
> *(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;*
>
> *the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.*

Section 269TAAD is posed as a negative - it explains circumstances in which sales will not be considered to be in the ordinary course of trade. Section 269TAAD identifies two forms of transactions - being, those for home consumption in the country of export and those for exportation to third countries. This allows those transactions to be used to determine a normal value pursuant to subsections 269TAC(1) or 269TAC(2)(d) of the Act. In either case the transaction must be in the ordinary course of trade.

The determination of a normal value under subsection 269TAC(2)(c)(ii) is a proxy for a normal value under subsection 269TAC(1). As noted above, subsection 269TAC(2)(c)(ii) specifically operates under the assumption that the goods were sold for home consumption in the ordinary course of trade. This confirms Steelforce's view that sales cannot be considered to have been made in the ordinary course of trade, where those sales were not for home consumption.

In addition, section 269TAAD does not provide an exhaustive list of factors as to when sales will not be considered to be in the ordinary course of trade. This is confirmed by the Commission's policy and practice outlined in its Dumping and Subsidy Manual[6]:

> *The Commission accepts there can be a number of factors which can be taken into account when deciding whether sales are in the ordinary course of trade – not only sales at a loss, which is the subject of section 269TAAD.*

It adds:

> *Article 2.2.1 of the ADA states that sales below cost of production may be treated as "…not being in the ordinary course of trade by reason of price…", recognising there are other situations that might require a finding that sales are not in the ordinary course of trade. Depending on the circumstances, profitable sales may not be in the ordinary course of trade. These circumstances may include sample sales, promotional sales made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances.*

This is further supported by the Appellate Body in *US — Hot-Rolled Steel*[7], when looking into the meaning of 'sales in the ordinary course of trade':

> *We note that Article 2.2.1 of the Anti-Dumping Agreement itself provides for a method for determining whether sales below cost are 'in the ordinary course of trade'. However, that provision does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade', nor even the range of possible methods for determining whether low priced sales are 'in the ordinary course of trade'.*

Of relevance, the Appellate Body explained the importance of excluding sales not made in the ordinary course of trade from the calculation of the normal value:

> *…, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value.* [8]

To that end, Steelforce notes the following findings by the Commission which determined that sales into the Free Trade Zone were not made in the ordinary course of trade for reasons other than profitability.

Investigation 177

[6] ADC Dumping & Subsidy Manual – April 2017, page 32-33.
[7] Appellate Body Report, US – Certain Hot-Rolled Steel from Japan, WT/DS184/AB/R, para 147, page 53.
[8] Ibid, para 140, page 51.

Sales to Free Trade Zone were reported by Steelforce as third country export sales and were correctly regarded as not being domestic sales for home consumption by the Commission.

Duty assessment 24

Sales to Free Trade Zone were reported by Steelforce as third country export sales and were correctly regarded as not being domestic sales for home consumption by the Commission.

Duty assessment 42

Sales to Free Trade Zone were reported by Steelforce as third country export sales and were correctly regarded as not being domestic sales for home consumption by the Commission.

Duty assessment 49

Sales to Free Trade Zone were reported by Steelforce as third country export sales and were correctly regarded as not being domestic sales for home consumption by the Commission.

Review 285

Sales to Free Trade Zone were reported by Steelforce as third country export sales and were correctly regarded as not being domestic sales for home consumption by the Commission.

Duty assessments 59 and 71

Sales to Free Trade Zone were reported by Steelforce as third country export sales but were reclassified as domestic sales by the Commission. In any case, the Commission concluded:

> *The argument presented in point a) showed that Dalian Steelforce considered the sales to* [redacted] *to be not ordinary nor normal sales for home consumption in the domestic market, because the customer in the* [redacted] *is a manufacturer of* [redacted]*, and so the level of trade differs from Dalian Steelforce's normal operations and export sales which are generally sales to traders.*
>
> *The verification team considers that the issue (point a) raised by Dalian Steelforce along with the fact that the main focus of Dalian Steelforce's operations is to manufacture products for export to Australia and New Zealand is sufficient to conclude that these sales should not be considered to be in the ordinary course of trade.*

Review 379 / 381

Sales to Free Trade Zone were reported by Steelforce as third country export sales but were reclassified as domestic sales by the Commission. Consistent with its findings from duty assessments 59 and 71, the Commission concluded that these were not sales in the ordinary course of trade due to the nature of the sales, being at different levels of trade to the corresponding export sales and Steelforce's normal operations.

This was reinforced by the Commission in its submission to the ADRP where it endorsed its approach to including Steelforce's sales to the Free Trade Zone, for the purposes of calculating the profit pursuant to subsection 45(3)(a) of the Regulation, despite those sales being found to not have been made in the ordinary course of trade.

Current Review 419

Sales to Free Trade Zone were again reported by Steelforce as third country export sales but were reclassified as domestic sales by the Commission. Whilst the sales were considered to be domestic sales, the Commission was '*satisfied that Dalian's domestic sales are not in the ordinary course of trade.*' This is supported by appendix 4.1 to the Dalian Steelforce exporter visit report which contains the visit team's profit calculations, and includes the Free Trade Zone sales for the purposes of calculating profit pursuant to subsection 45(3)(a) of the Regulation, consistent with the Commission's profit determination in review 379.

The purpose of summarising the Commission's historical treatment of the Free Trade Zone sales is to highlight that these sales have always been found to not be in the ordinary course of trade either due to not being destined for home consumption or due to the nature of the sales not being 'normal' sales. The exclusion of these sales for the purposes of calculating profit pursuant to subsection 45(2) of the Regulation, has been consistent with the terms, circumstances or nature of sales to Free Trade Zone, which have remained unchanged since the original investigation (1 July 2010 to 30 June 2011).

That is:

- the sales continue to be made to [redacted], reflecting [redacted];
- the sales continue to incur a residual 'export' VAT of 8%;
- the sales continue to require Steelforce to hold an applicable export license;
- the sales invoices continue to be denominated in US dollars;
- the sales continue to be treated as third country exports in Steelforce's accounts; and
- the sales continue to legally be recognised as exports by China Customs.

Given then that none of the facts surrounding these sales to Free Trade Zone have changed over the past seven years, it is implausible that the Commission could now simply reverse its position and find that the sales are both destined for home consumption in the country of export, and possess characteristics representative of 'normal' domestic sales.

It is noted that SEF 419 simply confirms that profit was calculated on the basis of domestic sales of like goods sold in the ordinary course of trade, and provides no explanation or reasoning to support the Commission's preliminary finding. As the Minister's determination of profit is an essential and critical fact affecting Steelforce's dumping margin, Steelforce considers that it is prevented from specifically addressing and responding to the Commission's finding in this submission.

Nevertheless, Steelforce provides the following examples which it considers display similarities to the circumstances of its Free Trade Zone.

i) Review of measures (Case 354) - prepared or preserved tomatoes – Exporters: Calispa SpA and Princes Industrie Alimentari S.r.L

The Commission concluded that sales to domestic customers in Italy were not sold for home consumption on the basis that there was '*insufficient evidence to suggest that any prepared or preserved tomatoes sold in bright cans during the review period* ***were for domestic consumption in Italy***'.[9] This confirms that the location of the actual customer is not the determinative factor

[9] EPR 354, Record no. 047, page 11-12.

in deciding whether the sales were for home consumption. Instead the Commission gave greater weight to whether the goods were consumed domestically.

Applied to Steelforce's sales to the Free Trade Zone, the location of the customer within the geographic border of China is irrelevant for deciding whether the goods were consumed domestically or entered for home consumption. As explained earlier, Steelforce's HSS sales are treated as export sales by China Customs as the goods never enter the commerce of China.

ii) Investigation (Case 217) into prepared or preserved tomatoes – Exporter: La Doria S.p.A.

The Commission found that '*a significant proportion of its [La Doria] domestic sales were brite cans. La Doria informed us that for such sales it is not aware of the identity of the final customer, and it was not aware of whether the product was ultimately sold for home consumption in Italy or sold to an export market (including Australia). We consider that La Doria's sales of brite cans are therefore not relevant sales for the purpose of s. 269TAC(1) of the Act because we cannot be satisfied that the price paid or payable for like goods sold in such sales were in the ordinary course of trade for home consumption in the country of export.*'[10]

Again, notwithstanding that the Commission confirmed that La Doria's domestic sales of brite cans were legitimate transactions with domestic entities, it considered the final destination of the goods and the location in which they were consumed to be critical in determining whether they were actual sales made for home consumption in the ordinary course of trade. A similar interpretation in Steelforce's case would require disregarding the location of the customer and instead focusing on whether the goods enter the commerce of the export country.

iii) Investigation (Case 145) into Geosynthetic clay liners – Exporter: Naue GmbH & Co. KG

In this case the exporter claimed that the only suitable domestic like product was primarily one for export markets, was sold to only one distributor customer and represented an immaterial percentage of its total sales for the type of product. The exporter considered that those domestic sales had characteristics that were extraordinary for the market in question.

The commission considered the claim and found that the domestic like model was not routinely sold in the domestic market and was made to only one distributor customer. The commission concluded that "*those sales were not, by reason of those unusual circumstances, in the ordinary course of trade*".[11]

As highlighted above, Steelforce's sales to Free Trade Zone were:

- to a [redacted],
- reflected [redacted];
- the sales are treated as exports for the purposes of incurring residual 'export' VAT of 8%;

[10] EPR 217, Record no. 060, page 40.
[11] EPR 145, Record no. 013, page 37.

- the sales require the manufacturer to hold an applicable export license;
- the sales are denominated in US dollars which further confirms their export nature; and
- the sales are legally recognised as exports by China Customs.

iv) European Commission case examples

On a number of occasions, the EU has stated that "local export" sales in Korea are disregarded from the normal value determination for not being in the ordinary course of trade. A "local export" sale is a domestic transaction of the product from the producer to a domestic buyer, who uses the product as intermediary elements in the final product destined for export.

In deciding to impose dumping duties on polyester staple fibres exported from Korea[12], the EU concluded:

> *It is considered that the specific administrative arrangements applicable to the 'local export' sales, whereby they were not subject to domestic sales tax, were normally invoiced in USD and paid for by letters of credit and were subject to duty drawback arrangements, evidenced the fact that these sales were made through a specific export oriented sales channel with a particular market situation. The exporting producers concerned specifically identified these sales in their accounting records as being destined for incorporation in products for export. Given their particular market situation, it was concluded that such 'local export' sales were not made in the ordinary course of trade and therefore, that their inclusion in the normal value calculations would not permit a proper and fair comparison with the export price in accordance with Article 2 of the basic Regulation.*

Likewise, in its investigation into exports of polyethylene terephthalate film exported from Korea[13], the EU again held that 'local-export' sales were not sales in the ordinary course of trade:

> *Two sampled exporting producers reported as domestic transactions certain sales made to Korean manufacturing companies where ultimately the manufactured product was destined for export. It was argued that these sales should be treated as domestic sales as they were intended for domestic consumption. However, these sales were subject to administrative arrangements specific to export sales. They were not subject to domestic sales tax, they were often invoiced in US dollars and paid for by letters of credit, they were subject to (transferable) duty drawback arrangements and they were normally classified as local export sales in the companies' accounting records. In these circumstances, these sales could not be considered to have been made in the ordinary course of trade or permitting a proper comparison, and thus were not considered for the determination of normal value.*

Both of these cases provide clear parallels to the circumstances involving Steelforce's sales to the Free Trade Zone, in terms of the export nature of the particular sales

[12] Council Regulation (EC) No 2852/2000 of 22 December 2000, para 29.
[13] Council Regulation (EC) No 367/2001 of 23 February 2001, para 57.

transactions. Therefore, they are undeniably sales not made in the ordinary course of trade for home consumption.

Conclusion

Steelforce contends that there is ample evidence and information gathered by the Commission during this review and previous dumping inquiries to continue to conclude that Free Trade Zone sales were not sold in the ordinary course of trade as they possess characteristics which are not representative of 'normal' domestic sales. There is no new information presented in review 419 which would overturn the Commission's previous findings.

Besides the unusual nature of the Free Trade Zone sales, it is clear that they were not sales destined for home consumption in China. Instead they are for all intents and purposes, export sales. This renders them unsuitable for the determination of profit within the context of section 45 of the Regulation.

Therefore, on the basis that Steelforce's Free Trade Zone sales were not sold in the ordinary course of trade for home consumption, the Commission must confirm that profit is unable to be calculated pursuant to subsection 45(2) of the Regulation, as there are no such sales that comply with that provision. The Commission must therefore consider whether profit is able to be calculated under the alternative methodologies contained in subsection 45(3) of the Regulation.

In considering whether actual amounts realised by Steelforce from the sale of the same general category of goods in the domestic market is able to be calculated for the purposes of subsection 45(3)(a) of the Regulation, the Commission must comply with the recent decision of the Full Federal Court[14] which outlined its interpretation of 'actual amounts realised' as requiring '*attention to a real world figure that was actually realised*' and that the '*provision is focused on the determination of an actual amount realised in an actual defined period.*'.

As verified by the Commission, Steelforce continued to make sales of downgrade product amounting to [redacted] tonnes during the review period, whilst it only produced [redacted] tonnes of downgrade product during that same period. This confirms that the vast majority of domestic sales made by Steelforce during the review period was produced prior to the review period and subject to different production costs than those during the review period. Therefore, it is not possible to calculate the actual amounts realised by Steelforce during the review period.

It is noted that SEF 419 identifies the following interested parties as cooperating exporters of HSS from China:

- Huludao City Steel Pipe Industrial Co., Ltd.; and
- Tianjin Youfa Steel Pipe Group Co., Ltd.

[14] Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science [2018] FCAFC 20.

It is also noted that the Commission has determined profit for these cooperating exporters under subsection 45(2) of the Regulation, using profit from the domestic sales of like goods in the ordinary course of trade. This confirms that sufficient information exists for the Commission to identify the weighted average of the actual amounts realised by other exporters from the sale of like goods in the domestic market, required under subsection 45(3)(b) of the Regulation.

Steelforce therefore considers that profit to be included in its constructed normal values must be calculated under subsection 45(3)(b) of the Regulation, using the weighted average of the actual amounts realised by other exporters from the sale of like goods in the domestic market. In doing so, it is important to note that the Commission must include **all** domestic sales of like goods by these other cooperating exporters and not only those sales found to be in the ordinary course of trade.

In calculating an actual amount realised by other exporters, the Commission must comply with its policy interpretation and be guided by the WTO's interpretation of Article 2.2.2(ii) of the Anti-Dumping Agreement, which is mirrored in subsection 45(3)(b) of the Regulation. The WTO Appellate Body has found that the phrase "actual amounts incurred and realised" should be interpreted in the ordinary sense to include "*profits or losses actually realised by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin*".[15] The Appellate Body concluded that, when calculating the amount for profit under Article 2.2.2(ii), an authority may not exclude sales by other exporters or producers that are not made in the ordinary course of trade.[16]

Yours sincerely

John Bracic

[15] Appellate Body Report, European Communities – Anti-Dumping Duties on imports of Cotton-type Bed Linen from India, WT/DS141/AB/9, para 80.
[16] Ibid, para 84.