



## **WTO Panel rules that the Anti-Dumping Commission acted inconsistently with the practice of an unbiased and objective investigating authority**

Following a challenge by China, a WTO review panel has ruled that Australia incorrectly imposed dumping duties on Chinese wind towers, deep drawn stainless steel sinks and railway wheels. The findings go to the heart of the methodology adopted by the Anti-Dumping Commission (ADC) in calculating the dumping margin. The methodology has largely been applied in respect of all cases involving Chinese steel products.

### **High level summary of the fault in the ADC approach**

In calculating a dumping margin, it is necessary to compare the normal value (domestic price) with the export price. If the normal value is higher than the export price, there is dumping. In calculating the normal value for many Chinese goods made from steel, the ADC has disregarded the real Chinese domestic cost of production as it argues that the price of Chinese steel does not reflect competitive market costs. The ADC substitutes the real (lower) steel cost, with a higher third country benchmark cost. This raises the normal value. In an approach that is almost certain to produce a dumping margin, the ADC does not also alter the export price in the same way. The export price remains based on the lower, real, steel costs.

The WTO panel found that in disregarding real costs of production on the basis that those costs did not reflect competitive market costs, the ADC had acted inconsistently with the WTO Dumping Agreement.

The WTO Review Panel also examined the approach that Australia adopted when required to construct a normal value due to the absence of domestic sales. The WTO Dumping Agreement required such a construction to be based on the costs of production in China. Australia has consistently adopted an approach of disregarding actual Chinese steel costs and substituting what it believes are benchmark steel costs. These costs will deliberately not be based on Chinese steel costs. By ignoring the actual Chinese costs of production, the WTO panel held that "...we find that the ADC acted inconsistently with the practice of an unbiased and objective investigating authority...".

While this may feel like strong language, for over a decade importers (and their lawyers) have been arguing that there is an inherent unfairness in artificially lifting the Chinese domestic price based on third party costs, but keeping the export price based on lower Chinese steel prices. It is an approach that will always result in a finding of dumping. However, rarely will it be the case that there is true dumping – that is, Chinese companies exporting to Australia at a price that is lower than the Chinese domestic sale price for the same good.

There were a variety of other more minor arguments, some of which were won by Australia and others by China. However, the key takeaway is that Australia's approach of disregarding real Chinese costs of manufacturing when calculating dumping margins has been found to be against WTO rules.

For each of the three products, the WTO panel found that the dumping duties imposed by Australia exceeded the margins of dumping that would have been established had Australia acted consistently with the terms of the WTO Dumping Agreement.

## **Government response**

Minister Farrell released a statement characterising the WTO panel findings as “technical issues” with how the ADC calculated the dumping margin. While they were technical issues in the sense that they were complicated, they were not technical in the sense that they were minor. The approach of disregarding actual Chinese costs of production was at the heart of the investigations and the reason Australia collected dumping duty in excess of what was permitted under the WTO Agreements.

The Minister also stated that “Our system is evidence-based and non-discriminatory and will continue to respond effectively to unfair trade practices.” This is clearly contrary to the repeated WTO panel findings that the ADC failed to act in an unbiased or objective way.

## **Next steps**

The WTO findings do not necessarily mean that the Australian domestic law was unlawful or that refunds can be obtained. Rather, the duties were against WTO law and give China, as a WTO member, rights. Once the findings are officially adopted by the WTO Dispute Settlement Body, Australia will be required to comply with the findings within a reasonable period of time. Ultimately, if Australia continued to act contrary to its WTO obligations, China could take retaliatory measures.

It should be noted that dumping duties on wind towers will expire in April regardless of this WTO Panel decision.

## **Implications**

Australia imposes dumping duties on a number of Chinese and steel and aluminium products. Often the basis for the calculation of the dumping duties is the disregarding of actual Chinese costs of production. The ADC and Government will now be aware that a failure to take into account the true cost of production could expose them to greater challenges by the participants in the investigations and, ultimately, the Chinese Government.

Hopefully, the Government and the ADC will review existing measures and its approach in new/ongoing investigations to ensure it acts in accordance with WTO requirements.

Please contact Russell Wiese if you need assistance with a ADC investigation or ABF compliance activity regarding dumping duties.

WTO Panel Decision - [Australia - Anti-Dumping and Countervailing Duty Measures on Certain Products from China - Report of the Panel](#)

Minister Farrell press release - [WTO Steel Products dispute | Minister for Trade and Tourism \(trademinister.gov.au\)](#)

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