Non-confidential

Anti-Dumping Review Panel
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By EMAIL

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

Dear Mr Seymour,

ALUMINIUM ROAD WHEELS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA - REQUEST FOR REINVESTIGATION UNDER S269ZZL OF THE CUSTOMS ACT, 1901

The Anti-Dumping Review Panel (ADRP) is conducting a review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science to publish findings in relation to a review of anti-dumping measures in respect of Aluminium Road Wheels exported from the People's Republic of China. The decision under review was made in relation to your report, REP 263.

The applicants are Pilotdoer Wheels Co. Ltd (Pilotdoer) and Zhejiang Yueling Co., Ltd (Yueling).

Pursuant to s269ZZL *Customs Act 1901*, I require that the following findings of the Anti-Dumping Commission (the ADC) in REP 263 be reinvestigated:

PILOTDOER

1. **The ADC's finding that that volume of Pilotdoer's sales of the goods on the domestic market are insufficient for the purpose of determining Pilotdoer's rate of profit**

   In REP 263 it is stated:

   > *"In analysing the data submitted by Pilotdoer as part of this review, the Commission has observed that Pilotdoer continues to be an export-oriented business, with only a very low volume of like goods sold on the domestic market. The Commission considers these sales are again insufficient for the purpose of determining Pilotdoer's rate of profit."* [1]

   The ADC rejected Pilotdoer's submission that its domestic sales did not meet the definition of "low volume" in s.269TAC(14)(c) of the Customs Act, on the basis that s.269TAC(14)(c) does not provide guidance on the requirements for determining profit when constructing normal value in terms of s.269TAC(2)(c). The ADC is correct that s.269TAC(14)(c) relates in particular to s.269TAC(2)(a), however, the ADC provides no analysis or other legal basis for

[1] See REP 263, page 51

its finding that the sales are of insufficient volume for the purpose of using Pilotdoer's own data to determine the rate of profit pursuant to s.45(2) of the *Customs (International Obligations) Regulation 2015* (IO Regulation).

The ADC is therefore requested to reinvestigate this finding. In the reinvestigation, the ADC is requested to take careful cognisance of s.45(2) of the IO Regulation, which unlike s.269TAC(2)(a) of the Customs Act, does not refer to a "low volume" of sales (in addition to sales outside the ordinary course of trade) as a reason for rejecting the exporter's own data in the relevant calculation. The ADC should also take into consideration WTO jurisprudence on Article 2.2.2 of the Anti-Dumping Agreement, which is the relevant WTO provision that is enacted into Australian legislation by s.269TAC(2)(c)(ii), s.269TAC(5B) and s.45 of the IO Regulation.

2. The finding that Pilotdoer did not meet the ordinary course of trade (OCOT) test referred to in s.269TAAD(2) of the Customs Act, leading the ADC to disregard Pilotdoer's domestic sales data for the purpose of determining Pilotdoer's profit rate, in accordance with s.45(2) of the IO Regulation

It is stated in REP 263 that the ADC also disregarded Pilotdoer's domestic sales data for the purpose of determining Pilotdoer's profit rate, because Pilotdoer did not meet the OCOT test. Reference was made in REP 263 to s. 269TAAD(2) of the Act which, according to REP 263, *"requires that for domestic sales of like goods to be considered in OCOT, they must represent at least 20 per cent of the total volume of export sales during the relevant period (the review period in this instance)"*[2]. Accordingly, the ADC did not recommend Pilotdoer's profit be calculated under subsection 45(2) of the IO Regulation.

Pilotdoer in its application for review pointed out that the ADC erred in its application of the OCOT test by comparing the amount of sales made in the OCOT with export sales volumes rather than domestic sales volumes. This error has been acknowledged by the ADC in its response to the Review Panel's Invitation to Comment Letter dated 19 January 2016 (the ADC Response).[3] The Review Panel therefore requires that the ADC reinvestigate its finding with regard to the OCOT test in s.269TAAD(1) and (2) of the Customs Act, for the purpose of s.45(2) of the IO Regulation.

The ADC is requested to recalculate Pilotdoer's rate of profit in accordance with the correct 'ordinary course of trade test' as set out in s.269TAAD(1) and (2) of the Customs Act. If, the ADC finds that sales below cost (that do not allow for the recovery of costs in a reasonable period of time) amount to 20% or more, it should still calculate the average profit for those sales that are not below cost (or are below cost but allow for recovery in a reasonable period of time). <u>It is particularly requested that these calculations should form part of the Reinvestigation Report, irrespective of whether the ADC comes to the conclusion, for some reason (other than price below cost), that the domestic sales are not in the OCOT and therefore that it is not reasonably practicable to work out the amount of profit by using Pilotdoer's own data, in accordance with s.45(2) of the IO Regulation. The Review Panel may require this information to calculate a value for profit, in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute it's own specified decision</u>

If the ADC comes to the conclusion that it is unable to work out the amount of profit by using the data mentioned in s. 45(2) of the IO Regulation, it should set out detailed reasons as to

[2] REP 263, page 52. It should be noted that this paraphrasing of s.269TAAD(2) in REP 263 is incorrect
[3] See the ADC's Response, page 11

how it came to this conclusion and the basis for determining that it is not "*reasonably practicable*" to work out the amount using the data relating to the production and sale of like goods sold in the ordinary course of trade. The ADC should take cognisance of WTO jurisprudence on the interpretation of the chapeau of Article 2.2.2 of the Anti-Dumping Agreement in this regard.

It is noted that the ADC in the ADC Response, while acknowledging that it had erred in the "*ordinary course of trade test*", stated:

> *"The Commission still believes that Pilotdoer's domestic sales may still have occurred outside the ordinary course of trade, having observed the company's proposed rate of profit* [redacted] *(as shown in the table at Attachment 14). The Commission views that this issue could warrant further investigation, and will consider how to address this issue."*[4]

In its reinvestigation, the ADC should take cognisance of WTO jurisprudence, particularly in respect of the limits on discretion afforded to WTO Members by the Anti-Dumping Agreement to determine that sales that are not "*in the ordinary course of trade*" (other than by reason of being sales at a loss). The ADC should also refer to the discussion in the Manual of "ordinary course of trade' for the purpose of working out an amount of profit in constructing normal value, in accordance with s.45 of the IO Regulation. [5]

3. **The finding that the ADC was unable to establish Pilotdoer's rate of profit under s.45(3)(a) of the IO Regulation, using the actual amounts realised by Pilotdoer from the sale of the same general category of goods in the domestic market, because the company did not reach the required level of domestic sales of goods from the same general category of ARWs to be considered in the OCOT pursuant to s.269TAAD(2)**

If after the reinvestigation in respects of Findings 1 and 2, the ADC still comes to the conclusion that it is unable to work out Pilotdoer's profit by using the data mentioned in s.45(2) of the IO Regulation, the ADC should reinvestigate the above finding in REP 263, taking particular cognisance of the wording of s.45(3) of the IO Regulation. As in the reinvestigation of Finding 1 relating to s.45(2) of the IO Regulation, the ADC should examine the role of 'volume' of sales in s.45(3)(a) of the IO Regulation, bearing in mind that there is no reference to "low volume" in s.45(3)(a) or a "*required level of domestic sales*". It should be noted that there is also no requirement in s.45(3) for the sales to be in the OCOT. The ADC in its reinvestigation should provide details of what it considers the "required level" of domestic sales to be for the purpose of s. 45(3)(a), and the legislative and policy basis for its reinvestigated finding in this regard.

Even if the ADC confirms its finding after the reinvestigation, it should still provide the Review Panel with details of the calculation of the profit realised by Pilotdoer from the sale of the same general category of goods in the domestic market of the country of export. The Review Panel may require this information to calculate a value for profit, in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute it's own specified decision

[4] See the ADC's Response to the Review Panel's Invitation to Comment Letter, dated 19 January 2016, page 11

[5] See page 47 of the Manual where there is also a reference to situations that may cause sales not to have been in the ordinary course of trade, other than sales at a loss, cross-referred to the last paragraph of Chapter 7.2 of the Manual.

4. **The finding that the ADC was unable to determine profit under s.45(3)(b) of the IO Regulation, which enables the ADC to identify the weighted average profit for other selected exporters, because the ADC was unable to identify a profit rate for all other selected exporters, due to the unreliability of Yueling's data**

   If after the reinvestigation in respects of Findings 1, 2 and 3, the ADC still comes to the conclusion that it is unable to calculate Pilotdoer's profit pursuant to s.45(3)(a) of the IO Regulation, and if the reinvestigation with regard to Yueling's grounds of review allows the ADC to identify a profit rate for Yueling, the ADC should reinvestigate the finding in REP 263 that it was unable to determine profit under s.45(3)(b) of the IO Regulation.

5. **The calculation of normal values for Pilotdoer by the use of average net profit from domestic sales made in the ordinary course of trade (OCOT) by other selected exporters (except Yueling) under section 45(3)(c) of the IO Regulation**

   In REP 263 the ADC used the average net profit from domestic sales made in the ordinary course of trade (OCOT) by other selected exporters (except Yueling), pursuant to section 45(3)(c) of the IO Regulation. If the ADC in its reinvestigation of Findings 1 to 4 above still comes to conclusion that the profit should be calculated in accordance with s.45(3)(c) of the IO Regulation, the Review Panel requests that the ADC investigate the operation of s.45(4) of the IO Regulation, which provides that if a method of calculating profit is used under s.45(3)(c) and the amount worked out exceeds the amount of profit normally realised by the exporters or producers on sales of goods of the same general category in the domestic market of the country of export, the additional amount must be disregarded. In its reinvestigation, the ADC should indicate the operation and application of s.45(4) of the IO Regulation in its finding, or set out reasons why the sub-section was not applied.

YUELING

6. **The findings that the information provided by Yueling should be disregarded for the purpose of establishing: (i) export prices pursuant to s.269TAB(4) and (ii) normal value pursuant to s.269TAC(7) of the Customs Act**

   In REP 263, the ADC considered Yueling to be a cooperative exporter, but also found Yueling's data to be unreliable for the purposes of determining dumping margins. The ADC found that while Yueling cooperated with the ADC, "*through providing relevant information in its Exporter Questionnaire and responses to various requests by the Commission for further information,*" it found inaccuracies in Yueling's data, "*which makes that data unreliable for the purposes of determining export prices, normal values and, consequently, dumping margins.*" Accordingly, the ADC recommended that Yueling's information be disregarded for the purpose of establishing an export price pursuant to subsection 269TAB(4) and for the purpose of establishing a normal value pursuant to subsection 269TAC(7).[6]

   According to REP 263, the key factors which contributed to this decision were as follows:

   - The ADC identified various inaccuracies in a key spreadsheet submitted as part of Yueling's exporter questionnaire, which, according to the ADC (due to the nature and scope of these inaccuracies), could potentially lead to an inaccurate dumping margin. This included incorporating various data in the spreadsheet which could not be matched to source documents (even after a revised version of the spreadsheet was

[6] See REP 263 pages 56 - 57

submitted), and which also indicated that the spreadsheet may be inaccurate, with implications for the accuracy of Yueling's dumping margin.

- There was a lack of clarity around distribution arrangements relating to the goods exported to Australia, which would have led to difficulties in calculating an accurate normal value and export price for Zhejiang Yueling.[7]

The Review Panel requests that the ADC reinvestigate these findings, particularly in the light of Section B of Yueling's application for review. In undertaking the reinvestigation, the ADC should also carefully consider Section A and B of the submission made by Yueling in response to SEF 263 dated 19 August 2016, particularly;

i. The corrections to the Australian spreadsheet was provided voluntarily as a result of an internal review of the EQ response in the course of preparing responses to the ADC's further enquires;
ii. Yueling's commitment to cooperation with the ADC and its willingness to offer explanations, clarifications and supporting material;
iii. Yueling's explanations of the corrections made to the spreadsheet;
iv. Yueling's explanations regarding invoice [redacted], as well as documentation relating thereto submitted by Yueling on 20 May 2015 and 18 June 2015;
v. Documentation voluntarily provided by Yueling in relation to [redacted] invoices (covering the transactions affected by the corrections to the Australian sales spreadsheet) referred to in Yueling's response to SEF 263;
vi. Yueling's explanation of the [redacted]
vii. Yueling's clarification regarding its distribution channels;
viii. The contention of Yueling, (borne out by its application for review and its submission pursuant to s.269ZZJ) that the arrangements made by Yueling's Australian customers, were not Yueling's arrangements and were not known to Yueling, and that the ADC could not reject Yueling's information as unreliable by simply assuming that Yueling knew about third party arrangements, without enquiring of Yueling about the matter;

It would appear that many of these issues raised in Yueling's submission in response to SEF 263 were not properly addressed in REP 263, notwithstanding the detailed explanations and clarifications by Yueling. The ADC should therefore take into consideration all the above issues, in its reinvestigation.

The ADC should also take cognisance of Australia's obligations under the Anti-Dumping Agreement, in particular, Article 6.8 and Articles 1,3,5, and 6 of Annex II, and all the WTO jurisprudence relating thereto. In particular, the ADC should carefully consider Annex II:5 and whether it could be said that Yueling did not act, "*to the best of its ability*". The ADC should carefully consider, particularly, in the light of the above, whether Yueling can be considered to have refused access to or otherwise did not provide necessary information or significantly impeded the investigation (within the meaning of Article 6.8). Also, the ADC should reconsider its finding that Yueling's information was not "verifiable", particularly in light of (iv) and (v) above.

If in its reinvestigation the ADC finds that Yueling's information should not have been rejected, it should recalculate export price, normal value and dumping margin using Yueling's own information.

[7] See REP 263, page 57

Even if the ADC confirms its finding to disregard Yueling's information, it should still provide the Review Panel with details of the calculation of the export price, normal value and dumping margin for Yueling using Yueling's own information. The Review Panel may require this information to calculate Yueling's dumping margin, in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute it's own specified decision

7. The findings that the export price and normal value of Yueling be calculated in the same way as that adopted for uncooperative exporters in accordance with s.269TAB(3) and s.269TAC(6) respectively and that Yueling's dumping margin be calculated by comparing the export price and normal value so ascertained

According to REP 263, the ADC disregarded Yueling's information as being unreliable, for the purpose of determining export price and normal value. Export price was determined under s.269TAB(3), using the lowest weighted average export price for the review period recorded for other selected exporters and normal value was determined under s.269TAC(6), using the highest weighted normal value for the review period calculated for other selected exporters.

Yueling claims in its application for review and in its submissions on SEF 263 (amongst other correspondence) that the ADC's decision to calculate these amounts by reference to the least favourable information obtained from other selected exporters, is incorrect and not preferable.

Yueling points out (without prejudice to its position that none of its information should have been disregarded) that the ADC's concerns were limited to certain aspects of Yueling's Australian sales information, and that even if that concern was well founded, it would be incorrect to disregard all of Yueling's information. The ADC is requested to reinvestigate this issue, bearing in mind that there appears to be no indication that any other information submitted by Yueling was in any way inaccurate or inadequate, or queried by the ADC. There are only unsubstantiated doubts by the ADC that other aspects of Yueling's information "may" or "potentially" be incorrect.[8]

Even if, in the reinvestigation of Finding 6 above, the ADC confirms that Yueling's export sales data should be rejected, it should reinvestigate why the information by Yueling that is unchallenged and undisputed, should not be used in the calculations of the dumping margin, and why the amounts of export price, normal value and dumping margin should be determined in the least favourable manner for Yueling, as if it were an "uncooperative exporter". The ADC should, in conducting the reinvestigation, bear in mind that in REP 263 it was stated that it considered Yueling to be "a cooperative exporter", and should consider whether it should apply the same punitive approach for Yueling as for an uncooperative exporter, even if the calculations are to be made in accordance with s.269TAB(3) and s.269TAC(6). In its application for review Yueling (in Section C) compares the treatment of "residual" exporters with uncooperative exporters, suggesting that might be a more appropriate methodology to determine the dumping margin for Yueling, bearing in mind that Yueling was not regarded by the ADC as an "uncooperative exporter".

The ADC should in its reinvestigation of this issue also take cognisance of Aricles 3, 5 and 7 of Annex II of the Anti-Dumping Agreement and the relevant WTO jurisprudence.

[8] See discussion of Yueling's submission in response to SEF 263 on pages 58 – 59 of REP 263, where there are a number of vague phrases relating to this such as, "*potential inaccuracies", "….there could be further errors ……not yet identified …", "potential inclusion of inaccuracies ",* and *"could potentially lead to inaccuracies"*

Even if the ADC confirms its finding after the reinvestigation, it should still provide the Review Panel with details of the calculation of the dumping margin for Yueling, as if it was a residual exporter rather than uncooperative exporter. The Review Panel may require this information to calculate Yueling's dumping margin, in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute it's own specified decision

8. **The finding that Yueling's subsidy margin was worked out under s.269TACD(1) and (2) of the Act, by using:**
    - **For "program 1" - the value of the subsidy was determined using the highest unit benefit received by other selected exporters. Benefits were attributed using the lowest weighted average export price and the average relevant turnover volumes for other selected exporters who received benefits under subsidy programs, being the same method as was adopted for uncooperative exporters; and**
    - **for all programs except "Program 1" - the actual amount of benefit received by Yueling reported in Yueling's responses to the exporter questionnaires, attributed by using the lowest weighted average export price and the lowest relevant turnover figures for other selected exporters, being the same attribution method as was adopted for uncooperative exporters.** [9]

    For the purposes of the "Program 1" subsidy, the ADC disregarded all the information provided by Yueling using the "*highest unit benefit"*, "*lowest weighted average export price*" and "*average relevant turnover volumes"* for other selected exporters. For all other Programs the ADC used the actual amount of benefit used by Yueling, but in so doing disregarded Yueling's export price and company turnover and attributed the amount of benefit received using "*lowest relevant turnover figures*" and "*lowest weighted average export price*" from other selected exporters.

    In the event that in its reinvestigation, the ADC finds that Yueling's information should not be disregarded for the purposes of determining its export price, normal value and dumping margin, pursuant to Finding 6 above, the Review Panel requests that the ADC reinvestigate the above findings using Yueling's own information to calculate the subsidy margin.

    In the event that the ADC in its reinvestigation confirms that Yueling's information should be disregarded for the purpose of determining its normal value, export price and dumping margin, the ADC should reinvestigate whether Yueling's actual information can be used for determining the subsidy margin.

    The ADC is referred to Yueling's contentions in Section D of its application for review, of the unreasonableness of disregarding information relating to the calculation of the subsidy margin. There would appear to be merit in Yueling's submission in this regard since Yueling was regarded as fully cooperative by the ADC and there appears to be no indication that any of its information submitted relating to subsidies was inaccurate. The ADC should in its reinvestigation specify the legislative basis for its decision to disregard Yueling's information for the purpose of determining the subsidy, on the same basis as it disregarded Yueling's information for export price and normal value under s.269TAB(4) and s.269TAC(7).

[9] See Appendix C of REP 263, page 106

The ADC states in the ADC Response that s.269TAACA of the Customs Act is not relevant to the determination of the subsidy margin since it relates to non-cooperative exporters (which it does not regard Yueling as one), yet the ADC seemed to treat Yueling in a similar way to that of non-cooperative exporters. The ADC should clarify this issue in the reinvestigation.

The ADC is also referred to Section D.2 of Yueling's application for review in relation to the calculation of the amount of subsidy under programs other than Program 1. Yueling points out that the ADC determined the amount of the subsidy received by Yueling by reference to the actual amount of benefit received by Yueling, but disregarded its turnover volume and worked out a per unit amount of subsidy received by reference to, "*lowest relevant turnover figures"*. Yueling points out the problematic, illogical and punitive nature of the methodology because the amount received by Yueling under these programs (an amount that was accepted by the ADC) was provided in most circumstances by reference to Yueling's particular business performance and financial information. Yueling questions how lowest relevant turnover figures (from other exporters) as used by the ADC can be considered to be "*relevant information*", as such volume information would have nothing to do with the amount of subsidy received. The Review Panel requests that the ADC address this issue in the reinvestigation.

The ADC is also directed to reinvestigate the issue raised by Yueling with regard to Program [redacted][10] . At the same time the ADC is requested to reinvestigate the issue raised by Yueling relating to the purchase of aluminium and / or alloy. Yueling contends that the ADC should not consider that Yueling received a countervailable subsidy under Program 1 because [redacted].[11]

Even if the ADC confirms its finding after the reinvestigation, it should still provide the Review Panel with details of the calculation of the subsidy margin for Yueling using Yueling's own information. The Review Panel may require this information to calculate Yueling's subsidy margin, in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute it's own specified decision

Date for providing reinvestigation report

Please report the result of the reinvestigation by 31 March 2016 (38 days from the date of this letter).

Should you require further information or clarification of this request in order to conduct the investigation, please contact the ADRP Secretariat on (02) 6276 1781 or by email at **adrp@industry.gov.au**.

Thank you for your assistance and co-operation.

Yours sincerely

Leora Blumberg
Member
Anti-Dumping Review Panel
22 February 2016

[10] See Section D.2 of Yueling's application for review, page 27
[11] See Section D.3 of Yueling's application for review, page 27 to 28