Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal, Audit & Assurance

Department of Industry, Innovation and Science
10 Binara Street
Canberra City ACT 2601

02 6276 1781
Email: ADRP@industry.gov.au
Web: www.adreviewpanel.gov.au

By EMAIL

Mr Dale Seymour
The Commissioner of the Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000

Dear Commissioner,

Hollow Structural Sections Exported from the People's Republic of China, Republic of Korea, Malaysia and Taiwan (No 2017/63)

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (Assistant Minister) made on 21 June 2017 pursuant to s.269ZHG(1)(b) of the *Customs Act* 1901 (the Act), to secure the continuation of the anti-dumping measures applying to exports of Hollow Structural Sections from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan (the Reviewable Decision).

As you are aware, I am conducting the review.

Pursuant to s.269ZZL of the Act, I require the reinvestigation of the following findings that formed part of the basis for the reviewable decision. I have outlined below a summary of my reasons for the reinvestigation. The findings to be reinvestigated and the reasons for the request are described below.

Tianjin Youfa Steel Pipe Group Co., Ltd (Tianjin Youfa)

For the reasons set out below, I request that the finding that Tianjin Youfa had received a countervailable subsidy and the amount of any subsidy received be reinvestigated. If it is confirmed that a countervailable subsidy was received, please advise the subsidy margin.

Public Body

The reviewable decision resulted in a countervailing duty of 12% being imposed on exports of HSS by Tianjin Youfa. In the report to the Assistant Minister (the Report), it was found that "HSS producers received financial contributions that conferred a benefit in respect of the goods via countervailable subsidy programs"[1]. One of these programs was described as Program 20 "Hot rolled steel provided by government at less than fair market value". The Report states that a detailed analysis in relation to the programs is provided at Appendix B.

With respect to Program 20, the analysis is that:

- The Anti-Dumping Commission has found that the Government of China (GOC) "materially influenced conditions within the Chinese hot rolled steel (HRC) market during the inquiry period (Appendix A refers)";
- The Commission also found that "hot rolled steel"[2] provided by Chinese invested enterprises (SIEs) was less than the competitive market benchmark and therefore conferred a benefit on HSS produced in China; and
- A similar program in respect of steel billet raw material was countervailed by the Commission in 2016 in relation to steel grinding balls (Program 1) and in that case the Commission also found that SIEs producing steel raw materials continue to be considered as "public bodies" for the purposes of the definition of subsidy in s.269(T) of the Act.

The relevance of an SIE being a public body is that the definition of s269T of the Act requires that there be a financial contribution by:

- a government of the country of export or country of origin of the goods;
- a public body of that country or a public body of which that government is a member; or
- a private body entrusted or directed by that government or public body to carry out a governmental function.

There are a number of issues with the above analysis with respect to "public bodies". Rather than conduct an analysis of the suppliers of HRC to Tianjin Youfa, the Report relies upon a finding made in another investigation. This is not itself necessarily a problem if the investigation covers substantially the same period or is reasonably proximate to the inquiry period in the continuation inquiry and it is clear that the findings do include the product and manufacturers involved in the continuation inquiry. However, contrary to the above statement

[1] Final Report 379, section 8.4.1 at page 41

[2] Appendix A uses the term hot rolled steel and the abbreviation HRC for this term. However, the abbreviations table in Final Report 379 refers to HRC as hot rolled coil. This letter uses the terms HRC to cover both or either.

in the Report, the grinding balls investigation did not conclude that "SIEs producing steel raw materials continue to be considered as 'public bodies'". Rather that report concluded "for the purpose of the current investigation that SIE's that produce and supply raw materials *to manufacturers of grinding balls* should be considered public bodies" (emphasis added).[3] It is not clear from the analysis relied upon by the Commission whether or not the suppliers of HRC to Tianjin Youfa are among the suppliers of grinding ball raw materials or there is some other basis upon which the Commission has extrapolated from the finding in relation to the grinding balls investigation that the suppliers of HRC to Tianjin Youfa are public bodies.

> While I note the submission by Austube Mills Pty Ltd[4] that the extent of the fact finding in a continuation inquiry may not be the same as that required in an original investigation, s.269ZHG(5) of the Act still requires that the report to the Minister set out the findings of fact and the evidence relied upon.

A further issue with the finding is that the analysis on the issue of public bodies may have confused the relevant law applicable to this issue. In the analysis it is stated that certain previous investigations and reviews were considered relevant as well as the report of the Appellate Body in DS 379[5] and the report of the WTO Panel in DS436[6]. It is not clear why the Commission had regard to the WTO Panel report in DS436 when the Panel's finding on the issue of public body was specifically rejected by the Appellate Body in that case.[7]

One aspect on which the Commission's analysis appears to have been influenced by the WTO Panel report (DS436) is the issue of the relevance of the degree of autonomy held by the entity being considered. The Commission's analysis refers to a quote (for which no reference is given) that "(s)/o long as public sector enterprises are involved, we are not persuaded that the grant of a greater degree of autonomy is necessarily at odds with a determination that such public sector enterprises constitute public bodies". This quote may not be consistent with the decision of the Appellate Body which considered that the degree of control exercised by the Government over the conduct of the entity and the degree of autonomy enjoyed by that entity to be relevant.[8]

The starting point for the analysis of the issue whether the suppliers of HRC to Tianjin Youfa were public bodies should be the law in Australia. The Federal Court in *Dalian Steelforce Hi-Tech Co. Ltd v Minister for Home Affairs*[9] has expressly adopted the reasoning of the Appellate Body in the US/China Report (DS379). Accordingly, the test for a public body in Australia is consistent with that in the Appellate Body's report. Importantly, the Appellate Body confirmed this test in the subsequent case in which it rejected the WTO Panel's finding in WTO Panel Report DS 436[10]. A public body must be an entity that possesses, exercises or is vested with governmental authority.

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[3] Final Report 316, Appendix 5 at page 161
[4] Letter from Austube Mills Pty Ltd dated 19 September 2017
[5] United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379) WT/DS379/AB/R (the US/China Report)
[6] Final Report 316, Appendix 5 at page 157
[7] WT/DS436/AB/R, page 125 at para 4.47
[8] Above, page 127 at para 4.54
[9] [2015] FCA 885
[10] WT/DS436/AB/R, page 123 at paragraph 4.37

In *Dalian Steelforce*, Nicholas J. referred to an earlier decision of his in which he stated that:

> "As the Appellate Body made clear, different types of evidence may be relevant to show that governmental authority has been conferred on a particular entity. One type of evidence that might demonstrate that this has occurred is "[e]vidence that an entity is, in fact, exercising governmental functions". Another type is that which shows that a government exercises "meaningful control" over an entity which may demonstrate that an entity both possesses and exercises governmental authority in the performance of governmental functions"[11]

This was accepted by his Honour in *Dalian Steelforce* as describing a key aspect of the decision in US/China Report (DS379)[12]. In DS436, the Appellate Body clarified that it was not any entity over which a government exercises meaningful control which will be a public body. Evidence of such control may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of government functions. It does not however replace the substantive test which is whether the entity possesses, exercises or is vested with governmental authority.[13]

The *Dalian Steelforce* case involved the previous investigation into the subsidisation of HSS exported from China (INV 177). In that investigation it was found that Chinese SIEs that produce and supply HRC or narrow strip were "public bodies" because they were bodies over which the GOC exercised meaningful control that perform government functions in relation to the iron and steel sector. His Honour found in that case that neither the relevant legislation nor the WTO Appellate Body decision (DS 379) had been misapplied.

It is not possible from the Report to determine whether the Commission has applied the correct test or how that test has been applied to the suppliers of HRC to Tianjin Youfa during the inquiry period.

Benefit

In order for there to be a subsidy as defined by s.269T(1) there has to be a benefit in relation to the goods exported to Australia. The benefit identified by the Commission in the report in relation to Program 20 was that HRC provided by SIEs was less than the competitive market benchmark. There is no reference to the analysis, findings of fact or evidence on which this conclusion was based. However, it is presumably based, at least in part, on the analysis in Appendix A to the Report.

Appendix A deals with the analysis by the Commission of the situation in the Chinese HSS market such that sales in the market were not suitable for the determination of normal values under s.269TAC(1) of the Act. That analysis did not expressly deal with the question to be answered by s.269TACC which prescribes whether the financial contribution by a public body confers a benefit. While not using the terms of the Act, it is the provision of goods, namely HRC, for less than adequate remuneration which is relied upon by the Commission.

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[11] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013]* FCA 870 at para [56]
[12] [2015] FCA 885 at page 19 para [55]
[13] WT/DS436/AB/R at page 123, paras 4.36 and 4.37

S.269TACC(4) requires that the adequacy of remuneration is to be determined having regard to prevailing market conditions for like goods in the country where those goods are provided.

The like goods for the purpose of s.269TACC(4) in this case is HRC and the analysis of market situation in Appendix A is relevant to the extent that it considered the prevailing market conditions for HRC in China. It is stated in Appendix A that in conducting the market situation assessment the Commission had regard to the Chinese HRC market as HRC accounted for 90 per cent of the cost to make HSS and was thus a key determinate of the domestic price of HSS in China.

After an analysis of the Chinese market and particularly GOC interventions in that market, the Commission concluded that "because of the significance of this influence over the Chinese HRC and HSS market, the domestic price for Chinese HSS was substantially different to what it would have been in the absence of these interventions". No similar finding was expressed in relation to the use of the domestic price for HRC for the purpose of determining the adequacy of remuneration in relation to the purchases of HRC by Tianjin Youfa.

The Commission in its submission to the Review Panel on this issue stated that the Commission used the same benchmark to determine the amount of the benefit under Program 20 as was calculated for the purposes of establishing normal value under s.269TAC(2)(c), being a weighted average benchmark of verified actual prices paid by cooperating exporters for HRC from Korea, Malaysia and Taiwan.

The difficulty with the approach taken by the Commission is that it has not in the Report set out the relevant findings and the evidence on which they are based in the context of an analysis for the purpose of s269TACC(4). While there is considerable relevance to an analysis for the purpose of s.269TACC(4) of the results of a particular market situation analysis, it cannot be a substitute for it.

In particular, it is not clear from the Report whether regard has been had by the Commission to the question whether there was a need to adjust any external benchmark. In *Dalian Steelforce*, the use of an external benchmark was found not to be inconsistent with the legislation, provided regard is had to prevailing market conditions in the country of export. However, in that case consideration had been given to the question of whether there was a need to adjust any external market benchmark.

The analysis of particular market situation in Appendix A notes that the Commission's preference when benchmarking prices is to use "in region" benchmarks where possible. There is no explanation however as to why India is not within the same region as China or a benchmark based on its pricing is not possible or suitable for the purpose of s.269TACC(4).

Calculation of subsidy

In its application for review Tianjin Youfa contends that there was a significant computational error in the calculation of the subsidy in that the Commission deducted the total benchmark and not simply the difference in the HRC pricing. In its submission to the Review Panel on this point, the Commission referred to the conference held with the Review Panel and the representative of Tianjin Youfa on 15 August 2017. During that conference the Commission

representative advised that the Commission agreed there had been a miscalculation of the amount of the subsidy.

Dalian Steelforce Hi-Tech Co., Ltd (Dalian Steelforce)

For the reasons given below, I request that the finding as to the normal value of the HSS exported by Dalian Steelforce to Australia be reinvestigated with respect to the calculation of the selling, general and administrative (SG&A) costs and the determination of profit used to construct the normal value. In the event that a different amount is determined for the normal value, please advise that amount and the dumping margin.

SG&A Costs

In the Report, it is stated that the Commission constructed normal values under s269TAC(2)(c) and as required by s.269TAC(5A) and s.269TAC(5B), in accordance with sections 43, 44 and 45 of the *Customs (International Obligations) Regulation 2015* (the Regulation). In particular, the Commission had worked out an amount for SG&A cost using the information set out in Dalian Steelforce records relating to sales of like goods during the inquiry period.

In its application for review, Dalian Steelforce asserted that the statement in the Report was not correct and that the Commission disregarded Dalian Steelforce's SG&A costs and relied solely on information from the records of a [redacted].

In its submission to the Review Panel, the Commission rejected the claim that only the SG&A costs of [redacted] were used in determining the amount of SG&A costs associated with the sale of like goods. The Commission had verified that a large majority of [redacted] domestic sales were made to [redacted] and then sold by [redacted] to [redacted] domestic customers. As the sales were not made in the ordinary course of trade (OCOT) an adjustment was required to Dalian Steelforce's SG&A to include the SG&A incurred by [redacted]. This treatment of the SG&A costs for Dalian Steelforce was set out in the Exporter Visit Report for Dalian Steelforce which was conducted for Duty Assessments 59 and 71.[14]

As the Report correctly notes, the SG&A in relation to goods under s.269TAC(2)(c)(ii) must be worked out in accordance with s.44 of the Regulation.[15] The Report states that the SG&A costs for Dalian Steelforce were worked out under s.44(2) of the Regulation. S.44(2) provides that if "an exporter or producer of like goods keeps records relating to the like goods" and certain conditions are met in relation to those records, then "the Minister must work out the amount by using the information set out in the records". Apparently, it was accepted by the Commission that the records of Dalian Steelforce met the conditions of s.44(2) given the statement in the Report.

The difficulty with the submission made by the Commission is that there is no qualification in s.44(2) that the SG&A costs in the records of the exporter have to be with respect to OCOT sales. Even if this requirement can by implied into s.44(2), it would mean that the Commission would have to work out the SG&A costs under s.44(3) which is not what the Commission has done. There does not appear to be any basis under the relevant legislation for the approach

[14] Section 4.1.22 on page 18
[15] S.269TAC(5A)(b) and s.269TAAD(4)(b)

taken by the Commission to the calculation of the SG&A costs for Dalian Steelforce. Either the records of Dalian Steelforce met the conditions of s.44(2), in which case the information in those records has to be used, or the Minister must use one of the methods in s.44(3). There is nothing in s.44(2) allowing the records of the exporter to be adjusted as the Commission has done in this case.

A footnote to the Commission's submission on this issue seems to contend that the adjustment to the SG&A costs was made under s.269TAC(9) of the Act. However, the list of adjustments the Commission considered necessary to be made under s.269TAC(9) is set out in the Report and does not include an adjustment made to the SG&A costs to include the SG&A costs of [redacted].[16] Any such adjustment would need to come within the criteria of s.269TAC(9) which requires the Minister to make such adjustments as are necessary to ensure that the normal value ascertained under s.269TAC(2)(c) is properly comparable with the export price of the goods. In any event, if the Commission is going to recommend to the Minister that an adjustment by made under s.269TAC(9), that adjustment and the basis for it should be set out in the report to the Minister.

Profit

In the Report it is stated that the Commission has calculated an amount for profit under s.45(3)(a) of the Regulation 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.[17] In its application for review, Dalian Steelforce contends this statement is not correct and that what the Commission did was to calculate the profit based on the amounts realised by [redacted].

The submission by the Commission to the Review Panel appears to accept that the contention by Dalian Steelforce is correct, that is that the profit on the sale by [redacted] was used, not that from the sale of the goods by Dalian Steelforce. The basis for the approach taken by the Commission is stated in the submission to be that when constructing normal value, the Act mandates an assumption that the goods have been sold in the OCOT and that the transfer of the goods from Dalian Steelforce to [redacted] is not an OCOT sale.

It is correct that s.269TAC(2)(c)(ii) does refer to the assumption that the goods have been sold in the OCOT. However, s.269TAC(5B) states that the amount of profit is to be determined as the regulations provide for that purpose. While s.45(2) of the Regulation refers to the sale of like goods by the exporter in the OCOT, there is no such requirement in s.45(3). The approach by the Commission in this case also seems at odds with the Commission's policy as set out in the Dumping and Subsidy Manual which relevantly states when referring to s.45(3):

> "There is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the Commission read any ordinary course of trade requirement into them."[18]

[16] Final Report 379, section 7.4.2.2 at page 22
[17] As above
[18] Dumping and Subsidy Manual at page 49

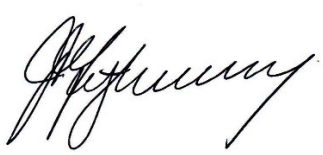
The Commission's submission also refers to the decision of the Federal Court in *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*[19] as support for the approach taken by the Commission. However, there is no reference in that case to the profit not being based on the sales of the exporter under s.45(3). That case proceeded on the basis that the Commissioner worked out the amounts under s.45(3) based on the prices received by Dalian Steelforce.[20] The decision of the Federal Court in that case does not provide support for the approach taken by the Commission in this case.

If you have any issues in relation to this reinvestigation, or if you consider that a conference under s.269ZZHA of the Act would assist in obtaining the further information on the subject of the reinvestigation, please contact the Secretariat.

You are requested to provide your report on the result of the reinvestigation within 44 days, that is, 20 November 2017.

Thank you for your assistance.

Yours Sincerely,



Joan Fitzhenry
Senior Member
Anti-Dumping Review Panel
6 October 2017

[19] [2016] FCA 1309
[20] As above at para 64 and 93