PUBLIC VERSION

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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

Dear ADRP member,

Please accept this submission on behalf of Dalian Steelforce Hi-Tech Co., Ltd (Dalian Steelforce), to the current review into the decision by the Minister in relation to the continuation of anti-dumping measures applying to imports of hollow structural sections exported from China by Dalian Steelforce. The purpose of this submission is to more clearly highlight the error by the Anti-Dumping Commission (Commission) with respect to finding 5 in our application.

As explained in the application, Dalian Steelforce contends that the Commission erred by failing to comply with subsection 45(3) of the Regulations which requires that the Minister must work out the amount of profit on the basis of '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'.*

Notwithstanding that the Commission found and determined Dalian Steelforce to be the producer and exporter of the goods to Australia, the Commission disregarded the actual profit amounts realised by Dalian Steelforce. Instead, the Commission determined profit using actual amounts realised by [redacted], a separate legal entity that is predominantly responsible for the [redacted].

The diagram below more clearly highlights the inconsistent finding of Dalian Steelforce as the exporter for the purposes of determining export price, and the inclusion of [redacted] into a collapsed single exporter for the purposes of determining profit in the constructed normal value.

[CONFIDENTIAL DIAGRAM REMOVED]

By including [redacted] in its interpretation of exporter for the purposes of determining normal value, the Commission has effectively applied differing interpretations of the term 'exporter' within different sections of the Act. This violates the very point made by the ADRP on the issue of collapsing in its review of steel reinforcing bars exported from Korea, Singapore, Spain and Taiwan -

that '[u]*nder 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*.'

As further support for the view that related companies should not and cannot be considered a single exporter under current Australian law, we note the consultation paper issued last month by the Department of Industry on behalf of the Australian Government (refer to Improvement 3 in **Attachment A**), which proposes to introduce legislative amendment to implement a new standard for determining whether related companies should be treated as a single exporter.

The consultation paper highlights:

> *Following the ADRP decision and independent legal advice, in order to collapse related companies under existing law a stringent test must be satisfied to determine whether two separate entities can be considered a single 'exporter' under current Australian law. The circumstances that would satisfy this test are considered to be rare, potentially ruling out some circumstances where collapsing would be appropriate. It would also be difficult for the Commission to establish the necessary evidence. As a result the circumstances in which the Commission may collapse related companies are extremely limited.*

It is clear from the consultation paper that the Australian Government has sought and received legal advice confirming the ADRP's view on applying differing interpretations on the term exporter within different sections of the Act. It also confirms that under the current legislative framework, the circumstances for determining whether two related entities can be considered a single exporter is both rare and extremely limited.

As noted in Dalian Steelforce's application, the reasoning and basis upon which the Commission rejected using the actual profit amounts realised by Dalian Steelforce on its domestic sales of the same general category of goods, is not clear and not explained in either the verification report, statement of essential facts report 379 or final report 379. Therefore, Dalian Steelforce urges the ADRP to correct the error by including its profit in the constructed normal value. In the event that the ADRP considers that the matter ought to be reinvestigated by the Commission, it is important that the Commission is requested to set out its justification for including [redacted] in its definition of exporter for the purposes of calculating profit.

In the event that the Commission raises issues surrounding the arms-length nature of the sales transactions between Dalian Steelforce and [redacted], it is important to note that subsection 45(3)(a) of the Regulations does not provide for any exclusion of domestic sales data on the basis of non-arm's length findings. The lack of any limiting language related to arms-length in subsection 45(3)(a) of the Regulations, means that an exclusion for arms-length should not be read into the provision.

Yours sincerely

John Bracic

ATTACHMENT A

Australian Government
Department of Industry, Innovation and Science

Further Improvements to Australia's Anti-Dumping System

Consultation Paper

August 2017

ATTACHMENT A

How to respond

The Department of Industry, Innovation and Science welcomes your written submissions on the issues raised in this consultation paper.

Please provide your responses to the Anti-Dumping Policy section by email to anti-dumping@industry.gov.au by **5pm on Thursday, 14 September 2017**.

This consultation is the first step in the process of developing any changes to Australia's anti-dumping system and there will be further opportunities to be involved.

For any other questions regarding this paper please contact Mr Karl Brennan, Anti-Dumping Policy Section Manager, at karl.brennan@industry.gov.au or on (02) 6213 6512.

ATTACHMENT A

Introduction to Australia's anti-dumping system

Australia's anti-dumping and countervailing system is based on the rules set out by the World Trade Organization (WTO) in the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM).[1] Dumping occurs when a company exports a product at a price lower than the price it normally charges in its home market. Some companies may also receive certain subsidies from their government or other public bodies that allow them to export products at a lower price. Dumping and subsidisation is not illegal, but WTO agreements allow Australia to impose special duties to counter the negative effect of dumping and subsidisation on domestic industry.

Anti-dumping or countervailing duties can only be imposed where the Minister is satisfied that goods exported to Australia have been dumped or subsidised, and that dumping or subsidisation has caused, or is threatening to cause, material injury to an Australian industry producing like goods.

The framework for Australia's anti-dumping and countervailing system can be found in several pieces of Australian legislation:

- *Customs Act 1901 (Customs Act),* particularly Parts XVB and XVC
- *Customs Tariff (Anti-Dumping) Act 1975*
- *Customs (International Obligations) Regulation 2015*
- *Customs Tariff (Anti-Dumping) Regulation 2013*

The system is administered by the Anti-Dumping Commission (the Commission) under the direction of the Anti-Dumping Commissioner (the Commissioner) and policy responsibility sits with the Department of Industry, Innovation and Science. The Commissioner is appointed by the Minister responsible for anti-dumping (the Minister). The Commissioner is required to report to the Minister on a range of matters, including recommending the imposition of duties following an anti-dumping and/or countervailing investigation.

The Minister may provide additional directions to the Commissioner to guide his or her conduct of investigations. There are currently three Ministerial directions, and they are available on the Commission's website. The Anti-Dumping Commission's Dumping and Subsidy Manual explains the practices used by the Commission in administering the anti-dumping and countervailing system.

[1] Further general references to the 'anti-dumping system' and 'anti-dumping decisions' should be read as including both anti-dumping and countervailing.

ATTACHMENT A

Improvements identified during earlier consultations and ITRF sub-committees

In 2016, a number of forums considered improvements to Australia's anti-dumping system. Three sub-committees of the ITRF were formed to specifically consider SME access, circumvention and compliance, and subsidies. These sub-committees made a range of recommendations to the Assistant Minister regarding improvements to operations and the anti-dumping framework. The recommendations that have an operational focus are currently under consideration by the Anti-Dumping Commission. Policy-focused recommendations from the SME Access sub-committee have been included in the scope of the SME Access review currently being conducted by the department.

While the sub-committees were ongoing, the Department of Industry, Innovation and Science (the department) also consulted stakeholders on whether improvements could be made to improve the effectiveness of the system. The department has considered the feedback from stakeholders and developed a range of options in response that could be proposed to the Minister for consideration. These options are detailed below. The department would appreciate your consideration of these proposals and your suggestions on opportunities for further refinement.

Improvement 1: Streamline exemptions from duties

Proposal description

Remove the need to apply for an exemption and await a determination of the exemption for goods subject to a Tariff Concession Order (TCO).

Background

Anti-dumping duties are imposed on goods described in the notice of the duties. The goods description can cover a good with numerous models.

Under current anti-dumping legislation, exemptions from anti-dumping duties can be granted for a variety of reasons. One of those, is that a TCO applies to the good. A TCO is granted on imported goods if substitutable goods are not produced in Australia. The TCO description is generally very specific and could cover one of the models subject to the broader anti-dumping goods description.

Currently, an exemption is sought by applying to the Anti-Dumping Commission, who examine the substance of the ground the exemption is sought on. For exemptions sought on goods subject to a TCO, the ground is that the TCO is in existence. The Anti-Dumping Commissioner recommends to the Minister whether an exemption should be granted. If the Minister agrees to granting an exemption, a notice of the exemption is published.

There is an opportunity to streamline this process. It is proposed that the application, examination and granting processes be removed by providing for TCOs to exempt the subject good from anti-dumping duties. No change to the policy of goods subject to TCOs being eligible for exemptions is proposed.

How the change could be made

Legislative change could be made to provide for TCOs to exempt the subject goods from anti-dumping duties.

The application form for anti-dumping duties could be amended to include additional information warning applicants that they should check TCOs in existence for the goods for which duties are being sought.

Potential problems

It was raised during consultation that the current operation of the exemption process (application, examination, granting) allows the Australian industry who applied for the anti-dumping duties to consider whether they want to seek to have the TCO revoked before an exemption can be granted. The purpose of this was to ensure that the integrity of duties are not undermined. The department does not consider this risk is genuine. The TCO process is longstanding, open and transparent and provides the opportunity to object to the making of any new TCOs. Australian industries have a substantial amount of time during the investigation process to ensure they seek revocation of any TCOs they consider should not be in existence.

The further formulation of this proposal will need to ensure consistency with Australia's WTO obligations.

Improvement 2: Submissions on form of duties

Proposal description

Introduce a formal method of allowing applicants to nominate the form of duty by directing the Commissioner to recommend the Minister impose the form of duty proposed by the applicant unless there are good reasons not to do so. The direction would still provide flexibility to recommend a different form of duties if the applicant's requested form would be ineffective or risked exceeding the dumping margin. The Minister's ability to impose any form of duty would be unchanged. All interested parties would retain the right to oppose the applicant's preferred form of duty and make submissions accordingly.

Background

The forms of duty are the methods by which the amount of dumping duty payable on goods exported to Australia is calculated. The Anti-Dumping Commissioner recommends the form of duty to the Minister. There are four potential forms of duty available.

1. Combination of fixed and variable duty method ('combination' duty)
2. Fixed duty method
3. Floor price duty method, and
4. Ad valorem duty method.

In 2013, the anti-dumping system was reformed to provide flexibility in choosing the form of duty. The purpose was to increase the effectiveness of the anti-dumping measure depending on the facts of the case. Although the forms of duty all have the purpose of removing the injurious effects of the dumping, certain forms will better suit particular circumstances. For example, a floor price can be become punitive when the market is falling, as the amount of duty collected becomes an increasing percentage of the actual export of the product, and ineffective in a rising market.

The form of duty is of significant interest to Australian industries seeking relief from the injurious dumping. However there is no formal process in anti-dumping and countervailing investigations specifically allowing interested parties to comment on the form of duty.

It is envisaged the formalisation of the opportunity for applicants, who are the party being injured, to provide advice and evidence on the form of duty should not come at the risk of impinging on interested parties' ability to counter any such arguments. Due process should be maintained.

How the change could be made

The Minister could issue a direction to the Commissioner as described in the proposal.

The opportunity for all parties to comment on the form of duty proposed by the applicant could be formalised through the Commissioner by including it in the notice of initiation and inviting interested parties to comment on the issue.

Potential problems

Consultation identified that Australian industry stakeholders (who make applications for duties) were supportive of the proposal, but some recognised that it may ultimately change little given the considerations of flexibility for the Commissioner and due process for other parties.

Improvement 3: Ensuring effective measures through collapsing of related exporters

Proposal description

Introduce a new test to determine whether multiple parties are sufficiently related to justify the imposition of a joint dumping duty, based on facts and evidence submitted or gathered in the investigation. A range of factors would be considered in making the determination. No individual factor would necessarily be determinative.

A list of factors might include:

- commonality of management and shareholding
- harmonised commercial activity and corporate objectives
- ability to shift products between themselves
- levels of control exercised by one party over other related parties,
- levels of ownership/shareholding between the related parties,
- the degree of joint management/ shared directorship of the related parties
- whether operations are intertwined, such as through:
    - the sharing of sales information,
    - involvement in production and pricing decisions,
    - the sharing of facilities or employees, or
    - significant transactions between the related parties.

Background

In an investigation, the Commission will calculate an individual dumping margin for each cooperating exporter. Each individual dumping margin is used to calculate the rate of dumping duty, if any, applied to goods imported into Australia from a particular exporter. However it is increasingly common to find investigated companies with complex company structures, and it is not unusual to see more than one exporter from a group of related companies selling to Australia. Past practice, where related companies were investigated, was to calculate one dumping margin to apply to all related companies as a single 'exporter'. This practice is sometimes called 'collapsing' and can be observed in some investigations. Where companies manage their exports collectively, individual dumping margins may not be representative of the overall dumping by the company group. If it is determined that the corporate group as a whole is dumping into Australia, it is arguable that the corporate group's collective action should be addressed to ensure the anti-dumping measure is effective.

Article 6.10 of the ADA requires that investigating authorities must as a rule determine an individual margin of dumping or subsidisation for each known exporter under investigation. Investigating authorities can deviate from this obligation only for the purposes of sampling or specific exceptions in the ADA.

ATTACHMENT A

In 2016, the Anti-Dumping Review Panel (ADRP) found that the Commission should not have calculated a single (collapsed) dumping margin for two related companies. The ADRP was of the view that "it is well established in Australian law that the separate legal personality of companies in a corporate group has to be recognised". While the ADRP noted limited circumstances where two separate entities may be treated as a single entity, it was of the view that these circumstances did not exist and that in this instance collapsing was not supported by Australian law. This opinion was supported by independent legal advice.

Following the ADRP decision and independent legal advice, in order to collapse related companies under existing law a stringent test must be satisfied to determine whether two separate entities can be considered a single 'exporter' under current Australian law. The circumstances that would satisfy this test are considered to be rare, potentially ruling out some circumstances where collapsing would be appropriate. It would also be difficult for the Commission to establish the necessary evidence. As a result the circumstances in which the Commission may collapse related companies are extremely limited.

Introducing a new test to determine whether related companies should be collapsed would ensure the effectiveness of duties are not undermined.

How the change could be made

Legislative change could be made to implement the new standard. Legislative change would likely be contained to anti-dumping legislation and consequential amendment to other legislation would not be required.

Potential problems

New exporters would be impacted by the proposal. New exporters that are related would be denied access to accelerated reviews, and would not be automatically permitted to access imposed or determined rate in the new investigation. Instead they would receive the all others/uncooperative rate. Those parties, and any other related party (whether investigated or not) would be able to seek a review of variable factors, however all related parties would have to participate and cooperate in the review. The development of a new test to determine whether related companies should be collapsed would need to be consistent with WTO obligations.

Improvement 4: Excluding imports by the applicant or related party

Proposal description

Exclude imports from the Australia industry applying for anti-dumping duties (and any related parties) from determinations of dumping and injury. Related parties would be considered related to an importer based on defined criteria, such as those listed in footnote 11 of the ADA.

Background

In the anti-dumping system, occasions arise where applicants may be related to importers (or foreign exporters) through varying arrangements. For example, a subsidiary of a parent company may produce a particular product in Australia while another arm of that company may import the same product from international suppliers. In addition, the applicant company may itself be an importer of a product that it also produces, due to product mix decisions and volume demands that cannot be met from domestic production.

The Commission takes into account Australian industry imports in undertaking its injury analysis. However, these imports are not explicitly excluded from injury analysis within the current operational policy.

The current legislation also prohibits the Commission from excluding Australian industry imports (and those of related parties) from quantifications of dumping. This means that a situation where applicants import dumped goods from a particular country that then contribute to volume or dumping margin thresholds is possible. This may result in an increased dumping margin and could also help the applicant exceed the de minimis volume threshold.

Concerns have been raised that allowing the applicant's own behaviour, or that of a related company, to contribute to a dumping finding is neither fair nor logical.

How the change could be made

Legislative change could be made to implement the proposal. Additional guidance would be provided on the new provision.

The existing Ministerial Direction on Material Injury would need to be amended to reflect the exclusion of Australian industry imports of the relevant goods from assessments of injury.

Potential problems

It is not proposed that the Australian industry member who also imports is excluded from the 'domestic industry'. Due to the highly consolidated nature of significant upstream manufacturing industries in Australia, a provision to exclude importers from the definition of domestic industry would likely mean that many applications could not meet standing requirements. The department does not consider it would be desirable to implement such a proposal.

Improvement 5: Clarifying the definition of a subsidy

Proposal description

Amend the definition of a subsidy to improve its alignment with the requirements of the ASCM.

Background

In the ASCM, the test of whether a financial contribution amounts to a subsidy has three limbs. First, there must be a financial contribution. Second, that financial contribution must be made by a government or any public body. Third, the financial contribution must confer a benefit.

The International Trade Remedies Forum sub-committee on subsidies considered whether the definition of subsidy in Australian legislation met this 'three limb' test. The sub-committee considered that the current wording of legislation is not fully consistent with the ASCM in terms of determining whether a benefit has been conferred. However, industry members noted that, based on their practical experience with the Commission's assessment of countervailing duty applications, the Commission examines whether a financial contribution does, in fact, confer a benefit. As part of a subsidies investigation, the Commission will examine whether because of the financial contribution, the recipient is placed in a more advantageous position than it would otherwise have been.

The sub-committee agreed that the contravening legislation (subsection 269TACC(2) of the Customs Act) should be repealed. The sub-committee considered two options following the repeal of the current text:

1. replace it with a mandate that a payment by a government or public body is not a countervailable subsidy unless the payment does in fact confer a benefit, or
2. operational guidance and procedures to ensure a payment is not determined to be a countervailable subsidy unless the payment does in fact confer a benefit.

The department considers that the second option is more desirable as it minimises the risk of unintended consequences. The majority of sub-committee members supported this option.

How the change could be made

Legislative amendment could remove the text from the legislation.

Appropriate operational policy guidance documents and materials will be developed to ensure that the Commission does not determine that a payment is a countervailable subsidy unless the payment does in fact confer a benefit, consistent with WTO rules and current jurisprudence.

Potential problems

The sub-committee considered additional operational policy guidance documents and materials would improve the consistency of Australian practice with the WTO ASCM. .

An earlier attempt to amend the definition of subsidy was rejected by the Senate following a negative reaction from industry members. The department considers the risk of a repeat of this is significantly lower following substantial industry engagement.

Improvement 6: Providing binding advice on the goods description

Proposal description

Provide the Commission with the authority to make rulings on the scope of goods subject to anti-dumping measures. The determination will be made following an application. Rulings will be contestable and public. The rulings will inform compliance by the Australian Border Force.

Background

Anti-dumping measures are imposed to remedy dumping that injures Australian industry. However, dumping investigations examine a 'product' based on the applicant's description of the goods that may be quite broad and cover several sub-categories (e.g. different models). The duties are imposed on the goods that are subject to that description.

The International Trade Remedies Forum sub-committee on compliance and circumvention considered the need for a transparent process that allows industry, including importers, to seek a ruling on whether imported goods are subject to dumping and/or countervailing duties. The sub-committee acknowledged that the Commission currently has a process in place for providing guidance to importers on whether goods are likely to be subject to dumping and/or countervailing duties. However the current process provides non-binding advice.

The sub-committee considered a more timely option would be establishing an open and contestable rulings system similar to Australian Border Force's process for inquiries into requests for tariff advice rulings. The sub-committee agreed that rulings should be made publicly available and could be de-identified to protect confidentiality.

How the change could be made

Authority to make rulings which will inform compliance could be introduced through legislative amendment. The rulings could be made by the Anti-Dumping Commissioner, although this power could be delegated to Anti-Dumping Commission staff.

Potential problems

Binding rulings can be complex and time consuming. The role of the Department of Immigration and Border Protection would need to be carefully considered, given the agency's role in enforcement at the border. In addition, work would need to be done to ensure binding legal standing of the ruling on importers, and ensure compliance in goods matching the goods description as interpreted by

Anti-Dumping Commissioner. The proposal would also need to be consistent with Australia's WTO obligations.

Potential financial implications

There may be minor additional resources required by the Anti-Dumping Commission.

Improvement 7: Amend anti-circumvention and duty assessment provisions[2]

Proposal description

Allow anti-circumvention inquiries and duty assessments to be conducted concurrently.

Background

The anti-circumvention framework allows the Commission to investigate circumstances where an importer has avoided the intended effect of duty by not increasing the price of dumped or subsidised goods by an amount commensurate with the duty that was imposed. Duty absorption means that Australian industry will continue to be injured despite duties being imposed.

In these instances, an anti-circumvention inquiry can be conducted into significant duty absorption, including through sales at a loss. Specifically, the legislative test states that circumvention activity occurs when the importer of the circumvention goods does not increase the price commensurate with the duty payable on the circumvention goods. The term 'duty payable' in that context has been taken to mean the final duty payable and does not include interim duty.

The practical effect of the term 'duty payable' is that it is not possible to ascertain whether the circumvention activity has occurred until the amount of final duty payable has been assessed, or until it is known there will be no such assessment. Duty payable (that is, final duty) is not determined until either:

- the closing date for the application period for a duty assessment (where no application is made), or
- where an application for a duty assessment is made, an assessment of that application has been completed.

As a result, an application for an anti-circumvention inquiry into avoidance of the intended effect of the duty cannot be properly accepted until after a final duty assessment is made, that is, no earlier than 12 to 18 months after duties are imposed.

This issue was considered by the International Trade Remedies Forum sub-committee on compliance and circumvention. The sub-committee endorsed the proposal to allow anti-circumvention inquiries to occur concurrently with duty assessments, increasing the timeframe for completing these anti-circumvention inquiries to 155 days, and reducing the application period for duty assessments to three months. The intended outcome of these changes is to reduce the timeframe in which avoidance of the intended effect of the duty can be investigated.

Potential problems

Importers have not raised any substantial concerns about reducing the timeframe allowed for duty assessment applications (from six months to three months). However there could still be concerns raised at a later stage. The proposal would also need to be consistent with Australia's WTO obligations.

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[2] Note: **Improvement 7: Amend anti-circumvention and duty assessment provisions** could not be implemented in conjunction with **Suggestion 2: Collect anti-dumping duties retrospectively**. Should both proposals appeal to stakeholders, a preference for one over the other should be indicated.

How the change could be made

Legislative amendment to the anti-circumvention and duty assessment provisions.

Additional Suggestions

Recently, the department has received additional suggested improvements to the anti-dumping system, particularly concerning reviews of measures. These suggestions have largely aimed to address concerns that the review of measures is not an effective way of updating measures and ensuring they are remaining effective.

As these concepts have not been previously consulted on, the department would appreciate your consideration of whether the system for conducting reviews of measures of measures can be improved, as well as the benefits and risks of any potential improvements.

Suggestion 1: Limiting timeframes for applications for reviews of measures

Reviews of anti-dumping measures can be applied for by affected parties (e.g. Australian industry, importers, foreign exporters) who consider that the variable factors used to determine the dumping or subsidy margin have changed. Currently, parties can apply for reviews anytime after 12 months has passed since the notice imposing duties was made or last amended (following a review).

It has been proposed that parties can time the applications of reviews to achieve more favourable outcomes based on market fluctuations. The ability to align an application with market circumstances could be removed by only allowing applications to be received during a certain period of time. Limiting applications to a 12 month anniversary month, would allow for a slight increase in the amount of reviews undertaken during the lifetime of measures. However, duties would likely be more accurate as they would be based on more recent information – currently, measures can effectively only be updated every 18-24 months.

Suggestion 2: Collect anti-dumping duties retrospectively[3]

Australia operates a prospective duty system. Imports are assessed for duty liability which is collected at the border upon importation. An alternative to this is a retrospective duty system, which assesses duty liability at a later stage after importation. Under such a system, when a good is imported, the duty is not paid, but a security (e.g. a cash deposit) equal to the duty rate is taken. The final duty liability is then calculated at a later stage through a combined review and duty assessment. If the review/duty assessment finds the final duty is different to the initial duty rate, the excess duty is collected or excess security is refunded.

[3] Note: **Suggestion 2: Collect anti-dumping duties retrospectively** could not be implemented in conjunction with **Improvement 7: Amend anti-circumvention and duty assessment provisions**. Should both proposals appeal to stakeholders, a preference for one over the other should be indicated.