Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: Dalian Steelforce Hi-Tech Co., Ltd

Address: No.26 Number 2 Street DD Port, Dalian Development Zone, Liaoning, China

Type of entity (trade union, corporation, government etc.): Corporation

2. **Contact person for applicant**

Full name: Mr Rod Corkill

Position: Chief Executive Officer

Email address: rodc@Steelforce.com.au

Telephone number: 07 3900-6903

3. **Set out the basis on which the applicant considers it is an interested party**

Dalian Steelforce is the producer and exporter of hollow structural sections from the Peoples Republic of China.

4. **Is the applicant represented?**

Yes

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☒Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The description of certain hollow structural sections (HSS) exported from China, Korea, Malaysia and Taiwan that are subject to:

Certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections. Normally referred to as either CHS (circular or oval hollow sections) or RHS (rectangular or square hollow sections) collectively referred to as hollow structural sections (HSS).

Finish Types include:

- Galvanised (including in-line galvanised, pre-galvanised or hot-dipped galvanised); or
- Non-galvanised (including, but not restricted to, painted, black, lacquered or oiled finishes).

Sizes include:

- Circular products with an outside diameter exceeding 21 mm up to and including 165.1 mm; or
- Oval, square and rectangular products with a perimeter up to and including 1277.3 mm.

The following categories of HSS are excluded from the application:

- Conveyor tube made for high speed idler rolls on conveyor systems with inner and outer fin protrusions removed by scarfing (not exceeding 0.1 mm on outer surface and 0.25 mm on inner surface), and out of round standards (i.e. ovality) which do not exceed 0.6 mm in order to maintain vibration free rotation and minimum wind noise during operation;
- Precision RHS with a nominal thickness of less than 1.6 mm; and
- Air heater tubes to AS 2556.

7. Provide the tariff classifications/statistical codes of the imported goods

- 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37)
- 7306.61.00 (statistical codes 21, 22, 25)
- 7306.69.00 (statistical code 10)

8. **Provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice 2017/70 is attached at **Attachment A**.

9. **Provide the date the notice of the reviewable decision was published**

The attached ADN 2017/70 was published on 26 June 2017.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☐

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

Please refer to **Attachment B**.

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

Please refer to **Attachment B**.

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

Please refer to **Attachment B**.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: JOHN BRACIC

Position: DIRECTOR

Organisation: J.BRACIC & ASSOCIATES PTY LTD

Date: 25th July 2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: Mr John Bracic

Organisation: J.Bracic & Associates Pty Ltd

Address: PO Box 6203, Manuka, ACT 2603

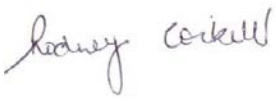
Email address: john@jbracic.com.au

Telephone number: +61-0499056729

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: 

Name: Rod Corkill

Position: Chief Executive Officer

Organisation: Dalian Steelforce Hi-Tech Co., Ltd

Date: 25/7/2017

J.BRACIC & ASSOCIATES
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25 July 2017

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

Review of a decision by the Minister in relation to the continuation of anti-dumping measures – Hollow structural sections exported by Dalian Steelforce Hi-Tech Co., Ltd

1. INTRODUCTION

Dalian Steelforce is registered as a liability limited company (wholly owned foreign enterprise) under the laws of China. Dalian Steelforce is effectively owned by Steelforce Australia Pty Ltd ("Steelforce Australia"), a private company incorporated under the Corporations Act 2001. Dalian Steelforce is the manufacturer and exporter of the goods subject to the anti-dumping measures.

Steelforce Trading Pty Ltd ("Steelforce Trading") is also a wholly owned subsidiary of Steelforce Australia, and operates in the Australian market as an importer/trader. Steelforce Trading purchases the subject goods from Dalian Steelforce and then on-sells the goods to Steelforce Australia and other unrelated Australian customers.

Steelforce Australia is an Australian distributor of the subject goods and other steel products, operating distribution centres out of various locations in Australia.

2. REASONS FOR BELIEVING THAT THE REVIEWABLE DECISION IS NOT THE CORRECT OR PREFERABLE DECISION.

Dalian Steelforce seeks a review of a following findings and conclusions which led to the negative preliminary decision by the Commissioner of the Anti-Dumping Commission:

- Finding 1: The Commission erred in determining a deductive export price;
- Finding 2: The Commission erred in treating free-trade zone (FTZ) sales as domestic sales for the purposes of calculating profit;

- Finding 3: The Commission erred in not treating HSS downgrade domestic sales as like goods and excluding those sales from the calculation of profit; and
- Finding 4: The Commission erred by not determining SG&A costs on the basis of information from the records of the exporter or producer of like goods; and
- Finding 5: The Commission erred by not determining profit on the basis of domestic sales of the same general category of goods by the exporter or producer; and
- Finding 6: The Commission erred in not determining costs in the country of export.

2.1 Finding 1: The Commissioner erred in determining a deductive export price.

In REP 379, the Commission concluded that Dalian Steelforce's export price should be calculated using a deductive export price methodology on the basis that prices between Dalian Steelforce, Steelforce Trading and Steelforce Australia were not arms length prices. The Commission supported this recommendation by stating:

> *Applying the criteria of section 269TAA in examining the arms length nature of these transactions, the Commission is satisfied that prices between entities in the Steelforce group appear to be influenced by the commercial relationships between these entities.*
>
> *Specifically, the Commission has found that;*
>
> - *Dalian Steelforce and Steelforce Australia are related entities, as Steelforce Australia is the owner of Dalian Steelforce;*
> - *there is a high degree of coordination between Steelforce Trading, Dalian Steelforce and Steelforce Australia;*
> - *it is clear that Steelforce Australia management understands the implications of internal transfer pricing within the Steelforce group regarding its potential liabilities for duties under anti-dumping measures; and*
> - *only one of the verified shipments was sold profitably by the importer and therefore it is reasonable to consider all shipments overall were unprofitable.*

The Commission's non-arms length finding also appears to be based on its observations of price comparisons outlined in the Commission's exporter visit report (**Confidential Attachment C**)[3]:

> *Specifically, the verification team made the following observations about the commercial relationship between the buyer (Steelforce Trading) and the seller (Dalian Steelforce):*
>
> - *Dalian Steelforce and Steelforce Trading are related parties as the ultimate owner of both companies is Steelforce Australia (as explained in section 3.5 above).*
> - *Given that the verification team concluded that sales to* [redacted] *(as a buyer) were arms length, the verification team compared the average sales price to* [redacted] *with the average sale price to Steelforce Trading. While the volumes*

[3] Dalian Steelforce exporter verification report, page 15.

> *of sales to [redacted] was less than [redacted]% of the volume of sales to Steelforce Trading during the [redacted] importation period, the average sale price to [redacted] was [redacted] % lower for [redacted] and [redacted]% lower for [redacted]. This is unusual as high volume customers usually attract lower purchase prices. This indicates that the price of sales to Steelforce Trading are potentially being influenced by the commercial relationship and being set higher (in order to meet or exceed the AEP) than would be able to be achieved if more sales were to unrelated customers, like [redacted].*

Dalian Steelforce strongly disputes the Commission's finding and reasoning that its inter-company transactions reflect non-arms-length transactions, and contends that the Commission erred in its assessment by overlooking the key elements of non-arms length transactions.

The Commission correctly concluded after its extensive examination and verification of the entire Steelforce Group financial accounts and inter-company transactions, that there is no evidence of either '*any consideration payable for or in respect of the goods other than their price*', or that '*the buyer, or an associate of the buyer, was directly or indirectly reimbursed, compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price*'[4].

Instead, the Commission has relied on evidence which it considers demonstrates that '*the price was influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller.*' The evidence relied upon by the Commission was a comparison of average purchase prices by the related entity, Steelforce Trading, and the unrelated entity, [redacted], which showed that '*the average sale price to [redacted] was [redacted]% lower for [redacted] and [redacted]% lower for [redacted].*' The Commission considered that this was an indication *'that the price of sales to Steelforce Trading are potentially being influenced by the commercial relationship and being set higher (in order to meet or exceed the AEP) than would be able to be achieved if more sales were to unrelated customers, like [redacted].'*

A review of the export sales information relevant to the Commission's analysis shows that:

- export sales by Dalian Steelforce to [redacted] were denominated in [redacted];
- export sales by Dalian Steelforce to Steelforce Trading were denominated in [redacted];
- after converting the sales to [redacted] to [redacted], a comparison of the free-on-board export prices reveals that the selling prices to [redacted] were substantially higher than the corresponding prices to Steelforce Trading, not lower as the Commission's analysis suggests.

Therefore, Dalian Steelforce submits that the Commission's analysis is flawed and contains errors as it incorrectly compares export prices denominated in different currencies. When converted to [redacted], the evidence shows that sales to Steelforce Trading were

[4] Ibid., page 14.

substantially lower than those equivalent sales to [redacted]. The observed lower selling prices to Steelforce Trading supports the view by the Commission that '*high volume customers usually attract lower purchase prices*'. On that basis, the Commission's finding is unsupported.

Further, the mere fact that the Steelforce entities are related is not sufficient to consider the transactions to be non-arms length. This is supported by the statement made by Lockhart J[5] '*[m]erely because parties themselves are not arm's length does not support the conclusion that they may not be engaged in transactions at arm's length*'. This is further supported by the Commission's own policy which states:

> *… the mere fact parties are associated – and in a legal sense not at arms length – is not taken to automatically mean that they cannot be engaged in arms length transactions. In assessing whether these transactions between related parties are at arms length, the Commission looks beyond the legal or functional relationship between the parties and determines whether they deal with each other as arms length parties would have and arrived at an outcome that is the result of real bargaining.*

The key assessment then is whether the transactions are a result of real bargaining. The Commission's Dumping and Subsidy Manual provides guidance on certain factors for assessing whether real bargaining has occurred.

> *There is a range of identified factors that are relevant when assessing whether a transaction is the result of real bargaining, and these can vary between cases because of different circumstances. Relevant factors can include:*
>
> - *whether or not negotiation has taken place between the buyer and seller;*
> - *the manner in which the prices were determined as a result of that negotiation;*
> - *whether those prices are comparable to those arrived at by parties that are at arms length;*
> - *whether the margins made by the parties to the transaction are comparable to those made by parties that are at arms length.*

A review of SEF 379, REP 379 and the relevant exporter and import visit reports reveals that the Commission did not undertake any such assessment, other than the price analysis involving [redacted] highlighted above, which is demonstrated to be erroneous. Without any meaningful analysis to address the factors outlined above, the Commission appears to have breached its own policy and simply relied on the fact that the parties are related.

Instead, Dalian Steelforce provided the Commission with ample explanation and evidence to reasonably demonstrate that negotiated prices between the related Steelforce businesses are indicative of arms-length transactions between unrelated parties. This includes:

- Negotiation: [redacted]

[5] Castle Bacon Pty ltd v Comptroller-General of Customs (1995) 38 ALD 230, page 236.

[redacted];

- Price setting mechanism: [redacted];
- Prices: [redacted];
- Margins: [redacted].
- Accounting practices: [redacted].

Further, it is also worth noting that the Commission has previously found the transactions between Dalian Steelforce, Steelforce Trading and Steelforce Australia to be arms-length in the original investigation, each review and duty assessment since the imposition of the measures. Given that none of the relationships, functions, price setting mechanisms or export circumstances have changed since the original investigation, it is incomprehensible that the Commission would now consider that selling prices are affected by the relationships between the parties.

Therefore, Dalian Steelforce contends that the Commission's finding that its export sales to Steelforce Trading are non-arms length are unsupported and inaccurate.

2.2 Finding 2: The Commission erred in treating free-trade zone (FTZ) sales as domestic sales for the purposes of calculating profit

As verified by the Commission during the original investigation (REP 177) and subsequent duty assessments and reviews, Dalian Steelforce continued to make a small parcel of prime HSS sales to a single customer located in the [redacted] (FTZ). That particular customer [redacted], with its manufacturing operations located in a free trade export processing zone.

The HSS goods sold by Dalian Steelforce to this customer in the FTZ never effectively enter the commerce of the domestic market and are therefore not sold for home consumption. This is consistent with the Commission's conclusion and treatment of such sales in the original investigation (Case 177), reinvestigation (Case 203), subsequent reviews (Review 285) and subsequent duty assessments, as third country exports and not domestic sales. In each of those inquiries, the Commission did specifically consider the FTZ sales and agreed to treat them as third country export sales and not domestic sales for the purposes of calculating profit.

In the current expiry review subject of the application, the Commission retreated from its previous findings and instead concluded that FTZ sales should be treated as domestic sales that enter the commerce of China. In considering whether such sales were 'ordinary' sales for the purposes of establishing profit pursuant to subsection 45(2) of *Customs (International Obligations) Regulation 2015* (Regulation), the Commission held that the FTZ sales were not made in the ordinary course of trade due to:

- the FTZ customer [redacted] and those sales being made at a different level of trade from Dalian Steelforce's normal operations and export sales which are to traders; and
- the FTZ sales differ generally from the main focus of Dalian Steelforce's operations which is to manufacture products for export to Australia and New Zealand.

Notwithstanding the Commission's view that these FTZ sales were not sales made in the ordinary course of trade, the Commission nonetheless considered the profits from such sales to be relevant for determining profit pursuant to subsection 45(3)(a) of the Regulations.

Dalian Steelforce agrees with the Commission's view and assessment that sales of like goods to the FTZ are not sales made in the ordinary course of trade which would allow profit to be determined pursuant to subsection 45(2) of the Regulation. However, for the reasons outlined below, Dalian Steelforce contends that the Commission's approach of then relying on the profit from such non-ordinary sales in constructing normal values to be incorrect and not preferable.

In considering which of the alternative methods for establishing profit set out in subsection 45(3) of the Regulation is appropriate, Dalian Steelforce submits that the primary purpose of constructing normal value pursuant to subsection 269TAC(2)(c) of the Act, is to approximate the price of the like product (i.e. the exported product) if that product was to be sold in the ordinary course of trade in the domestic market. This is confirmed by the legislation which states:

> *the normal value of the goods for the purposes of this Part is:*
>
> *(c) except where paragraph (d) applies, the sum of:*
>
> *(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*
>
> *(ii) 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*

This is supported by the relevant WTO jurisprudence which makes clear the intention of the profit ascertainment method that is implemented by the regulation concerned. The WTO Panel in *Thailand — H-Beams*[6] stated:

> *…this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.*

In EC — Bed Linen[7], the Panel stated:

> *… Paragraphs (i)–(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule …*

Dalian Steelforce reiterates then that the constructed normal value is intended to represent a selling price as close as possible to what could be expected to be the price of the like product sold in the ordinary course of trade in the domestic market. Given that the Commission had determined that Dalian Steelforce did not have any domestic sales which were found to be in the ordinary course of trade, and the profits from such sales were not suitable or appropriate for determining profit under subsection 45(2)(a) of the Regulations, it was then incompatible for the Commission to consider that those same profits are suitable for determining profit under subsection 45(3)(a) of the Regulations.

As presented to the Commission, this interpretation of establishing a profit which best approximates a domestic sale made in the ordinary course of trade was the basis for the Commission's finding in Reinvestigation Report 203 (REP 203) and the Commission's preliminary finding in Statement of Essential Facts Report 285 (SEF 285).

REP 203 states:

> *… in the case of Dalian Steelforce, the original investigation found that after having regard to the nature and volume of Dalian Steelforce's remaining profitable domestic sales, Customs and Border Protection considered those sales were not made in the ordinary course of trade. In constructing normal values for Dalian Steelforce, REP177 determined that the appropriate rate of profit was "the average net profit from domestic sales made in the ordinary course of trade by the other selected cooperating exporters from China".*

SEF 285 concluded:

> *Subsection 45(3)(a) of the Regulations provides that the Minister can use the actual amounts of profit realised by the exporter from the sale of the same general category of*

[6] Panel Report, Thailand – H-Beams, WT/DS122/R, para 7.112, p 34.
[7] Panel Report, EC – Bed Linen, WT/DS141/R, para 6.60, p 21.

> *goods in the exporter's domestic market. Dalian Steelforce does not have any domestic sales of the same general category of goods during the review period that are considered suitable for the purpose of establishing a profit on domestic sales.*

Therefore, Dalian Steelforce contends that the inclusion of FTZ sales found to not be in the ordinary course of trade in the Commission's calculation of profit for constructing normal values, does not achieve the objective of constructing normal value that approximates the price of the like product (i.e. the exported product) if that product was to be sold in the ordinary course of trade in the domestic market.

2.3 Finding 3: The Commission erred in not treating HSS downgrade domestic sales as like goods and excluding those sales from the calculation of profit.

Dalian Steelforce contends that the Commission has erred in finding that mixed downgrade HSS products are not like goods and not the same general category of goods to the goods exported to Australia and to the other downgrade HSS products sold domestically. Before setting out its reasons for disputing the finding, Dalian Steelforce wishes to again clarify and provide an overview of the nature of its downgrade domestic sales. This is important as the Commission continues to overlook and ignore information and evidence presented, even after verifying and confirming through an on-site inspection of Dalian Steelforce's manufacturing facility.

Dalian Steelforce grouped and reported its downgrade HSS sales into three categories 'pregal downgrade', 'NOPC downgrade' and 'mixed downgrade' products. In previous inquiries, these products were classified into two categories which were referred to as 'non-prime' and 'downgrade'. The reason for the change in terminology for the expiry review was to avoid further apparent confusion from the Commission that appeared to elevate the attributes of non-prime product, when in fact they were simply downgraded HSS product where the finish was able to be identified in its sales system. Whereas goods previously identified as downgrade HSS were mixed downgrade products which did not allow for the identification of finish.

As demonstrated to the Commission during its inspection of Dalian Steelforce's production facility and manufacturing process, [redacted].

[redacted].

[redacted].

[CONFIDENTIAL DETAILS OF MANUFACTURING OPERATIONS]

Each of the points listed above was explained and shown to the Commission during the verification visit where possible, and where relevant, evidence was also provided.

Therefore, the current descriptions of downgrade and mixed-downgrade more accurately reflect that all domestic sales of HSS are downgrade product, with some sales allowing for the identification of finish and others being of a mixed variety that does not allow for the identification of finish. Importantly, in terms of their physical, commercial and functional characteristics, all downgrade products are similar and each possesses defects which prevent them from complying with the Australian standard and being exported to Australia.

All downgrade products sold domestically possess defects that fall into one or more of the following three categories:

- [redacted];
- [redacted]; and
- [redacted].

Whilst it is correct that downgrade products fall within a spectrum of defects, it is incorrect and unjustified for the Commission to conclude that mixed downgrade products '*contain more significant defects than others*'[8]. Dalian Steelforce strongly disputes this statement as there is no evidence to support it and notwithstanding Dalian Steelforce's request, the Commission has been unable to identify the information it has relied upon to make this conclusion. Instead, that statement appears to rely solely on [redacted] which

[8] Dalian Steelforce exporter verification report, page 9.

the Commission considers '*indicates that these are likely the goods with greater physical defects and therefore* [redacted].'[9]

Dalian Steelforce again reiterates that [redacted]. There is no effort made by Dalian Steelforce to individually sort orders or purchases of downgrade product into different degrees of defects.

The Commission also concluded that mixed downgrade products were not like goods on the basis that they '[redacted]'[10]. This again is simply not correct and misleading, as there were, in fact, [redacted]. This included the following customers:

- [redacted];
- [redacted]; and
- [redacted].

Further, the Commission's statement that it is 'unlikely' confirms that it is basing its conclusion on mere conjecture and with no real evidence.

It appears to Dalian Steelforce that the Commission is also placing weight on [redacted]. **[Confidential production, selling and accounting information]**.

Importantly, as the Commission verified during its interrogation of Dalian Steelforce's sales and financial accounting system, downgrade and mixed downgrade HSS products are [redacted]. **[Confidential production, selling and accounting information]**.

[9] Ibid.,
[10] Ibid.,

Dalian Steelforce considers that in the absence of any evidence being requested or collected by the Commission during its verification visit, it has incorrectly applied a broad assumption that the customer name determines the end use. This is incorrect and again the Commission has failed to identify the information it has relied upon to make this conclusion. Instead, the Commission has again simply assumed that mixed downgrade are 'unlikely' to be used in the same functional and commercial manner as the exported goods, with no reference to information or evidence relied upon.

The Commission also appears to place substantial weight on the fact that downgrade sales were identified by their finish on the corresponding VAT invoice, whilst mixed downgrade was simply referenced as 'downgrade' on the equivalent VAT invoices. Dalian Steelforce is confused by the relevance of this distinction given that the Commission has verified and confirmed that all domestic sales, regardless of their description on the invoice, were downgrade products and were recorded as downgrade HSS in its accounts. As explained and demonstrated to the Commission on numerous occasions, the lack of finish information on the VAT invoice for mixed downgrade sales is simply a function of the mixed bundling and loading of various finishes, and the fact that the volumes are insignificant which makes the importance and relevance of recording total number of pieces or tonnes for each finish inconsequential.

Fundamentally though, it is apparent that the Commission's rejection of the mixed downgrade is primarily driven by its observance [redacted].

As a prime example of the Commission's unsound and unjustified method to determining which domestic sales were to be included in its calculation of profit based on sales in the same general category of goods, the exporter visit report[11] highlights instances where the Commission has simply reclassified and renamed sales of NOPC and pre-galvanised downgrade to mixed downgrade on the basis of [redacted]. These are sales which have been verified by the Commission as being legitimately and corrected classified as downgrade sales in Dalian Steelforce's accounting records and as a consequence falls within the parameters of the same general category of goods as defined by the Commission. Yet the Commission has ignored or overlooked the verified evidence and its own findings and simply altered the description of certain verified domestic sales in the submitted sales listing to incorrectly reflect "mixed downgrade".

The Commission's explanation contained in the relevant comments inserted in the normal value calculations further highlighted that the amendments were not based on actual

[11] Ibid, pages 20-21.

evidence but instead on mere conjecture or unsupported assumptions. Refer to **Confidential Attachment D**.

These amendments by the Commission to Dalian Steelforce's reported domestic sales information are clear examples that the Commission has not relied on its like goods framework for assessing whether domestic downgrade HSS sales are like goods. As explained and demonstrated, the descriptions assigned to Pregal and NOPC downgrade are driven by [redacted]. Therefore, Dalian Steelforce considers the Commission's finding that mixed downgrade is not 'like goods' and not 'the same general category of goods' on the basis of price to be flawed.

In order to properly determine whether products have characteristics closely resembling each other, the factors outlined in the Commission's like goods framework are required to be assessed. The Commission appears to have undertaken this assessment for Pregal and NOPC downgrade products but not so for mixed downgrade. Instead, it is apparent that the finding of mixed downgrade not being like goods stems predominantly from [redacted].

Dalian Steelforce considers that had the Commission applied its like goods framework to mixed downgrade products, it would have demonstrated no difference between downgrade and mixed downgrade sales. Dalian Steelforce submitted its assessment of the like goods framework to assist the Commission in identifying the similar characteristics.

i) **Physical likeness**: all domestic downgrade is similar in that it possesses the same size, weight, grade, strength, shape of the corresponding exported goods of the same type. In exactly the same way as the downgrade products, mixed downgrade differs to the exported goods stemming from possible issues with appearance such as [redacted];

ii) **Commercial likeness**: all domestic downgrade products are commercially like as they are sold into similar markets and compete directly with comparable HSS products;

iii) **Functional likeness**: all domestic downgrade is functionally similar as they are used in similar end-use applications and able to be substituted to perform similar functions; and

iv) **Production likeness**: identical as all downgrade is produced in the same manner as the exported goods as they are originally intended to comply with relevant Australian standards.

It is apparent then that all downgrade products are like goods to the exported goods. There is no scope to consider that products are not 'like' and do not possess characteristics closely resembling each other based purely on [redacted]. Therefore, Dalian Steelforce contends that the Commission has erred in concluding that 'mixed downgrade' HSS

products are not like goods or the same general category of goods, and erred in excluding such sales from the determination of profit under subsection 45(3)(a) of the Regulation.

2.4 Finding 4: The Commission erred by not determining SG&A costs on the basis of information from the records of the exporter or producer of like goods.

In constructing normal values pursuant to subsection 269TAC(2)(c) of the Act, the Commission states in REP 379[12]:

> *The Commission has worked out an amount for SG&A costs under subsection 44(2) of the Regulation. The Commission calculated a weighted average SG&A cost using the information set out in Dalian Steelforce SG&A records relating to sales of like goods during the inquiry period.*

As evidenced from the Commission's calculations, the above statement is incorrect and does not accurately reflect the basis on which the Commission calculated the amounts for SG&A. As demonstrated below, the actual approach adopted by the Commission for calculating the amounts for SG&A costs is inconsistent with the requirements of the Act.

Subsection 44 of the Regulations sets out the manner upon which the Minister must work out an amount to be the SG&A costs associated with the sale of like goods in a country of export. Subsection 44(2) of the Regulation requires that:

> *If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) reasonably reflect the administrative, general and selling costs associated with the sale of the like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.*

Given that the Commission stated in REP 379[13], that it '*is satisfied that Dalian Steelforce is the exporter of the goods*' (emphasis added), and found that the conditions of subsection 44(2) had been met, the Commission was obliged to recommend to the Assistant Minister that he determines the amount of SG&A costs using information from Dalian Steelforce's records.

Whilst REP 379 indicates that the Commission and the Assistant Minister complied with the Regulations in determining the amounts of SG&A on the basis of information set out in Dalian Steelforce's records, the exporter visit report and associated dumping calculations clearly show that this was not the case. Instead, the Commission inexplicably disregarded

[12] REP 379, page 22.
[13] Ibid., page 20.

Dalian Steelforce's SG&A costs incurred and relied solely on information from [redacted].

By way of background, [redacted].

In determining the amount of SG&A costs associated with the sale of like goods, the Commission used only [redacted]. By disregarding the SG&A costs of Dalian Steelforce even though the conditions of subsection 44(2) of the Regulations had been satisfied, the Assistant Minister had clearly breached his obligation to '*work out the amount by using the information set out in the records*' of the '*exporter or producer of the like goods*'. As [redacted] was neither found to be the producer or the exporter of the goods, it was not open to the Commission to recommend to the Assistant Minister that the amount of SG&A costs to be added to the constructed normal value, should be referenced to SG&A expenses incurred by Dalian Steelforce's domestic customer.

2.5 Finding 5: The Commission erred by not determining profit on the basis of domestic sales of the same general category of goods by the exporter or producer.

In constructing normal values pursuant to subsection 269TAC(2)(c) of the Act, the Commission states in REP 379[14]:

> *The Commission has calculated an amount for profit under subsection 45(3)(a) of the Regulation. The Commission calculated an amount of profit using actual amounts realised by Dalian Steelforce from the sale of the same general category of goods in the domestic market in the country of export.*

This statement is incorrect and does not accurately reflect the basis upon which the Commission calculated the amounts for profit. As demonstrated below, the actual approach adopted by the Commission for calculating profit is inconsistent with the requirements of the Act.

Subsection 45(3) of the Regulations sets out that, in determining profit pursuant to subsection 45(3)(a) of the Regulations, the Minister must work out the amount by:

[14] Ibid., page 23.

(a) identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export the Minister;

As highlighted earlier, the Commission was satisfied that Dalian Steelforce was the exporter of the goods and found that it had made domestic sales of the same general category of goods. Given that the Commission had sufficient information to identify the actual amounts realised by Dalian Steelforce on its sales of same general category of goods, the Commission was obliged to recommend to the Assistant Minister that he determines the amount of profit using actual amounts realised by Dalian Steelforce from the sale of the same general category of goods in the domestic market of the country of export.

Whilst REP 379 indicates that the Commission and the Assistant Minister complied with subsection 45(3) of the Regulations in determining the amount of profit on the basis of Dalian Steelforce's sales of the same general category of goods in the domestic market respectively, again the exporter visit report and associated dumping calculations clearly show that this was not the case. The Commission instead disregarded actual amounts realised by Dalian Steelforce on its sales [redacted].

As explained earlier, [redacted]. Whilst neither the exporter visit report or REP 379 provide any explanation or reasoning for the Commission's approach, it is assumed that the Commission has disregarded the profit achieved by Dalian Steelforce on those sales as it has opted to 'collapse' [redacted] for the purposes of constructing the normal value.

If that is indeed the Commission's justification then Dalian Steelforce contends that the Commission has erred. The issue of collapsing two or more separate legal and corporate entities for the purposes of identifying a joint or group exporter was considered and addressed by the Anti-Dumping Review Panel (ADRP) in its review of steel reinforcing bars exported from Korea, Singapore, Spain and Taiwan[15]. The ADRP held that domestic legislation governing Australia's anti-dumping framework did not explicitly provide for the grouping or collapsing of companies.

Whilst it is again unclear as to why the Commission considered it appropriate to collapse the separate legal entities in this case, it appears that their only basis for doing so was that [redacted]. However, this is clearly not sufficient for considering that [redacted] entities are joint exporters of the goods, let alone justification for collapsing and treating them as a single common exporter.

[15] ADRP Report No. 34, paras 49-85.

This is especially so in these circumstances given that [redacted]. As the ADRP noted, *'[n]othing in the case law or in the legislation would indicate that the exporter could be other than the legal entity which has truly exported the goods.'*

Further, the ADRP highlighted:

> *One difficulty with an interpretation of the legislation to allow the approach taken by the ADC is that it would mean giving different interpretations to the term "exporter" for different purposes. It would mean, for example, that Nervacero is an exporter for the purpose of s.269TAB but not for s.269TACB. Under Australian law, legislation must be construed so far as possible to give the same meaning to the same words wherever they appear in a statute.*

This is especially relevant in this case given that the Commission applies a different interpretation and approach to determining the exporter for the purposes of establishing export price under subsection 269TAB, establishing normal values under subsection 269TAC, and the components of the constructed selling prices including amounts for SG&A under subsection 44 and amounts for profit under subsection 45 of the Regulations.

For these reasons and consistent with the ADRP's interpretation that collapsing of entities is not provided for, under domestic legislation, Dalian Steelforce contends that the Commission's identification of the 'exporter' in subsection 45(3) of the Regulations is not correct or preferable. Accordingly, the Commission erred in disregarding the amounts actually realised by Dalian Steelforce on its sales of the same general category of goods in determining the profit to be included in the constructed normal values.

2.6 Finding 6: The Commission erred in not determining costs in the country of export.

Summary/overview of ground

Dalian Steelforce disagrees with the substitution of its costs for hot-rolled coil (HRC) with a benchmark cost for HRC based on a basket of costs from third countries being Korea, Malaysia and Taiwan ("the benchmark") in the determination of its normal value. Dalian Steelforce submits that the use of the benchmark is not the correct or preferable decision. It is an error of law in determining *"the cost of production or manufacture of the goods in the country of export"* within s 269TAC(2)(c)(i) of the Act not to use costs in or of China.

In Report 379, the Commission worked out the normal value under subsection 269TAC(2)(c) of the Act, on the basis of the costs of production of HSS, selling general and administrative costs, and profit. This method was adopted as the Commission considered that the situation in the domestic Chinese HSS market was such that sales in that market were not suitable for use in determining a price for normal value purposes under subsection 269TAC(1) of the Act.

In working out the normal value in this way, the Commission did not use Dalian Steelforce's HRC cost as set out in its financial records. Instead, the Commission substituted what it referred to as a 'benchmark' cost for HRC into Dalian Steelforce's costs to produce HSS. In Report 379, at paragraph 7.4.3 on page 19, the Commission recommended to the Parliamentary Secretary that it was appropriate to use a similar benchmarking method to that following in Investigation 177 and Reviews 265 and 266. In Investigation 177, the costs of HRC were replaced with what the Commission considered to be a competitive market cost for HRC by reference to a benchmark determined by average domestic HRC costs derived from Korea, Malaysia and Taiwan.

Properly construed, subsection 269TAC(2)(c) of the Act requires the Commission to determine the cost of production of HSS in China. And so, by substituting an HRC cost representing the average costs of production in other countries, the Commission did not properly or lawfully apply subsection 269TAC(2)(c) of the Act.

Section 269TAC – methods available to work out normal value

Under the Act, subsection 269TAC makes provision for the determination of the normal value of exported goods. Methods for assessing normal value follow a certain hierarchy and are contained in subsections (1), (2), (4), (5D), and (6) of Section 269TAC. We outline the effect of each of these subsections as now follows:

- Subsection (1) directs attention to the price paid for like goods in the ordinary course of trade in the country of export that are arms' length transactions.
- Subsection (2) is available when the Minister reaches a state of satisfaction of a specified kind to the effect that the method in subsection (1) cannot be used, in which case two alternative methods become available to the Minister to determine normal values: see ss.269TAC(2)(c) and (d). The first of these methods empowers the Minister to construct a normal value in a particular manner, using the costs of production, regulated by subsection (5A) and the regulations implicitly picked up therein. The second of these methods looks to the price paid for like goods sold for exportation from the country of export to a third country determined by the Minister.
- Subsection (4) provides methods that may be used when the Government of the country of export has a monopoly of the trade of the country or determines or substantially influences the price of goods in the country. In such a case, the Minister can determine normal value by reference to the price of like goods produced in a third country and sold in the ordinary course of trade in that country: s 269TAC(4)(c).
- Subsection (5D) allows the Minister to determine the normal value *"having regard to all relevant information"* if satisfied that the country of export has an economy in transition. While this method may allow the Minister to use the cost to produce like goods in a third country, as being *"relevant information"*, this method is expressly excluded, with respect to all countries that are members of the World Trade

Organisation (such as China), by s 269TAC(5J), and s 47 and Schedule 2 of the Regulations.

- Subsection (6) provides that the Minister may determine normal values *"having regard to all relevant information"* if the Minister is satisfied that sufficient information has not been furnished or is not available to enable the normal value to be ascertained under one of the preceding subsections.

Subsection 269TAC(2)(c) - calculating costs of product in the country of export

Where the Minister is to determine a constructed normal value under subsection 269TAC(2)(c) (which he did so based on the recommendations of the Commission in Report 379) the costs of production of the goods in the country of export must be worked out in such manner, and taking account of such factors, as the regulations provide under subsection 269TAAD(4): see s.269TAC(5A).

Subsection 269TAAD(4)(a) provides that *"the cost of goods is worked out by adding the amount determined by the Minister to be the cost of production or manufacture of those goods* ***in the country of export***". This is not a deeming provision but directs the Minister to a method, further expanded upon by subection 269TAAD(5) and Section 43 of the Regulations.

Subsection 43(2) provides a mandatory source of evidence for making these calculations if the three conditions stated in paragraphs (a) and (b) are satisfied. In substance, the records of the manufacturer **must** be used to construct the normal value if:

- the manufacturer keeps records: s 43(2)(a);
- in accordance with generally accepted accounting principles: s 43(2)(b)(i); and
- the records *"reasonably reflect competitive market costs associated with the production or manufacture of like goods"*: s 43(2)(b)(ii).

Where the conditions are not met, the Minister must still determine the costs of production or manufacturer of like goods (in the present context) in China but is not limited to the records of the manufacturer.

In the present case, the Commission did not consider that the records of Dalian Steelforce *"reasonably reflected competitive market costs"* (see page 19 of Report 379) and so its records were not used. The formulation of the Regulations does not, however, give any warrant for the Commission to identify the costs in a third country (or a basket of third countries) considered by the Commission to have a competitive market for HRC. The Act (and the international agreements it seeks to translate into domestic law) requires that the normal value be identified by reference to *"the cost of production or manufacture of the goods* ***in the country of export***".

Use of benchmark based on HRC prices from Korea, Malaysia and Taiwan

Nothing in the Act expressly or impliedly indicates that, under subsection 269TAC(2)(c), costs of production in a third country with a competitive market can simply be substituted

for the costs in the country of export. Simply because the records of the producer do not reflect costs in a competitive market does not mean that the Minister is free to rely upon the costs of any other market, whether seen to be a "competitive" one or not, without adjustment. One can readily imagine a situation where one country of manufacture has a range of competitive advantages not existing in other countries of manufacture (say cheap labour costs). Even if the records of a manufacturer in the first country cannot be used to determine normal value, to simply use the costs of manufacture in a third country (or bundle of third countries) will not lawfully constitute the determination of the costs in the first country because it does not address issues of competitive advantage pertaining to that country.

However, that is precisely what occurred in Report 379. At part 7.4.3 on page 18, the Commission stated:

> *"…during Investigation 177, the then ACBPS sought to replace the costs of HRC and narrow strip for each Chinese exporter, as recorded by these exporters, with a competitive market cost for these inputs, when constructing normal values. This replacement was made with reference to a 'benchmark', determined to be the weighted average of domestic HRC costs incurred by verified selected and cooperating exporters from Korea, Malaysia and Taiwan."*

The Commission considered that it was "*appropriate to use a similar benchmarking method to that followed in Investigation 177 and Reviews 265 and 266"* (see part 7.4.3 on page 19). The Commission went on further to explain its process of calculating a quarterly weighted averaged HRC purchase cost and stated on page 19 of Report 379:

> *"Specifically, Chinese exporters HRC purchase costs have been uplifted by the difference between the price actually paid by them for that product and the price of the comparable competitive market benchmark that has been calculated from verified data of the selected exporters in Korea, Malaysia and Taiwan."*

The Commissioner erred in his construction of the legislation in seeking to identify the costs of manufacture in a country (China) with the costs of manufacture in another country (or an average of several other countries). It was not open to ignore:

(a) the cost of production in China; or

(b) differences between costs of production in China and costs of production in other countries,

by simply adopting a benchmark reflecting a basket of costs in other countries.

WTO decision in European Union – Anti-Dumping Measures on Biodiesel from Argentina

The requirement purported above that the costs of production for the calculation of normal value are to be costs in the country of export has been confirmed and crystallised by the

WTO Panel decision in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*[16] which was upheld on appeal by the WTO Appellate Body[17] ("EU - Biodiesel"). That dispute involved the EU's decision to resort to a constructed normal value in relation to exports from Argentina. In constructing the normal value, the EU substituted the price of soybeans when exported from Argentina, at the FOB level, into the cost of production of biodiesel in the Argentinian exporter's costs of production. The EU contended that this was necessary because the Argentinian cost of soybean was distorted by various Argentinian Government regulatory measures.

At first instance, the Panel stated:

> *7.256. The text of both Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 refer to the "cost of production" in "the country of origin". Thus, the question before us is whether the cost used by the EU authorities for soybeans can be understood to be a cost in "the country of origin", that is, in Argentina.*
>
> *7.257. We recall, in this regard, that the EU authorities found the domestic prices of the main raw material used by biodiesel producers in Argentina to be "artificially lower" than international prices due to the distortion created by the Argentine export tax system. On that basis, the EU authorities disregarded the price actually paid by Argentine producers for soybeans and replaced it with "the price at which those companies would have purchased the soya beans in the absence of such a distortion". Accordingly, the EU authorities replaced the average actual purchase price of soybeans during the IP, as reflected in the producers' records, with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, FOB Argentina, minus fobbing costs, during the IP. The EU authorities considered that this reference price reflected the level of international prices and that this would have been the price paid by the Argentine producers in the absence of the export tax system.*
>
> *7.258. In our view, it is plain from this that the cost used by the European Union is not a cost "in the country of origin". It was specifically selected to remove the perceived distortion in the domestic price of soybeans caused by the Argentine export tax system. This is because the prices prevailing in Argentina were considered to be artificially lower than international prices. In other words, the EU authorities selected this cost precisely because it was not the cost of soybeans in Argentina.* [footnotes omitted]

On the basis of this plain interpretation of the relevant provision of the Anti-Dumping Agreement, the Panel decided that the costs used for constructing normal value under Article 2.2 of the Anti-Dumping Agreement must be based on the cost of production in the country of origin. The Panel ruled as follows:

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16 WT/DS473/R (29 March 2016)

17 WT/DS473/AB/R (6 October 2016)

> *7.260. …the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a "cost" that was not the cost prevailing "in the country of origin", namely, Argentina, in the construction of the normal value.*

The Panel's finding was upheld by the WTO Appellate Body, where the Appellate Body ruled as follows:

> *6.83. …Consequently, we uphold the Panel's finding, in paragraphs 7.260 and 8.1.c.ii of its Report, that the European Union acted inconsistently with Article 2.2 of the Anti Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Having upheld this finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.*

In arriving at this decision, the Appellate Body stated:

> *6.23. Furthermore, Article 2.2 of the Anti Dumping Agreement refers to "the cost of production in the country of origin". In our view, given the fact that Article 2.2.1.1 starts with the phrase "[f]or the purpose of paragraph 2", the interpretation of the term "costs" in Article 2.2.1.1, for purposes of calculating the costs of production, must be consistent with how the term "cost" is understood in Article 2.2. Thus, insofar as the cost of production is concerned, the costs "calculated on the basis of records kept by the exporter or producer" under Article 2.2.1.1 must lead to a cost "in the country of origin".* [emphasis added] *The context provided by Article 2.2 suggests that the second condition in the first sentence of Article 2.2.1.1 should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin.*
>
> *6.24. In addition, in our view, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market.*
>
> *…*
>
> *6.73. We further observe that, while both obligations apply harmoniously when an investigating authority constructs the normal value, the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the*

scope of the obligation to determine the cost of production in the country of origin in Article 2.2. In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the Anti Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production […] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects. It is in this sense that we understand the Panel to have stated that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 "require that the costs of production established by the authority reflect conditions prevailing in the country of origin".

6.81. As noted earlier, when relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2 of the Anti-Dumping Agreement, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this may require the investigating authority to adapt that information. In our view, domestic prices may reflect world prices and, in such circumstances, a price at the border could, as the European Union argues, be simultaneously characterized as both an international and a domestic price. We do not consider, however, that the Panel failed to take such considerations into account. Rather, the Panel's analysis focused on the EU authorities' understanding of the surrogate price for soybeans. In line with the Panel's understanding, we consider that the mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina. In addition, we note, as the Panel did, that the EU authorities considered that the reference price published by the Argentine Ministry of Agriculture reflected the level of international prices of soybeans. Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina. On the contrary, the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina. As the Panel stated, the EU authorities selected and used this particular information precisely because it did not represent the cost of soybeans in Argentina. Thus, we agree with the Panel that the surrogate price for soybeans

> *used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel. Accordingly, we do not consider that the European Union has established that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 2.2 of the Anti Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel.*
>
> …
>
> *6.83. …Consequently, we uphold the Panel's finding, in paragraphs 7.260 and 8.1.c.ii of its Report, that the European Union acted inconsistently with Article 2.2 of the Anti Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Having upheld this finding, the condition for Argentina's request for completion of the legal analysis is not fulfilled. Thus, we do not examine this request.* [emphasis added] [footnotes omitted]

We submit that the WTO Panel's finding in EU – Biodiesel, as upheld by the WTO Appellate Body, is directly relevant to this matter as it establishes that costs in the country of origin must be used for normal value purposes. A finding of the existence of a "particular market situation" in the market for the like goods (which, in Australia, equates with the situation where sales in that market are found not to be suitable for use in determining a price for normal value purposes) simply allows the investigating authority to determine the normal value by way of a cost-based construction or to base it on an exporter's third country sales. It does not allow the investigating authority to go beyond the markets of the country of export and substitute costs which are not those "in" or "of" the country of export.

We submit that these findings confirm the already clear language of subsection 269TAC(2)(c) of the Act, which requires the constructed normal value to be based on *"the cost of production or manufacture of the goods in the country of export"*, together with the relevant selling, general and administrative costs, and profit.

Accordingly, Dalian Steelforce respectfully requests the Review Panel to find that the use of a cost of production in working out Dalian Steelforce's normal value, by use of a benchmark HRC costs based on costs in Korea, Malaysia and Taiwan, without adjustment for suitable use as a costs of HRC in China, is not the correct or preferable decision. The correct and preferable decision ought to be that any cost used in the constructed normal value must be such amount as determined by the Minister to be a cost in the country of export. In that the benchmark cost of HRC was not a cost in or of China, that part of the reviewable decision was incorrect.

If it was the case that it is not possible to make adjustments to the benchmark costs from third countries to reflect the position in China, then the method in subsection 269TAC(2)(c) should have been rejected. As outlined in response to question 10 above, there are other

methods available to the Minister to determine normal value being either subsections 269TAC(2)(d) or 269TAC(6).

3. THE PROPOSED CORRECT AND PREFERABLE DECISIONS

Finding 1: The Commission erred in determining a deductive export price.

The proposed correct and preferable decision relevant to finding 1 is that export sales by Dalian Steelforce were made at arms-length as the related parties had engaged in real bargaining. In determining Dalian Steelforce's export prices under subsection 269TAC(1)(c) of the Act, the proposed and correct decision would have resulted in export prices being determined on the basis of the free-on-board invoiced prices, less prescribed deductions for post-exportation expenses.

Finding 2: The Commission erred in treating free-trade zone (FTZ) sales as domestic sales for the purposes of calculating profit.

The proposed correct and preferable decision relevant to finding 2 is that FTZ sales by Dalian Steelforce were not sales destined for home consumption in China. Instead, previous findings by the Commission that such FTZ sales were effectively third country sales is correct and preferable. The effect of this proposed decision would be to exclude the FTZ sales from the calculation of domestic profit.

Finding 3: The Commission erred in not treating HSS downgrade domestic sales as like goods and excluding those sales from the calculation of profit.

The proposed correct and preferable decision relevant to finding 3 is that mixed downgrade HSS sales by Dalian Steelforce are considered like goods and the same general category of goods when assessed against the Commission's like goods framework. The effect of this proposed decision would be to include the mixed downgrade domestic sales in the calculation of domestic profit.

Finding 4: The Commission erred by not determining SG&A costs on the basis of information from the records of the exporter or producer of like goods.

The proposed correct and preferable decision relevant to finding 4 is that the Commission's finding that Dalian Steelforce is the exporter and producer of the exported goods and like goods be affirmed. In doing so, the proposed decision would reverse the decision to include [redacted] into a collapsed single group exporter category. The effect of this proposed decision would be to include only SG&A amounts from Dalian Steelforce's records as required by subsection 44(3) of the Regulations.

Finding 5: The Commission erred by not determining profit on the basis of domestic sales of the same general category of goods by the exporter or producer.

The proposed correct and preferable decision relevant to finding 5 is that the Commission's finding that Dalian Steelforce is the exporter and producer of the exported goods and like goods be affirmed. In doing so, the proposed decision would reverse the decision to include

[redacted] into a collapsed single group exporter category. The effect of this proposed decision would be to include only actually amounts realised by Dalian Steelforce in the calculation of profit under subsection 44(3) of the Regulations.

Finding 5: The Commission erred in not determining costs in the country of export.

The correct or preferable decision relevant to finding 6 is that the Commission was required to determine Dalian Steelforce's HRC costs using costs in the country of export.

Conclusion

Based on the correct and preferable decisions outlined above with regards to findings 1 to 6, Dalian Steelforce contends that the correct and preferable determinations by the Assistant Minister were:

(a) exports of HSS by Dalian Steelforce in the inquiry period were not dumped;

(b) the measures should not be continued as against Dalian Steelforce and/or China, in that dumping of HSS from Dalian Steelforce and/or from China in the inquiry period was taken into account by the Minister as one of the factors leading to the decision to continue the measures, and that factor did not exist;

(c) failing (b), that different variable factors be published with respect to exports from Dalian Steelforce to those published in the notice, calculated in accordance with the proper application of the relevant provisions of the Act and the Regulations.

4. REASONS WHY THE PROPOSED DECISION IS MATERIALLY DIFFERENT FROM THE REVIEWABLE DECISION

Finding 1: The Commission erred in determining a deductive export price.

The proposed decision to determine export prices on Dalian Steelforce's invoice export values would result in the weighted average export price being higher by approximately 4.5%, which in turn would correspond to an equivalent reduction in Dalian Steelforce's dumping margin.

Finding 2: The Commission erred in treating free-trade zone (FTZ) sales as domestic sales for the purposes of calculating profit.

The proposed decision to exclude FTZ sales from the determination of profit would result in a substantial reduction in the average amount realised by Dalian Steelforce on its domestic sales and a corresponding substantial reduction in Dalian Steelforce's dumping margin.

Finding 3: The Commission erred in not treating HSS downgrade domestic sales as like goods and excluding those sales from the calculation of profit.

The proposed decision to include mixed downgrade sales into the determination of profit would result in a substantial reduction in the average amount realised by Dalian Steelforce

on its domestic sales and a corresponding substantial reduction in Dalian Steelforce's dumping margin.

Finding 4: The Commission erred by not determining SG&A costs on the basis of information from the records of the exporter or producer of like goods.

The proposed decision to include only the SG&A amounts reflected in Dalian Steelforce's record would impact on the SG&A amount to be added to the constructed normal values and a commensurate reduction in Dalian Steelforce's dumping margin.

Finding 5: The Commission erred by not determining profit on the basis of domestic sales of the same general category of goods by the exporter or producer.

The proposed decision to include only the amounts actually realised by Dalian Steelforce in the calculation of profit would result in a substantial reduction in the average rate of profit to be included in the constructed normal value. This would have a commensurate reduction in Dalian Steelforce's dumping margin.

Conclusion

The proposed decisions set out above are materially different because either:

(a) the measures imposed and/or continued as a result of the reviewable decision would not be continued against Dalian Steelforce; or

(b) if measures were continued, no fixed duty would be collected with respect to imports of HSS from Dalian Steelforce, in circumstances where the reviewable decision presently requires fixed duty to be paid in the amount of 18.7% of the export price of those imports.

Yours sincerely

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