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 2018/74 is attached at **Attachment A**.

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

The attached ADN 2018/74 was published on 6 June 2018.

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.**

    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.

Please refer to **Attachment B**.

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: 5th July 2018

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

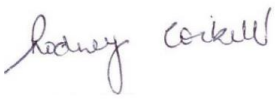
Email address: john@jbracic.com.au

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: 5/7/2018

J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

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6 July 2018

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 review of 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 Minister erred in determining profit by relying on Dalian Steelforce sales to the ~~XXXXXXX~~ Free Trade Zone (FTZ) which were not sold for home consumption in China;

- Finding 2: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sales made in the ordinary course of trade;
- Finding 3: The Minister erred by not making necessary adjustments to ensure that export prices and normal values were compared at the same time.

2.1 Finding 1: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sold for home consumption in China.

In Rep 419, the Commission recommended that the Minister determine that sales by Dalian Steelforce that were destined for the FTZ, be treated as domestic sales of like goods which were sold for home consumption in the country of export and in the ordinary course of trade. Accordingly, the Minister relied exclusively on such sales for the purposes of establishing an amount of profit pursuant to subsection 45(2) of *Customs (International Obligations) Regulation 2015* (Regulation).

The facts and supporting information presented to the Commission does not support a finding that sales to FTZ were for home consumption. Instead the circumstances surrounding the FTZ sales supports the view that such sales are treated as exports for Customs purposes and are not sales for home consumption in China as they do not enter circulation in the domestic market of China. On that basis, Dalian Steelforce contends that the Minister erred in determining profit pursuant to subsection 45(2) of the Regulation as domestic sales for home consumption did not exist.

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

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

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

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

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

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

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

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

Further,

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

In considering then whether the FTZ sales had been sold for home consumption, Dalian Steelforce submits the following verified facts which would confirm the sales to be akin to export sales rather than domestic sales for home consumption.

As verified by the Commission, the relevant sales were made to a corporation located in the FTZ is part of the larger ~~XXXXXXXXXX~~ FTZ. The FTZ is more accurately described as an Export Processing Zone ("EPZ"). The primary law governing such areas is the Interim Measures of the Customs of the People's Republic of China on Supervision and Control of Export Processing Areas[3]. A copy of the Interim Measures is included at **Non-Confidential Attachment C**.

Of relevance are the following aspects of these measures:

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

Accordingly, goods that are sold to entities within an EPZ are not sold for home consumption but are instead legally recognised as exports.[4]

Further, the nature and circumstances of the specific transactions also supports a finding that such sales were not for home consumption:

- the FTZ customer is a manufacturer of ~~XXXXX~~ for direct export to ~~XXXXXXXX~~;
- the sales into the FTZ are treated in the same way as exports to Australia by China Customs which is demonstrated by the requirement for Dalian Steelforce to prepare and submit all necessary export declarations and associated customs clearance processes,
- similar to all HSS export sales, Dalian Steelforce incurs a residual 'export' VAT of 8% on its sales to FTZ;
- Dalian Steelforce is required to hold an applicable export licence to make the sale to FTZ, whereas other Chinese HSS producers that don't hold a similar export licence are unable to sell their products into the FTZ;

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

[4] The ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ website notes that it aims at international markets only, including Australia, New Zealand, Canada and the USA [redacted].

- sales invoices to the customer in FTZ are denominated in US dollars reflecting the export nature of the transactions. This contrasts to normal domestic sales which are required under Chinese law to be denominated in Renminbi; and
- the sales continue to be treated as third country exports in Dalian Steelforce's accounts.

Further support for Dalian Steelforce's view that the Commission erred in considering the FTZ sales to be made for home consumption can be found in the Commission's determinations from other recent investigations which exhibit similar circumstances.

Example A - Review of measures (Case 354) - Prepared or Preserved Tomatoes – Exporters: Calispa SpA and Princes Industrie Alimentari S.r.L

The Commission concluded that sales to domestic customers in Italy were not sold for home consumption on the basis that there was '*insufficient evidence to suggest that any prepared or preserved tomatoes sold in bright cans during the review period* ***were for domestic consumption in Italy***'.[5] This confirms that the location of the actual customer is not the determinative factor in deciding whether the sales were for home consumption. Instead the Commission gave greater weight to whether the goods were consumed domestically.

Applied to Dalian Steelforce's sales into the FTZ, the location of the customer within the geographic border of China is irrelevant for deciding whether the goods were consumed domestically or entered for home consumption. As explained earlier, Dalian Steelforce's HSS sales are treated as export sales by China Customs as the goods never enter the commerce of China and therefore never effectively consumed within the domestic market.

Example B - Investigation (Case 217) - Prepared or Preserved Tomatoes – Exporter: La Doria S.p.A.

The Commission found that '*a significant proportion of its [La Doria] domestic sales were brite cans. La Doria informed us that for such sales it is not aware of the identity of the final customer, and it was not aware of whether the product was ultimately sold for home consumption in Italy or sold to an export market (including Australia). We consider that La Doria's sales of brite cans are therefore not relevant sales for the purpose of s. 269TAC(1) of the Act because we cannot be satisfied that the price paid or payable for like goods sold in such sales were in the ordinary course of trade for home consumption in the country of export.*'[6]

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

Finally, Dalian Steelforce has obtained a legal opinion from Moulis Legal on the interpretation of 'home consumption' and its application to the particular circumstances of Dalian Steelforce's FTZ sales. A copy of the legal opinion is at **Confidential Attachment D**. A public version of the legal opinion is also attached to this application.

[5] EPR 354, Record no. 047, page 11-12.
[6] EPR 217, Record no. 060, page 40.

The legal opinion presents the view that:

- sales for "home consumption" should and have been taken to mean "circulation"; and
- Dalian Steelforce's FTZ sales are not for home consumption as it is evident that they do not enter circulation in the domestic market of China.

Given the export nature and export treatment of Dalian Steelforce's FTZ sales, and the Commission's recent conclusions in inquiries involving prepared or preserved tomatoes that the location of the customer was not determinative of whether the sales was home consumption, Dalian Steelforce submits that the Commission's finding is not correct or preferable. This view is further supported by the attached legal opinion from Moulis Legal.

Accordingly, Dalian Steelforce contends that the Minister has erred in determining a profit pursuant to subsection 45(2) of the Regulation, on the basis of sales which were not sold for home consumption in China.

2.2 Finding 2: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sales made in the ordinary course of trade.

In Rep 419, the Commission recommended that the Minister determine that sales by Dalian Steelforce that were destined for the FTZ, be treated as domestic sales made in the ordinary course of trade. Accordingly, the Minister relied exclusively on such sales for the purposes of establishing an amount of profit pursuant to subsection 45(2) of the Regulation.

As outlined below, this represents a fundamental departure from the Commission's findings and treatment of such sales in each previous investigation, review and duty assessment. Importantly, the circumstances, nature and facts surrounding Dalian Steelforce's FTZ sales remain unchanged since the original investigation period (1 July 2010) and as such provide no reasonable basis for the Commission's altered finding in Rep 419. On that basis, Dalian Steelforce contends that the Minister erred in determining profit pursuant to subsection 45(2) of the Regulation as domestic sales in the ordinary course of trade did not exist during the period of review.

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

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

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

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

In addition, section 269TAAD does not provide an exhaustive list of factors as to when sales will not be considered to be in the ordinary course of trade. This is confirmed by the Commission's policy and practice outlined in its Dumping and Subsidy Manual[7]:

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

It adds:

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

This is further supported by the Appellate Body in *US — Hot-Rolled Steel*[8], when looking into the meaning of 'sales in the ordinary course of trade':

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

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

> *…, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value.* [9]

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

To that end, Dalian Steelforce notes the previous findings of fact by the Commission in determining that sales by Dalian Steelforce to the FTZ were not made in the ordinary course of trade for reasons other than profitability.

Investigation 177

Sales to FTZ were reported by Dalian Steelforce as third country export sales and were correctly treated as such by the Commission following a view that they were not domestic sales for home consumption.

Duty assessment 24

Sales to FTZ were reported by Dalian Steelforce as third country export sales and were correctly treated as such by the Commission following a view that they were not domestic sales for home consumption.

Duty assessment 42

Sales to FTZ were reported by Dalian Steelforce as third country export sales and were correctly treated as such by the Commission following a view that they were not domestic sales for home consumption.

Duty assessment 49

Sales to FTZ were reported by Dalian Steelforce as third country export sales and were correctly treated as such by the Commission following a view that they were not domestic sales for home consumption.

Review 285

Sales to FTZ were reported by Dalian Steelforce as third country export sales and were correctly treated as such by the Commission following a view that they were not domestic sales for home consumption.

Duty assessments 59 and 71

Sales to FTZ were reported by Dalian Steelforce as third country export sales but were reclassified as domestic sales by the Commission. Whilst considered domestic sales, the Commission concluded:

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

Review 379

Sales to FTZ were reported by Dalian Steelforce as third country export sales but were reclassified as domestic sales by the Commission. Consistent with its findings from duty assessments 59 and 71, the Commission concluded that these were not sales in the ordinary

course of trade due to the nature of the sales, being at different levels of trade to the corresponding export sales and Dalian Steelforce's normal operations.

This was reinforced by the Commission in its submission to the ADRP where it endorsed its approach to treating Dalian Steelforce's sales to the FTZ as not in the ordinary course of trade.

Current Review 419

Sales to FTZ were again reported by Dalian Steelforce as third country export sales but were reclassified as domestic sales by the Commission. Following the conduct of a verification visit, the verification team published its findings in the corresponding visit report which concluded that whilst the FTZ sales were considered to be domestic sales, the verification team was '*satisfied that Dalian's domestic sales are not in the ordinary course of trade.*' This is further supported by the visit team's profit calculations, which includes the FTZ sales for the purposes of calculating profit pursuant to subsection 45(3)(a) of the Regulation, consistent with the Commission's profit determination in review 379.

The above summary of the Commission's historical treatment of the FTZ sales highlights and demonstrates that such sales have always been found to not be in the ordinary course of trade either due to not being destined for home consumption or due to the nature of the sales not being 'normal' sales. The exclusion of these sales for the purposes of calculating profit pursuant to subsection 45(2) of the Regulation, has been consistent with the terms, circumstances and nature of sales to FTZ, which have remained unchanged since the original investigation (1 July 2010).

The unchanged circumstances which have been the basis of the Commission's previous findings that FTZ sales were not made in the ordinary course of trade include:

- The FTZ customer is a manufacturer of ~~XXXXXXXX~~ for direct export to ~~XXXXXXXX~~ and the level of trade differs from Dalian Steelforce's normal operations and export sales to Australia and New Zealand which are all made to traders. Sales to the FTZ reflect Dalian Steelforce's distribution pricing given that orders received are irregular and for very small parcels which are below Dalian Steelforce's normal minimum order quantities.
- the FTZ sales continue to be made to the same individual customer, reflecting distribution prices given the orders received are irregular and for very small parcels. This compares to the regular and large orders destined for the other export markets;
- the sales into the FTZ are treated in the same way as exports to Australia by China Customs which is demonstrated by the requirement on Dalian Steelforce to prepare and submit all necessary export declarations and associated customs clearance processes, and incur a residual 'export' VAT of 8%;
- in order to sell to FTZ, Dalian Steelforce is required to hold an applicable export licence, whereas other Chinese HSS producers that don't hold a similar export licence are unable to offer or sell their products into the FTZ. This confirms that sales to FTZ are not able to be supplied by a large section of domestic HSS producers and as such, Dalian Steelforce essentially does not compete on the domestic market in order to make these sales;

- sales invoices to the customer in FTZ are denominated in US dollars reflecting the export nature of the transactions. This contrasts to normal domestic sales which are required under Chinese law to be denominated in Renminbi;
- the sales continue to be treated as third country exports in Dalian Steelforce's accounts; and
- the sales continue to legally be recognised as exports by China Customs.

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

In response to submissions made by Dalian Steelforce on this issue, the Commission acknowledged its recent finding in Continuation 379 that sales to the FTZ were not in the ordinary course of trade. The Commission noted that the basis of the finding in Continuation 379 was the different level of trade between the FTZ sales and Dalian Steelforce's export sales and that the main focus of its operations is to manufacture products for export to Australia and New Zealand.

Upon considering the issue in REP 419, the Commission now considers:

> *'that the factors upon which it concluded that the EPZ sales were not in the ordinary course of trade were not strong. A review of these factors, combined with the fact that Dalian Steelforce has continued to make these sales, establishing a pattern of trade, has caused the Commission to reconsider the status of these sales. The Commission is of the view that domestic sales with a different level of trade to export sales does not render those sales not in the ordinary course of trade. Where differences in level of trade are shown to affect price, adjustments are made, if warranted, to ensure fair comparison with export price.[35] It is not unusual for exporters to sell at different levels of trade both within and between countries. The Commission is also of the view that Dalian Steelforce's 'export-orientation' does not, in itself, render sales as not in the order course of trade. The Commission notes that sales to the EPZ are arms length transactions to an unrelated entity which have occurred over several years. This appears to be a normal commercial relationship.*
>
> *The Commission agrees with Dalian Steelforce that the term 'ordinary course of trade' may extend to circumstances where, although all sales were profitable, there may be situations that cause those sales to have not been made in the ordinary course of trade.[36] The Dumping and Subsidy Manual provides an illustrative list of where these circumstances may apply—the list refers to sample sales, promotional sales made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances.[37] The Commission notes that none of these circumstances apply to the EPZ sales.*

The Commission appears to suggest that the circumstances outlined in its Dumping and Subsidy Manual represents an exhaustive list of factors which would render sales as not being made in the ordinary course of trade. This cannot be so.

To highlight, Dalian Steelforce presents relevant examples and circumstances which have supported findings that sales were not made in the ordinary course of trade. Each of these examples display similarities to the circumstances of Dalian Steelforce's FTZ sales.

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

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

The commission considered the claim and found that the domestic like model was not routinely sold in the domestic market and was made to only one distributor customer. The commission concluded that "*those sales were not, by reason of those unusual circumstances, in the ordinary course of trade*".[10]

As highlighted above, Dalian Steelforce's sales to FTZ:

- were irregular in their frequency and volume;
- were to a single individual end-user customer,
- reflected distribution prices given the orders received are irregular and for very small parcels;
- were treated as exports for the purposes of incurring residual 'export' VAT of 8%;
- required the manufacturer to hold an applicable export license;
- were denominated in US dollars which further confirms their export nature; and
- were legally recognised as exports by China Customs.

Example B – EU investigation into Polyester Staple Fibres exported from Korea

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

In deciding to impose dumping duties on polyester staple fibres exported from Korea[11], the EU concluded:

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

[10] EPR 145, Record no. 013, page 37.
[11] Council Regulation (EC) No 2852/2000 of 22 December 2000, para 29.

> *and fair comparison with the export price in accordance with Article 2 of the basic Regulation.*

The circumstances in this case exhibits clear parallels to the circumstances involving Dalian Steelforce's sales to FTZ, in terms of the export nature of the particular sales transactions. Consistent with the EU's consideration of the nature of the sales transactions, Dalian Steelforce contends that its FTZ sales should be found to not be in the ordinary course of trade.

Example C – EU investigation into Polyethylene Terephthalate Film exported from Korea

In the EU's investigation into exports of polyethylene terephthalate film exported from Korea[12], it again held that 'local-export' sales were not sales in the ordinary course of trade:

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

Again the circumstances in the above case provides guidance on the relevant factors that would render sales to not be in the ordinary course of trade. Given the similarities with Dalian Steelforce's FTZ sales, it is incorrect for the Commission to find that such sales were normal sales that met the broader definition of ordinary course of trade.

In conclusion, Dalian Steelforce contends that the Commission erred in finding that its FTZ sales were made in the ordinary course of trade. This finding is inconsistent with:

- the Commission's previous determinations made in the original investigation and every subsequent inquiry up to Review 419;
- the findings of the Commission's verification teams that undertook and completed a firsthand assessment of Dalian Steelforce's operations and a detailed understanding of the circumstances of the FTZ sales;
- the unchanged facts and circumstances of the FTZ sales which continue to display characteristics associated with export sales; and
- previous determinations by the Commission and the EU administering authority in cases involving similar circumstances.

[12] Council Regulation (EC) No 367/2001 of 23 February 2001, para 57.

2.3 Finding 3: The Minister erred by not making necessary adjustments to ensure that export prices and normal values were compared at the same time.

In calculating Dalian Steelforce's deductive export prices, the Commission relied on Steelforce Australia's distribution sales into the Australian market. As verified by the Commission, these sales are made from stock held in various distribution centres throughout Australia. As the determined normal values reflect constructed prices at the free-on-board level and at the date of invoice/shipment, the Commission correctly considered that a timing adjustment was required to the Steelforce Australia selling prices to ensure that they can be properly compared at the same time as the constructed normal values.

To assist with the timing adjustment, the Commission requested average stock holding periods for each of Steelforce Australia's distribution centres. The verified data outlined in the table below shows that the imported goods were held in stock for an average period ranging from ~~XX~~ to ~~XX~~ days, which represents an average period of ~~X~~ months.

Using the actual invoice date of Steelforce Australia's individual distribution sales, the Commission calculated a date of sale by applying the corresponding average inventory holding period for each distribution centre. For example, for a sale made on ~~XXXXXXXXXX~~ from the ~~XXXXXXXX~~ distribution centre, the Commission calculated a date ~~XX~~ days prior to the sale which resulted in a date of sale of ~~XXXXXXXXXXX~~.

[CONFIDENTIAL TABLE DELETED]

Dalian Steelforce agrees with this approach but submits that the Commission's timing adjustment is missing an additional timing adjustment to effectively ensure that the date of sale of the deductive export prices corresponds to the date of export invoice/shipment which would allow for a proper comparison with the constructed normal values. That is, by adjusting for Steelforce Australia's average inventory holding periods, the calculated date reflects a date of arrival in Australia or more precisely the date of home consumption.

To accurately calculate the date of sale corresponding to the date of shipment, a further adjustment is required to cover the average shipping period between the date of exportation and the date of arrival into Australia. This period reflects an additional average ~~XX~~ days. Therefore, using the earlier example again, the correct date of sale for the deductive export price based on a sale by Steelforce Australia made on ~~XXXXXXXXXXXX~~ is ~~XXXXXXXXXXX~~.

The need to make this further timing adjustment is confirmed by the Commission in its correspondence with Dalian Steelforce (refer to **Confidential Attachment E**) which relates to earlier duty assessment periods. The Commission notes that the '~~XXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXX~~' and '*correcting for this error decreases the dumping margin*'.

3. THE PROPOSED CORRECT AND PREFERABLE DECISIONS

Finding 1: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sold for home consumption in China.

The proposed correct and preferable decision relevant to finding 1 is that Dalian Steelforce did not make domestic sales of like goods which were sold for home consumption in China

and in the ordinary course of trade. As such, it was not open to the Minister to determine a profit pursuant to subsection 45(2) of the Regulation.

In determining a profit under the alternative methods provided for under subsection 45(3) of the Regulation, Dalian Steelforce submits that it was not possible to calculate the actual amounts realised by Dalian Steelforce on domestic sales of the same general category of goods. Therefore, profit could not be determined in accordance with 45(3)(a) of the Regulation.

Dalian Steelforce notes that during Review 419, multiple Chinese exporters had cooperated with the Commission's request for information and each of them had made domestic sales of like goods for home consumption in China and in the ordinary course of trade. As the requirements for determining actual amounts realised pursuant to subsection 45(3)(b) of the Regulation are met, Dalian Steelforce proposes that the correct and preferable decision was for the Minister to determine profit using the weighted average of actual amounts realised of domestic sales of like goods in China by other cooperating exporters.

Finding 2: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sales made in the ordinary course of trade.

The proposed correct and preferable decision relevant to finding 2 is that Dalian Steelforce did not make domestic sales of like goods which were made in the ordinary course of trade. As such, it was not open to the Minister to determine a profit pursuant to subsection 45(2) of the Regulation.

In determining a profit under the alternative methods provided for under subsection 45(3) of the Regulation, Dalian Steelforce submits that it was not possible to calculate the actual amounts realised by Dalian Steelforce on domestic sales of the same general category of goods. Therefore, profit could not be determined in accordance with 45(3)(a) of the Regulation.

Dalian Steelforce notes that during Review 419, multiple Chinese exporters had cooperated with the Commission's request for information and each of them had made domestic sales of like goods for home consumption in China and in the ordinary course of trade. As the requirements for determining actual amounts realised pursuant to subsection 45(3)(b) of the Regulation are met, Dalian Steelforce proposes that the correct and preferable decision was for the Minister to determine profit using the weighted average of actual amounts realised of domestic sales of like goods in China by other cooperating exporters.

Finding 3: The Minister erred by not making necessary adjustments to ensure that export prices and normal values were compared at the same time.

The proposed correct and preferable decision relevant to finding 3 is that a further timing adjustment was required to be made to Steelforce Australia's distribution sales to ensure that the deductive export prices reflected a date of sale that was consistent with the constructed normal values. The timing adjustment required applying a further ~~XX~~ days to the Commission's calculation of the date of sale for the average shipping period between exportation from China and home consumption in Australia.

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

Finding 1: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sold for home consumption in China.

Whilst Dalian Steelforce is not aware of the actual amounts realised by other cooperating exporters on domestic sales of like goods, it is noted that during the original investigation, the Commission determined profit utilising the proposed method which amounted to a 0% rate of profit. This is consistent with Dalian Steelforce's understanding of HSS profit margins achieved domestically in China which are significantly impacted by the large number of domestic HSS producers and the intense domestic competition between them.

Given the Commission's calculation of a ~~XX~~% profit achieved on sales to the FTZ, a weighted average amount actually realised by other cooperating Chinese exporters on domestic sales of like goods of 0% would result in a substantial reduction in Dalian Steelforce's dumping margin to approximately ~~XX~~% from the 11.0% determined in REP 419.

Finding 2: The Minister erred in determining profit by relying on Dalian Steelforce sales to the FTZ which were not sales made in the ordinary course of trade.

Whilst Dalian Steelforce is not aware of the actual amounts realised by other cooperating exporters on domestic sales of like goods, it is noted that during the original investigation, the Commission determined profit utilising the proposed method which amounted to a 0% rate of profit. This is consistent with Dalian Steelforce's understanding of HSS profit margins achieved domestically in China which are significantly impacted by the large number of domestic HSS producers and the intense domestic competition between them.

Given the Commission's calculation of a ~~XX~~% profit achieved on sales to the FTZ, a weighted average amount actually realised by other cooperating Chinese exporters on domestic sales of like goods of 0% would result in a substantial reduction in Dalian Steelforce's dumping margin to approximately ~~XX~~% from the 11.0% determined in REP 419.

Finding 3: The Minister erred by not making necessary adjustments to ensure that export prices and normal values were compared at the same time.

As confirmed by the Commission, the proposed decision to correctly adjust the deductive export prices for the average shipping period would reduce the dumping margin. Based on Dalian Steelforce's preliminary calculation, the proposed decision would reduced the dumping margin by approximately ~~XX~~%.

Interim Measures of the Customs of the People's Republic of China on Supervision and Control of Export Processing Areas

(Approved by the State Council on April 27, 2000, and promulgated by Decree No.81 of the General Administration of Customs on May 24, 2000)

Chapter I General Provisions

Article 1 These Measures are formulated in accordance with the Customs Law of the People's Republic of China and relevant laws and regulations of the State for the purpose of strengthening and improving the administration of the processing trade, regulating the supervision of the export processing areas by Customs, promoting the healthy development of the export processing areas and encouraging the expansion of foreign trade and exports.

Article 2 In order to prevent duplicated construction, export processing areas (hereinafter referred to as processing areas) to be established within the territory of the People's Republic of China shall be located only in the existing economic and technological development zones that have been approved by the State Council, and shall be reported to the State Council for approval by the people's governments of the provinces (autonomous regions, municipalities directly under the Central Government).

Article 3 Processing areas are specific areas under the supervision and control of Customs. Customs shall establish offices in the processing areas and exercise, pursuant to these Measures, 24-hour supervision over the goods entering or leaving the processing areas and over the relevant sites therein.

Article 4 Separation facilities and close circuit television supervision and control systems that meet the requirements of Customs supervision and control shall be installed between the processing areas and other areas of the territory of the People's Republic of China (hereinafter referred to as the outside areas). Only after the General Administration of Customs has tested and accepted the separation facilities of the processing areas, may business operations related to the processing areas be engaged in.

Article 5 An administrative committee of the processing area, export processing enterprises, warehousing enterprises that provide services solely for the production of the export processing enterprises, and transportation enterprises that are solely engaged in the transportation of goods into and out of the processing area with Customs approval shall be established therein.

No other persons may live in a processing area except the security guards and

the duty-employees of enterprises. No profit-oriented consumer facilities may be established.

Article 6 No retailing business, general trade, transit trade and other business irrelevant to the processing area may be conducted therein.

Article 7 The enterprises established within the processing areas (hereinafter referred to as enterprises within the areas) shall go through registration formalities with Customs.

Article 8 Enterprises within the areas shall, in accordance with the provisions of the Accounting Law of the People's Republic of China and the relevant laws and regulations of the State, set up account books and statements that meet the requirements of Customs supervision and control. They shall make entries and conduct accounting on the basis of the legitimate and valid vouchers and make a record of such items as inventory, assignment, transfer, sale, processing, use and consumption of the enterprises' goods and articles entering or leaving the processing areas.

Article 9 The processing areas shall be subjected to computer network control and the Customs auditing system.

Enterprises within the areas shall establish computerized databases that conform to the requirements of Customs supervision and control, connect them to Customs through computer networks and exchange electronic data each other.

Article 10 The bank guarantee ledger system for processing trade shall not be applied to the processing trade business conducted by enterprises within the areas, and Customs shall not exercise administration by the Processing Trade Register.

Article 11 Customs has the power, in accordance with the provisions of the Customs Law of the People's Republic of China, to conduct inspections and examinations of goods, articles, means of transport and persons entering or leaving the processing areas and relevant sites therein.

Article 12 The State does not levy value-added tax on the processed products within the areas.

Article 13 No goods or articles that are prohibited from being imported or exported by the State may enter or leave the processing areas.

Chapter II Supervision and Control of Goods Moving between the Processing Areas and Places outside China

Article 14 With respect to the goods moving between a processing area and a place outside China, the owner of goods or his agent shall fill in a filing list of goods entering or leaving China on the basis of the documents of approval issued by the

administrative committee of the processing area, and file it with the competent Customs office. The filing list shall be uniformly printed and distributed by the General Administration of Customs.

Article 15 With respect to the goods moving between a processing area and a place outside China, Customs shall exercise supervision and control through direct release or by transshipment to another Customs office.

Article 16 Import or export quota control and licensing control shall not apply to the goods moving between processing areas and places outside China, except those goods to which the passive export control applies.

Article 17 With respect to goods entering a processing area from a place outside China, the import duties and taxes related to importation shall be collected according to the following provisions except where laws and regulations provide otherwise:

(1) Machines and equipment needed for infrastructure construction projects for the production in the area, and materials for capital construction needed for the construction of factory buildings and storage facilities shall be exempted from duties and taxes.

(2) Machines, equipment, modeling tools and parts and components used for the maintenance thereof, which are needed for the production of the enterprises within the areas shall be exempted from duties and taxes.

(3) Raw materials, spare parts, components, packing materials and materials for productive consumption, which are needed for the processing of products for export by enterprises within the areas, shall be treated as bonded goods.

(4) Articles for office use in reasonable quantities needed by the enterprises and administrative bodies within the areas shall be exempted from duties and taxes.

(5) With respect to means of transport and consumer goods which are used by the enterprises and administrative bodies within the areas, the Customs declaration formalities shall be fulfilled in accordance with the provisions concerning imported goods and Customs shall collect duties and taxes in accordance with the regulations.

Article 18 The goods manufactured by the enterprises within the areas, leftovers, surplus materials, rejects and sub-standard products, wastes, etc. arising in the course of the processing and production shall be exempted from export duties if they are to be sold abroad except where laws and regulations provide otherwise.

Chapter III Supervision and Control of Goods Moving between Processing Areas and Outside Areas

Article 19 For goods transported from the processing areas to outside areas,

Customs shall handle declaration formalities in accordance with the provisions concerning imported goods and treat them as manufactured goods in collecting duties and taxes. If the goods are under the licensing control, the valid import licensing certificates shall also be presented to Customs.

Article 20 The goods manufactured by the enterprises within the areas, leftovers, rejects and sub-standard products, wastes, etc. arising in the course of the processing and production shall be re-exported out of China. Where there is a need to transport them to outside areas under special circumstances, they shall be valued and taxed according to their value of utility upon application by the enterprises and verification and approval by the competent Customs offices. If the goods are under the licensing control, the valid import licensing certificates shall also be presented to Customs.

Where leftovers and wastes of no commercial value need to be transported to outside areas for destruction, exit formalities shall be completed with the competent Customs offices on the basis of the documents of approval issued by the administrative committee and the environmental protection department. Customs shall exempt them from import licenses and duties and taxes.

Article 21 Enterprises within the areas shall not entrust enterprises located outside the areas to do the processing of products. Where, under special circumstances, it is necessary to entrust enterprises located outside the areas to conduct any processing operation due to technical and processing difficulties to meet the required product standards, on condition that such processing of products shall not change the basic feature and quantity of the original products (at the time of the exit from the area), the entrusted enterprises located outside the areas may, upon approval of the commissioner of the competent Customs office, pay to the competent Customs office in the processing area the amount of guarantee equivalent to the value of the products and complete exit formalities with reference to the provisions pertaining to the control of temporarily imported goods.

The period for entrusted processing by an enterprise outside the area is six months, and no extension of the period shall be permitted. Upon the completion of the processing, the processed products (including rejects and sub-standard products and wastes) shall be transported back to the areas, and formalities for examining and releasing the products, verifying and canceling the accounts thereof shall be completed with the competent Customs offices in the processing areas on the basis of the application for entrusted processing outside the areas and the relevant documents originally written out at the time of their exit from the area.

Article 22 Machines, equipment, modeling tools, etc. which are sold by enterprises within the areas to places outside the areas shall be dealt with in

accordance with relevant existing import policies and the relevant provisions of the State.

Article 23 The enterprises within the areas may have their products tested, examined or exhibited outside the areas upon approval of the competent Customs offices. For products to be tested, examined and inspected or exhibited, formalities pertaining to exit from the areas shall be executed in accordance with Customs regulations on control of temporarily imported goods.

Article 24 Where machines, equipment, modeling tools, articles for office use, etc. which are used in the areas need to be transported to outside areas for maintenance, testing or examination, enterprises within the areas or the administrative bodies shall fill in the Contact Sheet for Examination, Inspection and Maintenance of the Goods Transported from within the Export Processing Area to an Outside Area, submit applications to the competent Customs offices, and may transport those machines, equipment, modeling tools, articles for office use, etc. to outside areas for maintenance, testing or examination and inspection only upon approval, registration and inspection by the competent Customs offices.

Where an enterprise within the area transports modeling tools to outside areas for maintenance, testing or examination and inspection, the sample products manufactured by these modeling tools shall be retained for the examination by Customs of the modeling tools transported back into the areas.

Machines, equipment, modeling tools, articles for office use, etc. transported to outside areas for maintenance, testing or examination and inspection shall not be used for the processing, production and use in outside areas.

Article 25 Machines, equipment, modeling tools, articles for office use, etc. transported to outside areas for maintenance, testing or examination and inspection shall be transported back into the processing areas within two months from the date on which they are transported out of the areas. Where they cannot be transported back on time under special circumstances, enterprises within the areas shall, within seven days before the expiry of the period, explain the circumstances to the competent Customs offices and apply for an extension of the period. The extension of the period may only be approved for one time and the period may not be extended more than one month.

Article 26 For machines, equipment, modeling tools, articles for office use, etc. transported to outside areas for maintenance, they may be transported back into the areas only on condition that it is possible for Customs to identify that they are the original articles or new parts, components or accessories of the same specifications, and where new parts, components or accessories have replaced the original ones, the original ones shall be transported back into the areas together with the new ones.

Article 27 Goods entering the processing areas from outside areas shall be deemed as exports, and Customs declaration formalities for exports shall be fulfilled. An export tax refund shall be processed in accordance with the following provisions, unless otherwise provided for by laws and regulations:

(1) For domestically produced machines, equipment, raw materials, spare parts, components and packing materials entering the processing areas from outside areas for the use of enterprises within the areas, and goods and materials for capital construction in a reasonable amount needed for the construction of infrastructures, production facilities and office buildings for the processing enterprises and the administrative bodies therein, Customs shall handle the declaration formalities in accordance with the relevant provisions on exported goods and issue a declaration form for export tax refunds. Enterprises located outside the areas shall apply to the tax authorities for undergoing export tax refund (exemption) formalities by presenting the export tax rebate vouchers of the declaration forms, and the specific measures for the administration of tax refunds (exemptions) shall be provided separately by the State Administration of Taxation.

(2) For consumer goods, means of transport, etc. entering the processing areas from outside areas for the use of enterprises and the administrative bodies within the areas, Customs shall not issue the declaration forms for export tax refunds.

(3) For imported machines, equipment, raw materials, spare parts, components, packing materials, goods and materials for capital construction, etc. entering the processing areas from outside areas, the enterprises located outside the areas shall submit a list of the aforesaid goods and articles to Customs and undergo export declaration formalities, and Customs shall release them upon examination. The import duties and taxes already paid for the aforesaid goods and articles shall not be refunded.

(4) Where it is necessary to transport commodities which are prohibited by the State from being exported or which are under State's centralized management into the processing areas for any processing operation due to inadequate domestic techniques to meet the requirements of a product, the matter shall be reported to the Ministry of Foreign Trade and Economic Cooperation for approval, and Customs shall exercise supervision and control according to the measures for administration of exported materials processing, and shall not issue export tax refund declaration forms for those goods transported into the processing areas.

Article 28 The goods and articles transported into the processing areas from outside areas shall be transported to the places or warehouses designated by Customs, and enterprises located outside the areas shall fill in export declaration forms and undergo Customs declaration formalities at the competent Customs offices in the processing areas by presenting purchase invoices and packing lists issued within the

territory of China.

Article 29 The goods transported into the processing areas from outside areas shall undergo substantive processing by enterprises within the areas before they can be shipped overseas.

Chapter IV Supervision and Control of Goods within Processing Areas

Article 30 Goods which move into or out of the processing areas by the enterprises within the areas shall be truthfully declared to the competent Customs offices, and Customs shall examine, inspect and release the goods which move into or out of the processing areas by the enterprises within the areas, and cancel accounts through verification on the basis of the memorandum lists and relevant documents.

Customs formalities for filing for the record, declaration, examination and inspection and release of goods moving into or out of the processing areas as well as account cancellation through verification shall be undertaken within the processing areas.

Article 31 The goods within the processing areas may be assigned or transferred between enterprises within the areas, and both of the parties involved shall report in advance to Customs for the record the names, quantities, values of the goods to be assigned or transferred and other relevant detailed particulars.

Article 32 Processing enterprises within the areas may not sell outside the areas imported raw materials, spare parts and components which have not undergone substantive processing. Enterprises engaging in warehousing service within the areas may not provide the raw materials, spare parts and components in their custody to enterprises located outside the areas.

Article 33 Enterprises within the areas shall present the account books and relevant documents of the enterprises to the competent Customs offices and undergo account cancellation formalities every six months, starting from the date on which they began their business of export processing or the business of warehousing service.

Article 34 Where the goods which have entered the processing areas are reduced in quantity or destroyed due to *force majeure* during the processing or warehousing period, the processing enterprises or the warehousing enterprises within the areas shall report the circumstances to the competent Customs offices within 10 days from the date of their discovery thereof and give their explanations. Customs shall approve a deduction from their account books upon verification and confirmation.

Chapter V Supervision and Control of Goods Moving between Processing Areas

Article 35 For goods moving between different processing areas, both the parties sending and receiving the goods shall jointly apply to the competent Customs office in the sending areas. Upon verification and approval by Customs, the matter shall be handled in accordance with the relevant provisions on Customs transshipment.

Article 36 When goods are transshipped to another processing area, the competent Customs office in the receiving area shall release them to the enterprise or the warehouse after checking and confirming that the sealing marks are intact and the goods tally with the documents.

Article 37 Where goods moving between different processing areas can not be moved as goods in Customs transshipment, the competent Customs office in the receiving area shall collect from the receiving enterprise a guarantee in the amount equivalent to the value of the goods. After goods arrive at the receiving area, and have been verified and confirmed by Customs that no error exists, the competent Customs office shall return the guarantee to the enterprise within 10 working days.

Chapter VI Supervision and Control of Means of Transport and Articles Carried by Persons Entering or Leaving Processing Areas

Article 38 Means of transport and persons shall enter or leave the processing areas through specific channels designated by Customs.

Article 39 Processed products to be shipped overseas from the processing areas and goods to be transported from the processing areas to outside areas, after being examined and released by Customs, shall be transported by the specialized transportation enterprises established within the areas with approval of Customs. The following goods may be carried by persons specially designated by enterprises or transported by the enterprises themselves after being examined by the competent Customs offices:

(1) petty goods with a value of 10,000 US dollars or less;

(2) articles which are transported back to outside areas to be returned or replaced due to sub-standard quality;

(3) articles for which the formalities for payment of import duties and taxes have been fulfilled; and

(4) other articles examined and approved by Customs.

Article 40 The person responsible for the means of transport of the goods entering or leaving the processing areas shall fulfill registration and filing formalities with Customs by presenting the business license of the enterprise legal person and a list of names, the number, registered plate numbers of the means of transport and the

names of drivers.

All the operators of the transportation enterprises that undertake the carriage of goods entering or leaving the processing areas and the goods in Customs transshipment shall abide by Customs regulations relating to administration of means of transport and goods carried thereon, and bear corresponding legal liabilities.

Article 41 Without approval of Customs, means of transport and persons leaving the processing areas for outside areas may not transport or carry goods out of the processing areas.

Chapter VII Supplementary Provisions

Article 42 Goods transported from overseas into the processing areas and goods transported overseas from the processing areas shall be listed in the import and export statistics. Goods transported from outside areas into the processing areas and goods transported from the processing areas to outside areas shall be counted in itemized statistics. The statistical measures shall be formulated by the General Administration of Customs separately.

Article 43 Violations of the provisions of these Measures shall be dealt with by Customs in accordance with the relevant provisions of the Customs Law of the People's Republic of China and the Rules for the Implementation of Administrative Penalty under the Customs Law of the People's Republic of China.

Article 44 The General Administration of Customs shall be responsible for the interpretation of these Measures.

Article 45 These Measures shall come into force as of May 1, 2000.

ATTACHMENT D

NON-CONFIDENTIAL

Steelforce Group

Memorandum of advice regarding "home consumption"

A Introduction

In *Anti-Dumping Commission Report No. 419 – Review of Anti-Dumping Measures Hollow Structural Sections exported to Australia from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan* ("Report 419"), the Commission has determined a dumping margin for Dalian Steelforce Hi-Tech Co., Ltd ("Dalian Steelforce") of 11%.

This dumping margin is based upon a comparison of a deductive export price worked out under the Section 269TAB(1)(c) of the *Customs Act 1901* (Cth) ("the Act") and a constructed normal value determined in accordance with Section 269TAC(2)(c) of the Act, having adopted a benchmark HRC cost, and on the basis of a profit purportedly determined under Regulation 45(2) of the *Customs (International Obligations) Regulations 2015* ("the Regulations").

More specifically, the profit component of the normal value (some [CONFIDENTIAL TEXT DELETED - number]) has been determined on the basis of a small volume of HSS sold by Dalian Steelforce to [CONFIDENTIAL TEXT DELETED – customer]. [CONFIDENTIAL TEXT DELETED – customer] is an entity that operates in the [CONFIDENTIAL TEXT DELETED – area] Free Trade Zone ("the FTZ").

We have been instructed to advise whether HSS sold into to the FTZ can be considered to have been *"sold for home consumption"*. Below we analyse the legislative scheme underpinning *"ordinary course of trade"* ("OCOT") profit determination, analyse what is considered to be *"home consumption"* under Australian law, apply this interpretation to the FTZ sales and consider the implications of this interpretation.

B Relevance of "home consumption" under the Act

The concept of *"home consumption"* is essential to the determination of the normal value under Australian law. Section 269TAC(1) of the Act stipulates as follows:

> *(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.* [underlining supplied]

Like goods that are not sold for home consumption, therefore, are not an appropriate basis for a normal value under Section 269TAC(1). The requirement that such sales be for home consumption is reiterated in Section 269TAAD of the Act, which further explains when goods will be considered to be in the *"ordinary course of trade"* as required by Section 269TAC(1):

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

Section 269TAAD identifies two forms of transaction – being, those for home consumption in the country of export and those for exportation to third countries – because these transactions may be used to determine a normal value under Sections 269TAC(1) or 269TAC(2)(d). Section 269TAAD(1)(a)(i), clearly relates to the circumstance of Section 269TAC(1) and clearly requires that the relevant sales be sales for home consumption in the country of export.

This is not only relevant to the determination of a normal value under Section 269TAC(1) of the Act, in terms of identifying the domestic sales, but is also relevant to such a determination under Section 269(2)(c) of the Act, which arises where it is not possible for the Commission to determine a normal value under Section 269TAC(1). The goal of 269TAC(2)(c) is to construct a proxy for what the price for like goods would be if they could otherwise be determined under 269TAC(1). Indeed, Section

269TAC(2)(c)(ii) of the Act provides:

> *(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.*[1] [underlining supplied]

Accordingly, the concept of home consumption goes to the heart of the determination of normal value in Australian law. If like goods were not sold for home consumption in the country of export then they are not appropriate for the determination of a normal value under section 269TAC(1). In the instant example, they also would not be appropriate for the determination of a normal value under Regulation 45(2), a regulation which states:

> *The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade*. [underlining supplied]

Regulation 45(2) expressly incorporates the "ordinary course of trade" test which is defined in Section 269TAAD and which, as noted above, specifically relates to sales for home consumption in the country of export. This is in line with Section 269TAC(2)(c)(ii) which, again as noted above, specifically operates under the assumption that the goods were sold for home consumption in the ordinary course of trade.

Accordingly, sales of like goods that are not for home consumption are not relevant to the determination of a profit under Regulation 45(2).

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[1] There is a direct link between Section 269TAC(2)(c)(ii) and Regulation 45(2) at Section 269TAC(5B) of the Act, which states:

> *(5B) The amount determined to be the profit on the sale of goods under subparagraph (2)(c)(ii) or (4)(e)(ii), must be worked out in such manner, and taking account of such factors, as the regulations provide for that purpose.*

C What is "home consumption"?

The concept of *"home consumption"* of significant importance to Australia's customs laws, as generally it is not until goods are entered for home consumption that import duty and interim dumping duty becomes payable.[2]

However, entry for *home consumption* is not synonymous with *importation*. Section 68 of the Act provides that the owner of goods that have been imported or are intended for import may enter those goods for home consumption, or may warehouse those goods.[3] This reference to warehousing is a reference to delivery of goods to a "bonded warehouse". These warehoused goods, although imported, have not been entered for home consumption. That notwithstanding, within the warehouse, those goods may be blended, packaged, manufactured or otherwise altered, subject to the terms of the relevant warehouse license prior to entry for home consumption or exportation.[4] Until either event, the goods are considered to be under the control of Customs.[5]

"Home consumption" is not defined in the Act. Fortunately the term has been ruled upon by Australian courts. In particular, we note the following:

- In *R v Lyon*,[6] O'Connor J considered the meaning of this term in the context of a provision of the Act that dealt with customs control over goods *"until delivery for home consumption or exportation"*. In this regard, His Honour concluded that:

  > *The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them.*[7]

- This was further clarified in *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation*, in which Sundberg J said:

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2 Section 132AAA of the Act and Section 8(5D) of the *Customs Tariff (Anti-Dumping) Act 1975* (Cth), respectively.

3 Section 68(2) and (3).

4 As provided for under Section 79 of the Act.

5 Section 30.

6 (1906) 3CLR 770

7 At 784.

> *…Justice O'Connor's reference to going into circulation was used to explain how effective security over goods is lost once they have entered home consumption. His Honour was not there describing the concept of delivery nor, more importantly, intending to limit its scope. He was drawing attention to the policy of the customs legislation and the importance of the customs authorities' having a form of security over imported goods to ensure the payment of duty. I agree with the Commissioner that Caltex's dedication of the residual oils for consumption by it at its premises is sufficient, in the sense O'Connor J had in mind, for the oils to "go into circulation".*[8]

Consistent with the clear architecture of the Act, these judgements interpret the concept of "home consumption" as meaning the circumstances where goods have left Customs control and gone into circulation. This term, as used throughout the Act, has been so defined for over a century. Adopting a different reading of the term for the instances where it is used in the anti-dumping portion of the Act would not only be confusing, it would also be inconsistent with fundamental principles of statutory construction.[9]

D Are sales to FTZ sales for home consumption?

We note that Report 419 considers that sales of HSS to the FTZ were for home consumption, on the basis that:

> *Indeed, the goods sold by Dalian Steelforce to the EPZ are sold to an entity in China who consumes the goods as inputs to produce a substantially different product. It is this new product which is then exported out of China. The fact that the sales may be subject to certain administrative arrangements in China does not impact on the fact that they are sold in China to be consumed in a manufacturing process.*[10]

We respectfully disagree. This reasoning would render the use of the term *"home consumption"* in Section 269TAC(1), 269TAC(2) and Section 269TAAD(1) to refer only to the geography of the sale. The reasoning for the adoption of this interpretation is unclear. It does not naturally flow from the terms used in any of the above quoted Sections, nor could it be readily implied from those words. It is also inconsistent with the interpretation of that term in the same Act as established by the Court over a century ago.

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8 [2008] FCA 1951.

9 Of particular relevance is the judgement of the High Court of Australia in *Project Blue Sky v ABA* [1998] HCA 28, which states at paragraph 69 the High Court clearly explained that:

> *The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole*. [footnotes omitted, underlining supplied]

10 At page 26.

What is required by both Section 269TAC(1), 269TAC(2)(c) and Section 269TAAD(1) is that like goods be sold for home consumption in the country of export. To understand whether goods were "sold for home consumption" it is of course necessary to consider the circumstances of the particular sale, and to apply the legal definition of *"home consumption"* under the Australian legislation to those circumstances.

These relevant sales were made to **[CONFIDENTIAL TEXT DELETED – customer]**, a corporation located in the FTZ in **[CONFIDENTIAL TEXT DELETED – city]**, part of the larger **[CONFIDENTIAL TEXT DELETED – area]** Free Trade Zone. The **[CONFIDENTIAL TEXT DELETED – area]** Free Trade Zone is more accurately described as an Export Processing Area. The primary law governing such areas is the *Interim Measures of the Customs of the People's Republic of China on Supervision and Control of Export Processing Areas* ("the Interim Measures").[11] In a submission dated 9 April 2018, the Commission was provided with a link to this law. Of relevance, we note that Article 3 of the Interim Measures provides that:

> *Processing areas are specific areas under the supervision and control of Customs. Customs shall establish offices in the processing areas and exercise, pursuant to these measures, 24 hour supervision over the goods entering or leaving the processing areas and over the relevant sites there-in.*

Clearly, then, these sales were not sales for *"home consumption"* instead they were sold into *"customs control"*. From a more purposive perspective, we can understand why such sales would not be an accurate basis for use in the determination of a normal value, nor in the determination of a proxy profit designed to mimic the circumstances of a sale for home consumption in China. Simply put, the sales to the FTZ are not representative of sales of HSS within the Chinese market generally. This is clear when the following aspects of the Interim Measures are considered:

- Article 27 deems goods that enter an EPZ from other areas of China to be exports, and requires them to undergo export declaration formalities and processes.
- Article 17 deals with the treatment of goods imported into the EPZ. Article 17(3) provides that raw materials, spare parts, components, packing materials and material for productive consumption, which are needed for the production of the enterprises within the areas, shall be treated as *"bonded goods"*, meaning that there is no import duty payable on them, unless they are ultimately entered into circulation in the Chinese market.
- Article 20 provides that goods manufactured by enterprises within the EPZ are to be

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11 https://www.wto.org/english/thewto_e/acc_e/chn_e/WTACCCHN46_LEG_1.pdf

exported out of China, allowing only for transportation to areas outside the EPZ within China in *"special circumstances"*.

- Article 29 provides that goods transported into the processing area from outside areas shall undergo substantive processing by enterprises within the areas before they can be shipped overseas.

Practically, this means that Dalian Steelforce's sales into the FTZ are treated in the same manner by Chinese Customs and are under the same legal controls as are sales to Australia and New Zealand, including being subject to the same VAT and tax requirements. For all of these sales, Dalian Steelforce is required to hold an export license, prepare and submit export declarations and incur residual export VAT of 8% (something that does not occur for domestic sales). Only Chinese manufacturers that hold an export license are able to sell into the FTZ market. These differences are significant. Report 419 itself emphasises the significance that differing VAT rebates and taxes on steel exports (being those that are applicable to the FTZ sales) have on the domestic market:

> *Through altering the VAT rebates and taxes applied to steel exports, the GOC is able to alter the relative profitability of different types of steel exports and of exports compared to domestic sales. For example, by either reducing VAT rebates or increasing export taxes on steel exports, the GOC is able to reduce the relative profitability of exports to domestic sales and hence provide significant incentives for traditional exporters to redirect their product into the domestic Chinese market. By using these mechanisms to alter the relative supply of particular steel products in the domestic market, the GOC is also able to influence the domestic price for those products.*[12]

There is a clear inconsistency in the Commission's view that differing VAT rebates and taxes applied to steel exports distorts prices in the domestic market, but are only *"administrative arrangements"* with regard to the FTZ sales. Ultimately, we think the differences between the FTZ sales and sales for home consumption within China would be clear if the Commission were to compare the profits achieved on Dalian Steelforce's **[CONFIDENTIAL TEXT DELETED - number]** tonnes of HSS sold to the FTZ (some **[CONFIDENTIAL TEXT DELETED - number]**) with the profits achieved by other manufacturers and exporters of HSS that sell the goods for home consumption in the Chinese market. No doubt, the differences will be stark and informative.

The ultimate goal of constructing a normal value under Section 269TAC(2)(c) is to calculate a proxy price that is representative of the sales of like goods for home consumption in arm's length transactions

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12 Report 419, page 74.

in the country of export. The small volume of HSS sold into the FTZ was not *"sold in the ordinary course of trade for home consumption in the country of export"* as per the relevant provisions of Section 269TAC, or of the OCOT provisions and Regulations which are subservient to Section 269TAC. That HSS went into a status that is not entitled to be considered as "home consumption" under Australian law. The technical circumstances of its sale and indeed the price at which the sale or sales took place bear this out, because those circumstances and those prices are not indicative of domestic market conditions.

Therefore, the very specific circumstances pertaining to these sales means that they cannot be used as a basis for the determination of profit under Regulation 45(2) of the Regulations. Using those sales will lead to a perverse and distorted normal value that is not appropriate for the determination of dumping.

E Implications of this analysis

Profit cannot be determined under Regulation 45(2). Accordingly, one of the methodologies under Regulation 45(3) must be used. These methodologies are:

> *(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; or*
>
> *(b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or*
>
> *(c) using any other reasonable method and having regard to all relevant information.*

The method provided for in Regulation 45(3)(a) cannot be used. This methodology requires sales of the same general category of goods in the domestic market of the country of export. For the reasons stated above, the FTZ is not the domestic market of the country of export. The differing tax and VAT rebates applicable to those sales, as well as the limited demand and differing competitive standards from those faced in the domestic Chinese market ensure that this is the case. Again, any doubt about this conclusion will be defeated if the **[CONFIDENTIAL TEXT DELETED - number]** profit margin determined on those FTZ sales is compared with the margin made by other producers and exporters of HSS in arm's length sales for home consumption in the domestic market.

This leaves methods (b) or (c). In the circumstances of Review 419, there is ample information to determine profit under either of the methods provided for under Regulation 45(3)(b) or under 45(3)(c). The latter is subject to 45(4), which essentially caps the profit determined under 45(3)(c):

> *…by the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export.*

There is ample information from Review 419 that would allow for the determination of the profit normally realised by domestic exporters on sales of the same general category of goods in the domestic market of China. The use of either methodology would result in a constructed normal value that is far more representative of the price of like goods sold in the ordinary course of trade for home consumption in the country of export then does the normal value that resulted in the 11% dumping margin attributed to Dalian Steelforce at the close of Review 419.

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