



Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal Branch
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By EMAIL

Dr Bradley Armstrong
Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Dear Commissioner,

ADRP Review No. 156 – Hollow Structural Sections exported from the People’s Republic of China, the Republic of Korea, Malaysia and Taiwan

The Anti-Dumping Review Panel (“Review Panel”) is currently conducting a review of the decision of the Minister for Industry and Science (“Minister”) made under s.269ZHG(1)(b) of the *Customs Act 1901* (the Act) in respect of Hollow Structural Sections (“HSS”) exported from the People’s Republic of China, the Republic of Korea, Malaysia and Taiwan (“the Reviewable Decision”).

The Review Panel accepted applications for review from the following applicants:

1. Orrcon Manufacturing Pty Ltd (“Orrcon”); and
2. Austube Mills Pty Ltd (“ATM”).

As you are aware, I am conducting the review.

Pursuant to s.269ZZL of the Act, I require the following findings in Report No. 590 (“REP 590”), relating to Orrcon’s Ground 1 and ATM’s Ground 1,¹ be reinvestigated:

¹ Orrcon and ATM have similar first grounds of review, challenging the determination of the dumping margin for the Korean exporter Hi-Steel Co., Ltd (“Hi-Steel”) based on export price assessment using the order date as the date of sale for fair comparison purposes.

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FINDING 1: The finding of the Anti-Dumping Commission (“ADC”) that the order date, rather than invoice date, was the preferred date of sale for comparison between export and domestic sales for the purpose of determining dumping for the Korean exporter, Hi-Steel Co., Ltd (“Hi-Steel”)

1. It was noted in REP 570 that Hi-Steel originally provided its data with the date of sale set as its invoice date and that in its REQ it ‘accepted’ that the date of sale was the invoice date. However, during verification of Hi-Steel’s data, the ADC identified that it may not be able to properly compare domestic sales with export sales because of the significant increase in the cost of steel during the importation period, with the ADC considering that domestic prices were likely to have increased in response to these higher export prices, more quickly than export prices. The ADC considered that the order date was the preferable date of sale when comparing export prices to the domestic sales prices, based on the following:
 - The confirmation through verification of commercial documentation supplied by Hi-Steel that the material terms of sales were set at the order date and did not vary between the order date and the invoice date, including key terms such as volume, price, exchange rate, delivery terms, packing, etc.
 - The analysis of the quarterly comparison of export price, normal value and HRC price depicted in Figure 14 of REP 590, which it stated demonstrated the delay in export prices based of the invoice date responding to changes in the underlying HRC price.
2. As background information to my reasons for making the request under s.269ZZL of the Act, I point out the following:
 - a. The ADC’s usual practice, as set out in the Dumping and Subsidy Manual December 2021 (“the Manual”),² is to consider the date of sale to be the invoice date unless some other claim to the contrary has been made, that a date other than the date of invoice better reflects the date of sale, and the evidence provided demonstrates that the material terms of sale were, in fact, established by this other date. The Manual reflects the practice approach of the ADC and is considered to be aligned with WTO practice. According to the Manual the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date. This suggests an evidentiary burden on the party claiming that a date other the date of invoice better reflects the date of sale.
 - b. It is also stated in the Manual that any claim would need to substantively address:
 - whether, why, and to what degree, the considerations in determining price differed between export and domestic sales;

² See the Manual, pages 51-52,

- whether the materials cost differs at the time of subsequent invoicing of that export sale (compared to domestic sale invoices in the same invoice month of that export sale) having regard to factors such as the production schedules for domestic and export; and lead times for purchasing main input materials;
 - whether contracts were entered into for the materials purchases, and materials inventory valuation.³
- c. Orrcon stated in its application for review, that the determination relating to date of sale for Hi-Steel is a departure from the ADC's usual "evidence-based policy that a date other than the invoice date best reflects the date of sale for a commodity product such as steel". Reference was made to all other exporters in the inquiry for which the ADC did not depart from the approach mandated by the Manual, being the assessment of date of export sale as the invoice date.⁴ Reference was also made to various other trade remedy inquiries for other steel products to which HRC was the key feed raw material, and in respect of which the ADC did not depart from the approach mandated by the Manual, being the assessment of date of export sale as the invoice date.⁵
- d. The ADC has itself stated the following in a previous investigation, also involving HSS:
- "The date of sale issue can be a complex question to be resolved during the verification process. The Commission's usual practice is to consider the date of sale to be the invoice date unless some other claim to the contrary has been made, the claim verified, and the particular circumstances warrant a different date of sale approach."⁶
- e. As stated above, Hi-Steel itself originally provided its data with the date of sale set as its invoice date and that in its REQ it 'accepted' that the date of sale was the invoice date. During a conference held with the ADC on 19 October 2022 ("the October 2022 Conference"), the ADC advised that it was first alerted to a possible issue of whether a fair comparison could be made at the invoice date, by the importer during the importer verification, and that the issue was raised by the ADC itself during verification of Hi-Steel's data.⁷ In its application for review Orrcon also made reference to having brought to the attention of the ADC, Hi-Steel's own claims in a recent United States (U.S.) Steel Pipe & Tube investigation, highlighting the date of invoice as the relevant date of sale.⁸
3. In regard to the first basis for the ADC's determination that the order date was the preferable date of sale, referred to in Paragraph 1 above, being the confirmation through

³ The Manual, page 52.

⁴ See Section B of Appendix B of Orrcon's application for review (unpaginated), 4th and 5th pages.

⁵ See Section C of Appendix B of Orrcon's application for review (unpaginated), 5th and 6th pages.

⁶ Report No. 532, "Hollow Structural Sections from Thailand – Continuation inquiry", page 59.

⁷ See October Conference Summary.

⁸ See Section C of Appendix B of Orrcon's application for review (unpaginated), 6th page.

verification of commercial documentation supplied by Hi-Steel that the material terms of sales were set at the order date and did not vary between the order date and the invoice date:

- a. In support of this, the ADC stated in its s.269ZZJ submission that, “Importantly, there was no evidence before the commission of price changes between order and invoicing”. Noting that exported goods were ordered and paid for in USD, the ADC observed that while there were some instances where volumes changed in immaterial amounts, there were no corresponding unit price changes.⁹
- b. It is of some concern that the only ‘evidence’ put forward to demonstrate that the material terms of sale were, in fact, established by the ‘other date’ (being the order date) was that there was “no evidence” of price changes between order and invoicing. I do not consider that this lack of evidence amounts to “positive” fact-based documentary evidence, such as, for example, a sales contracts with clarifying terms, or specific provisions on sales orders/ invoices or specified dates for payment or the opening of letters of credit. I question whether the “lack of evidence” of price changes, is sufficient to meet the evidentiary burden set out in the ADC’s own Manual and in accordance with its established practice in similar types of cases where the default position is that the date of sale is based on the invoice date.
- c. During the October 2022 conference I requested the ADC to elaborate on the exact nature of the evidence that was presented, to demonstrate that the material terms of sale were, in fact, established by this other date, with reference to the Manual. The ADC advised that the evidence involved examining the verified information provided and analysing the samples of order and invoice documentation relating to export and domestic sales, to ascertain whether or not the evidence demonstrated any changes in the material terms of sale between order and invoice date.¹⁰ I noted that the ADC examined only limited “samples” of transaction documentation, which appeared to confirm the lack of strong positive evidence in this regard. The ADC had also indicated during the October 2022 conference that the evidence included information contained in the response to the exporter questionnaire and examined during the verification process, relating to an understanding of the price setting and price negotiation processes for that particular exporter. I reviewed the Exporter Work Program in this regard and did not consider that the price setting and price negotiation processes for export and domestic sales amounted to positive evidence demonstrating that the material terms of sale were clearly established on the order date.
- d. In reinvestigating this issue the Commissioner is requested to determine if there is positive fact-based evidence, such as: sales contracts; printed terms of sales on transaction documents; or payment documents (as examples) that meet the ADC’s

⁹ See Paragraph 13b and Footnote 17 of the ADC’s s.269ZZJ submission, page 4.

¹⁰ See October 2022 Conference Summary.

own evidentiary burden reflected in the Manual, of demonstrating that a date other than the date of invoice better reflects the date of sale and that the material terms of sale were, in fact, established by this other date.

- e. During the October 2022 Conference the ADC pointed out that the Manual does not expressly address the situation where the ADC itself identifies that, based on the evidence, it appears that a date other than the invoice date might better represent the date of sale. The ADC pointed out further that the Manual does not prescribe the kind of evidence that is required, and the ADC considers that it very much depends on the circumstances of the case.¹¹ I consider it to be appropriate for the ADC in these circumstances to properly review the evidence on its own initiative, meeting the same evidentiary standard, particularly in view of the fact that there are interested parties challenging the ADC's determination of date of sale, being ATM and Orrcon, both of whom did not have access to the confidential details of the contractual relationship and documentation relating to the exporter's sales. WTO rules and jurisprudence provide that while interested parties claiming adjustments are required to provide evidence in support of and to quantify their claim, there is also an affirmative information-gathering burden on the investigating authority to ensure a "fair comparison", and Article 2.4 of the WTO Anti-Dumping Agreement ("ADA") requires that the authority, in ensuring a fair comparison "shall not impose an unreasonable burden of proof" on the parties in question claiming (or opposing) the adjustment.¹²
4. In regard to the second basis for the ADC determining that the order date was the preferable date of sale, referred to in Paragraph 1 above, being the analysis of the quarterly comparison of export price, normal value and HRC price depicted in Figure 14 of REP 590, my reasons for making the request under s.269ZZL of the Act, are as follows:
 - a. First, I consider that there is merit in ATM's and Orrcon's criticisms of the ADC's analysis related to Figure 14 in that: (i) there are incomplete data series for 'Export Price – Invoice date' data series and 'Export Price – Order Date' data series, casting doubt over the likelihood of a meaningful assessment of the correlation (or otherwise) of the 'Order Date' versus 'Invoice Date' to the HRC baseline; (ii) the ADC appears to have ignore the apparently non-correlative movement of the normal value data series with the HRC purchase price data series, casting doubt over the likelihood of meaningful conclusions to be drawn.

¹¹ See October 2022 Conference Summary.

¹²See WTO Panel Report, *Egypt - Definitive Anti-Dumping Measures on Steel Reinforcing bar from Turkey* (WT/DS211/R) at paragraph 7.352; Appellate Body Report in *United States – Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan* (WT/DS184/AB/R) paragraph 178; Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/R), at paragraph 7.157 and 7.158.

- b. Second, it does not appear that the analysis in Figure 14 addresses the second part of the requirements in the Manual referred to in Paragraph 2b above, relating to: the materials cost differences between export and domestic sales, and setting of prices; having regard to factors such as: the production schedules for domestic and export; lead times for purchasing main input materials; whether contracts were entered into for the materials purchases, and materials inventory valuation. In this regard:
- As ATM points out in its s.269ZZJ submission, there is no evidence to suggest that the ADC performed this analysis and no explanation in REP 590 on what basis the HRC Purchase Price in Figure 14 is calculated. ATM asks relevant questions in this regard:

“Is it the weighted average cost of inventory movements into production, or the weighted average buy-in price when entering inventory? Further, is the HRC Purchase Price calculated on the invoice or has it also been adjusted to the date of order also? Furthermore, there is no discussion or analysis of the inventory carrying period apparent here.”¹³
 - The ADC in its s.269ZZJ submission references Hi-Steel REQ attachment G7.4 as the source of the yellow data line for the HRC Purchase Price¹⁴ in Figure 14, which appears to be all Hi-Steel’s raw material purchases during the inquiry period. The ADC noted during the October 2022 Conference that there was no distinction in the data provided by Hi-Steel between HRC purchases for domestic and export sales.¹⁵
 - The ADC’s determination that the order date best represented the date of sale for Hi-Steel’s sales in REP 590 was also based on the ADC identifying during the verification process that Hi-Steel’s domestic sales were generally met from inventory, whereas production for export sales commenced after order. However, there is no indication from the ADC’s analysis in REP 590 as to when the HRC used to produce those domestic sales of HSS was purchased and if the HRC used to produce the export sales after order was purchased at a different time. It is not clear how, without a detailed analysis relating the input costs, production times and inventories, the ADC could conclude that using the invoice date as the date of sale may not permit a fair comparison between domestic and export sales.
- c. In reinvestigating this issue and in order to addresses the second part of the requirements in the Manual, referred to in Paragraph 2b above, the ADC should conduct a more in depth analysis of the interaction between material costs and

¹³ See Appendix B of ATM’s application for review, page3.

¹⁴ See Footnote 18 of the ADC’s s.269ZZJ submission, page 4.

¹⁵ See October 2022 Conference Summary.

domestic and export price setting. For such an analysis, the ADC may need to examine various issues relating to the production and HRC inputs, including:

- whether the HRC used in the production of the domestic and export sales was sourced from inventory or purchased contemporaneously from Hi-Steel's suppliers;
 - the material terms of such input purchases, including the pricing;
 - evidence to show when the HRC was ordered and when it was received;
 - evidence to show the price of HRC used in production and the date of production of HSS;
 - whether contracts were entered into for HRC purchases in response to HSS orders; and
 - the timing of HRC purchases relative to the production and sale of the HSS, i.e. the lead times for how long stock was held in inventory before production and shipment.¹⁶
5. If, after conducting its reinvestigation, the ADC determines that the operative or determinative date of sale is the invoice date, the ADC should recalculate the dumping margin for Hi-Steel based on the appropriate comparisons of export price and normal value.
6. If after conducting its reinvestigation, the ADC confirms its determination in REP 590, that the operative or determinative date of sale is the order date, the ADC is requested to still provide the Review Panel with recalculated dumping margins for Hi-Steel, based on a comparisons of export price and normal value at invoice date.

FINDING 2: Should the finding in relation date of sale be changed as a result of the above reinvestigation request, resulting in adjustments to Hi-Steel's dumping margin, consideration should be given as to whether this impacts the ADC's assessment of the likelihood of dumping and material injury continuing or recurring.

7. The ADC is therefore requested to reinvestigate the impact of any changes to Hi-Steel's dumping margin, resulting from the above request, on the ADC's assessment of the likelihood of dumping and material injury continuing or recurring.

¹⁶ In this regard the ADC is referred to the Reinvestigation of Certain Findings in Report 419, in reference to ADRP Report No. 88, which was referenced by Orrcon and ATM in their applications for review, where the issues were not dissimilar as in the present case.

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

Please could you report the result of the reinvestigation within 115 days, that is, by **23 February 2023**.

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Blumberg', with a stylized initial 'L'.

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
31 October 2022