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

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

Dear ADRP member,

Please accept this submission on behalf of Dalian Steelforce Hi-Tech Co., Ltd (Dalian Steelforce), to the current review into the decision by the Minister in relation to the review of anti-dumping measures applying to imports of hollow structural sections exported from China by Dalian Steelforce. The purpose of this submission is to more clearly highlight the change in the Anti-Dumping Commission's (the Commission) findings in relation to the treatment of Dalian Steelforce's sales for the purposes of determination of profit.

In the previous review of measures (Review 379) applying to HSS exports by Dalian Steelforce, the Commission found that Dalian Steelforce's sales to the FTZ were **not** in the ordinary course of trade due to the nature and circumstance of the particular sales, being at different levels of trade to the corresponding export sales and Dalian Steelforce's normal operations. As a result, the Commission determined that there were no domestic sales of like goods sold in the ordinary course of trade to calculate a profit pursuant to subsection 45(2) of *Customs (International Obligations) Regulation 2015* (Regulation). Despite this, the Commission considered that FTZ sales remained relevant for the purposes of determining profit pursuant to subsection 45(3)(a) of the Regulation in calculating the actual amount realised on sales of the same general category of goods in the country of export.

Dalian Steelforce agreed with the Commission's view and assessment that sales of like goods to the FTZ were **not** sales made in the ordinary course of trade which would allow profit to be determined pursuant to subsection 45(2) of the Regulation. However, Dalian Steelforce sought an ADRP review of the Commission's finding as it held the view that construction of the normal value required approximating an ordinary sale and it was

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therefore not correct or preferable to rely on the profit from the non-ordinary FTZ sales in constructing normal values.

In considering the issue, the ADRP Member concluded¹:

...that s.45(3)(a) does not require that the sales used to calculate the profit be sales in the ordinary course of trade. The wording of s.45(3)(a) can be contrasted in this respect with that of s.45(2) of the Regulation.

The ADRP Member also found support in the decision of Justice Robertson in *Steefforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*², where Robertson J. stated that:

"s 269TAC(2)(c)(ii) proceeds on an assumption, that assumption being that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export. It is in that context that the Minister may determine what would be, relevantly, the profit on that hypothetical sale."

Dalian Steelforce accepts the finding and interpretation of the ADRP Member in ADRP Report No. 63, that a profit calculated under s.45(3)(a) need not be based on sales in the ordinary course of trade.

However, the Commission's finding in the current Review 419 overturns its previously held view that FTZ sales are **not** ordinary sales, and as a result, the issue at the centre of Dalian Steelforce's current ground of appeal differs to the issue previously considered by the ADRP.

In summary, the Commission now considers that its previously held view that FTZ sales were **not** in the ordinary course of trade was flawed as '*domestic sales with a different level of trade to export sales does not render those sales not in the ordinary course of trade.*'. This directly contradicts the Commission's statements to ADRP Review No. 63 and is made without any of the facts having changed between Review 379 and Review 419.

The unchanged circumstances of the FTZ sales confirm that such sales are **not** ordinary sales and demonstrates that the Commission's finding is not correct or preferable. These include:

- The FTZ customer is a [REDACTED] **[details of customer operations]** 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. 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 for 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

¹ ADRP Report No. 63, para 29, page 11.

² *Steefforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science*, [2016] FCA 1309.

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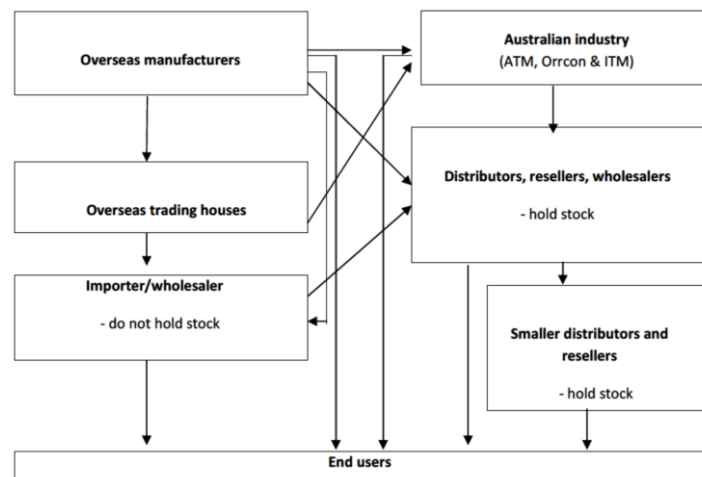
are not able to be supplied by a large section of domestic HSS producers and as such, Dalian Steelforce does not compete on the domestic market in order to make these sales;

- 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.

As highlighted in its application, the circumstances outlined above have also previously been found by the Commission and the equivalent EU administration, to be sufficient for determining sales to not be in the ordinary course of trade.

It is also noted that during the conference meeting held between the ADRP Member and Commission officers on 1 August 2018, the Commission explains that level of trade differences must be demonstrated to *'have an impact upon price'*. The Commission added that no evidence was put to the Commission to support any differences in the cost base and prices between Dalian's export sales to Australia and those into the FTZ.

Dalian Steelforce submits that the Commission must be well aware of the various levels of trade operating in the HSS markets of both Australia and China, given that there have been well over 30 different inquiries undertaken by the Commission into HSS products. For example, the original application lodged by the Australian industry and each application requesting the imposition of measures since, has included the diagram below.



Dalian Steelforce contends that level of trade has a direct impact on price as small end-users such as its FTZ customer cannot be expected to negotiate a lower competitive price relative to a large volume trader, simply due to the vast difference in purchased volumes and bargaining power attached to those volumes. It is for this reason that traders, importers and distributors are each able to operate in the respective market, with the ultimate customer being an end-user.

On the question of evidence, Dalian Steelforce notes that during its verification visit, the Commission's verification team outlined the stated requirements in the Commission's Dumping & Subsidy Manual for allowing a level of trade adjustment, by seeking to confirm and evidence observed price differences between the different levels of trade on the

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domestic and/or export markets. In response, Dalian Steelforce highlighted to the Commission that as all export sales were made to a single trader and all FTZ sales were made to a single end-user, the available sales data did not allow for a price comparison as per the example in the Dumping and Subsidy Manual.

Therefore, it is not correct for the Commission to state that no evidence was put to it with respect to the level of trade differences and their impact on price. It is more accurate to note that there was no available evidence held by Dalian Steelforce which would allow for a direct price comparison of prices at different levels of trade as preferred by the Commission. More precisely, the information provided to the Commission was an explanation of the price setting mechanism relied upon by Dalian Steelforce and the importance of ordered volumes in determining and setting its price offers.

This is particularly relevant given the requirement of Article 2.4 of the Anti-Dumping Agreement for the investigating authority to *'not impose an unreasonable burden of proof'* on parties. This has been interpreted by the Panel in *Egypt - Steel Rebar*³ as placing an *'affirmative information-gathering burden on the investigating authority'*. Further, in *US - Hot-Rolled Steel*⁴, the Appellate Body considered that *'under Article 2.4, the obligation to ensure a "fair comparison" lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports.'*

Dalian Steelforce submits that the Commission had relevant and reliable information from numerous cooperating exporters, importers and Australian industry producers to allow for a meaningful examination and assessment of sales, to establish whether prices varied according to different levels of trade and the corresponding purchased volumes at the various levels. Instead, the Commission has been inactive in its role as the investigating authority and clearly not undertaken any assessment or analysis of the large volume of sales information gathered during Review 419.

Yours sincerely

John Bracic

³ Panel Report, *Egypt - Steel rebar from Turkey*, WT/DS211/R, para 7.352, page 85

⁴ Appellate Body Report, *US - Hot-Rolled Steel from Japan*, WT/DS184/AB/R, para 178, page 61