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24 August 2018

The Director
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Anti-Dumping Commission
55 Collins Street
Melbourne
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By email

Dear Director

Hyundai Steel Company
Hot rolled structural steel sections from Korea – Review 465

As you know we represent Hyundai Steel Company ("Hyundai Steel") in this matter.

Hyundai Steel takes this opportunity to provide its comments on matters referred to in the Hyundai Steel Verification Report ("the Verification Report") and the Statement of Essential Facts ("the SEF") recently published by the Anti-Dumping Commission ("the Commission").

1 The correct date of sale

(a) Standard for establishing correct date of sale

For the purposes of establishing normal value under Section 269TAC(1) and (8), and for making a fair comparison between the export price and *corresponding* normal value under Section 269TACB, the Commission must ensure the relevant export prices and normal value are established and compared based on the same date of sale.

Hyundai Steel submits that the date of sale is the date upon which the material terms of the sale were established. This reflects the definition provided in footnote 8 of the WTO *Anti-Dumping Agreement* ("the ADA"):

> *Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.*

As explained to the verification team, Hyundai Steel submits that the date of its sales order, being the document generated to confirm all essential terms of the transaction constituted by any particular purchase order received from a customer, best establishes the date of sale.

In the same context – namely the proper date of sale for the purposes of comparison - Section 269TAF(1) of the Act adopts similar language:

> *…using the rate of exchange on the date of the transaction or agreement that, in the opinion of the Minister, best establishes the material terms of the sale of the exported goods.*

The Verification Report confirms the Commission's understanding and acceptance that the date of sale is to be established based on the date that *"best reflects the material terms of sales*", which is the requirement under the ADA.[1]

The Verification Report further states that the Commission *"normally use[s] the date of invoice as it best reflects the material terms of sale*", but that it will consider another date, if that other date *"better reflects the date of sale*". Further, *"the date of sale is the date that best reflects the material terms of sale, which include price, quantity, payment and delivery terms*" [underlining supplied].

We respectfully submit that the approach of favouring the date of invoicing as the default "date of sale", and of focusing on a sales document that "reflects" material terms of sales, is flawed. This flawed methodology and understanding has led to the Commission's decision to refuse Hyundai Steel's sales order date as the date of its Australian sales, and to insist on using the invoicing date as the date of those sales.

A commercial invoice issued at the time that goods leave the possession of a seller is part of the carrying out of a contract that is already in place, the material terms of which have been settled previously. Obviously an invoice *reflects* the material terms of the sale to which it refers. It confirms a moment in time for the purposes of the contract. In most cases, an invoice recognises a point in the movement of the goods under the contract and starts the agreed time for payment under the contract. An invoice is a prospective document in so far as the contract to which it refers is concerned. As such a commercial invoice does not establish the material terms of the sale. We are not saying that it might not, in certain circumstances, bring about an agreement which had previously been nothing more than an unaccepted offer – but that would be unusual. Indeed, it would be better if the Commission's default position was that the date of sale was to be determined by examining the date of order as the date of sale. In 99% of cases we would expect that to be the date on which offer and acceptance has taken place and the material terms have been established.

Plainly, in the circumstances of Hyundai Steel's Australian sales, the commercial invoice is issued at the time when Hyundai Steel has:

- finished production of the customer order; and
- placed the goods on a ship based on coordinated shipping schedule with the customer (shipping term is FOB for all Australian sales during the POR).

It is wrong to claim that the material terms of Hyundai Steel's Australian sales have not been established until the point that the invoice is issued. Such a proposition implies that the supplier has committed to manufacture the goods in accordance with the order, for the price agreed in the order, and placed them for shipping in accordance with the order, without having any legal obligation to do so and with no contract in place to ensure that it is paid and can take action to seek compensation for any breach of contract by its customer. The suggestion that there are no contractual terms in place with respect to the transaction, and that there are no legal obligations between the parties until a commercial invoice is issued, has no basis. Similarly, the suggestion that the customer cannot rely upon the agreed terms to take action for breach against Hyundai Steel until a commercial invoice is issued has no basis either.

Any view to the contrary would defy real world commercial practices and basic principles of contract law.

We can think of examples where the material terms of a transaction are established by the invoice itself. For example, a commercial invoice may be issued as soon as the order is received, as the

1 Verification Report, at Section 6.7

order confirmation itself, where sales are made from inventory. However this did not apply to Hyundai Steel's Australian sales in this matter, and we cannot think of anything else about the facts of Hyundai Steel's Australian sales that would disrupt the proposition that the material terms are established at the time of ordering.

The significance of the sales process for Hyundai Steel's Australian sales during the period of review ("POR") and of the sales order was presented to the Commission during the on-site verification. The material terms of sales between Hyundai and its Australian customers are well documented. The sales order records the final agreement on the material terms of the sale between Hyundai Steel and its customer. The contract itself, in legal terms, has arisen through the making of a sales inquiry by the customer, the formulation of an offer by Hyundai Steel in response to that inquiry, and a purchase order or like confirmation of acceptance from the client. The details of that sale are then entered into Hyundai Steel's integrated sales and accounting system **[CONFIDENTIAL TEXT DELETED – integrated system]** and the sales order comes into being. The sales order record recites and records the material terms of the sale that has been made, being:

- name of the customer
- specification of the goods, including the size and grade;
- price;
- quantity;
- shipping terms
- payment terms, including the requirement to provide a letter of credit, if applicable; and
- destination of the sale.

The sales order is a record of the contract arrived at by way of negotiations between Hyundai Steel and its customer regarding the sale and the material terms of the sale. The sales order date thereby best reflects the date that the material terms of the sales are *established.*

As verified by the Commission, the specification of products, price, quantity, shipping terms, etc, remain unchanged between the sales order and the time the goods are shipped to Australia, when the commercial invoice is issued. The commercial invoices issued by Hyundai Steel for its Australian sales *confirm* and *reflect* the material terms established by the sale order. They do not and cannot by themselves *establish* the material terms of sales.

Hyundai Steel also pointed out to the verification team that its sales terms include the requirement, in all cases for Australian sales, for the buyer to provide a letter of credit to secure payment to Hyundai. This should put further beyond doubt the proposition that the sales order crystallises and establish all material terms of the sale for the parties concerned. It would be odd if the material terms were held to only be finalised at the time of issuance of the invoice in circumstances in which the buyer had already complied with its contractual commitment to pay for the goods upon evidence of that invoice by giving the seller the right to obtain payment without referring to the buyer at all.

(b) Issues concerning date of sale raised in the verification report

We believe that the above submissions more than adequately establish the proposition that the sales order date best establishes the material terms of the Australian sales by Hyundai Steel. This should be enough. On that basis the date of sales for comparing the Australian sales prices with the corresponding normal values, and the date for the correct currency conversion of sales denominated in a currency that is different to that of the domestic market, should be based on the date of the respective sales orders.

Nonetheless, we now address some of the comments and concerns raised in the verification report.

Firstly, we note the verification report states:

> *the verification team considers that the invoice date best establishes the material terms of sale and a downwards adjustment for sales occurring at different times has not been substantiated.*[2] [underlining added]

With respect, this statement misunderstands the issue at hand. We recall that the establishment of the correct date of sale is a critical step for determining two things:

- the point at which export sales and domestic sales were made, in order for corresponding sales to be compared, for the purpose of working out a dumping margin under Section 269TACB; and

- the relevant exchange rate to be used for currency conversion under Section 269TAF(1).

A timing based *adjustment* only becomes relevant when no domestic sales of like goods were made at the same time as the export sales under consideration. That is not the case here. The reference to a *"downwards adjustment"* can only suggest that there were no sales that took place at the same time, and that therefore domestic and export sales that took place at different times need to be subject to some sort of adjustment.

Another factor cited in the Verification Report as a basis for not accepting the sales order date as the date of sale is as follows:

> *The verification team has examined Hyundai Steel Steel's claims and makes the following findings:*
>
> - *The sales order is an entry in Hyundai Steel Steel's accounting system intended to reflect the terms of the purchase order received from the customer, however for a certain number of the selected transactions the sales order date preceded the date of the purchase order.*[3]

Hyundai Steel advised that the sales order records all aspects of the sale to which it refers, and that they are undoubtedly the material terms of that sale. This includes the specification/dimension of the batch of products to be subject to the sales order, and quantities for each specification. A particular purchase order would normally be fulfilled and finalised by a number of separate sales orders. With this in mind, the placement of the sales order one or two days prior to the purchase order is what one would expect to see. Hyundai Steel and its Australian customer negotiate and finalise the terms of the sale typically by email. Once finalised, Hyundai Steel and the customer will confirm the order, again, typically by email. A purchase order is then issued by the customer. Once the purchase order is received, [CONFIDENTIAL TEXT DELETED – details of sales process].

Naturally, the very first sales order may be negotiated at the same time as the purchase order itself, in order to confirm production schedules and anticipated shipping dates. It is typically the case that the purchase order predates the sales order, however, there are instances where the final documentation and delivery of the purchase order may be delayed for a few days, whilst Hyundai Steel's sales department and the Australian customer have reached clear agreement as to the material terms of the first order in the email correspondences. In such instances, the sales order might be created prior to the arrival of the purchase order from the customer. And in any case, as can be seen in the selected samples, in these instances there is generally only one or two day's difference between the two documents. This occasional one or two days difference does not distract

2 Verification Report at page 14.
3 *Ibid.*

from the fact that sales order does establish the material terms of the sale concerned, and that it is clearly recognised by the parties as doing so.

The Verification Report further states:

> *Hyundai Steel recognises a transaction as a sale in its accounting system, i.e. posts it to the sales ledger, on 'shipment' date, i.e. date the truck leaves the plant for delivery to the port for export. Hyundai Steel didn't provide shipment dates in the export sales listing, only sales order date and invoice date, however the verification team was able to identify the shipment date for the selected transactions. Analysis of the dates for these transactions shows that the invoice date is much closer to the date when Hyundai Steel recognises exports as sales in its accounting system than the sales order date.*[4]

First of all, as the Verification Report noted above, a sales transaction is first *recognised,* and entered into the accounting system when a sales order is created. What the Commission has focussed on in the above extract is an internal accounting principle that has nothing to do with the establishment of the material terms of the sale between the parties themselves. In accounting practice *"recognising"* a transaction means that the goods have left the factory to be delivered to the customer and that the seller has completed its obligations under the agreement and can call upon the buyer for payment. This internal accounting practice, common amongst companies, does not inform the question of when the material terms of the sales were established.

The fact that the invoice date is closer to the sales/revenue recognition/conclusion date in the sales ledger says nothing about whether the material terms of the sales were only established at that time. It simply signals that a commercial invoice has been issued. The date of invoicing, shipment, or sales ledger posting are the events that take place at the end of a sales transaction, concluding a sale process, not events that *establish* the material terms of the sale. They are the *performance* of the material terms.

Lastly, the Verification Report notes:

> *The delivery date by which the customer requires the goods to be exported to Australia is a material term of sale included on the purchase order and reflected in the sales order. The verification team was able to identify these dates for the selected transactions and analysis shows that a not insignificant percentage of the goods by volume were exported after the date requested by the customer on the purchase order. This analysis indicates that the terms of the sales order were not met on a significant number of occasions and the discrepancy between the sales order terms and the actual terms of the sales was substantial.*[5]

With respect, the view that a failure to comply with a contract can mean that the contract did not set out its own material terms is incorrect and, in this context, wrong-headed.

Strict compliance with shipping dates is not insisted upon and would be difficult to honour in cases involving forward production and long delivery distances. As explained during the verification, the exports of the goods concerned are subject to underlying manufacturing and shipping schedules for the goods concerned, which not only involve Australia as the destination country but also other countries. This considerable logistical exercise is understood by Hyundai Steel's customers. There is moderate flexibility of the agreed shipping timeframes and this is not often complained-about. The dates are given so that production, shipping and freight forwarding can be targeted and coordinated

4 *Ibid.*
5 *Ibid.*

as well as can be achieved given the many variables and circumstances that are involved in this exercise.

Fortunately, the commodity nature of the product and the mutual understanding of the contractual parties means that strict delivery dates are not usually insisted upon. That said, they could be insisted upon, and if the delay was longer than a court or arbitrator might consider justified, by interpretation of the contract or force majeure, then a buyer would be able to enforce the contract and be awarded damages.

Missing a production or shipping date does not mean that the term of the contract that required the goods to be produced or shipped by the respective dates concerned was not a material term of the sale and was not agreed at the time the purchase order was accepted and a sales order issued. Non-compliance with such a contractual term simply means that there may have been a breach of contract. It does not mean, and cannot suggest, that the material term with respect to delivery was not previously established by a contract entered into by the parties at an earlier point.

The comments in the Verification Report appear to suggest that because the shipping date is sometimes different to what was agreed at the time of the sales order, the invoice then supplants the contract and is itself the material terms of the sale. To us this proposition is unsustainable and illogical. The invoice is issued to reflect the completion of the obligations of the seller, or at least those obligations that must be complied with before the seller can be paid. It does not "terminate" any existing contract and does not establish new obligations. If Hyundai Steel's commercial invoice has the function of establishing the material terms of a sale, then Hyundai Steel could never be found to be in breach of its contractual obligations up to that point of the transaction concerned.

Lastly, and most importantly, the purpose of this endeavour is to determine what has been the price behaviour of the exporter concerned. On any given day, an exporter will enter into contracts for domestic sales, and for export sales. It is on that day that the salesman decides whether to sell at a higher or lower price into one or other market. The exporter's behaviour is to be assessed as at that date. That is why the date on which the material terms of both sales – an export sale and a domestic one – must be at or around the same date, That is why Section 269TAC(8) specifically directs the Minister to make adjustments to ensure that sales on different dates do not distort the comparison. That is why Section 269TACB speaks of *corresponding* sales. That is why Section 269TAF(1) directs that currency conversion must take place on the date of sale, because the exchange rate at that time was known to the exporter but future exchange rates were not. All of this is directed towards ensuring that prices are compared on the same basis.

Hyundai Steel points to the Commission's Manual:

> *Where a claim is made that a date other than the date of invoice better reflects the date of sale, the Commission will examine the evidence provided.*
>
> *For such a claim to succeed it would first be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. In doing so, 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 arises because there can be circumstances where an exporter and importer agree on price and quantity and make a sales agreement to that effect, but this may not establish the date on which terms were finally agreed upon because an element of informality continues, and conditions can be changed.*

Hyundai Steel has demonstrated, through all of the sampled Australian sales, that the creation of a sales order is a record of a contract that has been entered into between Hyundai Steel and its Australian customer setting out the price, quantity, and the type of goods to be sold and purchased

thereunder. There are no ongoing negotiations between the parties once the contract is entered into and the sales order is created. Thus the sales order date is the most appropriate date for the export sales to be compared to the domestic sales and to achieve a fair comparison.

Once again, Hyundai Steel asks, for the purpose of comparing export price with normal value, that the date of sale for its Australian sales is the date of the sale order with respect to each such sale. It follows that this date also provides the relevant date for the purpose of currency conversion.

2 A sustained change in the exchange rate has occurred

Hyundai Steel has requested that the exchange rate for the beginning part of the POR be determined under Section 269TAF(4) of the Act, due to the existence of a sustained movement, being an appreciation of the KRW against the USD. This is not an "adjustment" claim, as the Verification Report refers. Rather, this is an exercise of currency conversion allowed by Section 269TAF, provided that the prescribed condition exists.

Section 269TAF(4), which is the only relevant reference to sustained movement in this context under the Act, provides as follows:

> *If:*
>
> *(a) the comparison referred to in subsection (1) requires the conversion of currencies; and*
>
> *(b) the Minister is satisfied that the rate of exchange between those currencies has undergone a sustained movement;*
>
> *the Minister may, by notice published on the Anti-Dumping Commission's website, declare that this subsection applies with effect from a day specified in the notice and, if the Minister does so, the Minister may use the rate of exchange in force on that day for the purposes of that comparison during the period of 60 days starting on that day.*

This section is the integration into Australian law of Article 2.4.1 of the ADA:

> *When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.* [footnote omitted]

In interpreting the Australian law and the Anti-Dumping Agreement, the plain and ordinary meaning of the relevant passages must prevail. Hyundai Steel considers this is consistent with the explanatory memorandum[6] that accompanied the introduction of Section 269TAF(4), which does not indicate that any special meaning or criteria should be referred to in applying this rule.

Further, the Commission's Manual provides:

> *The principles underlying the provisions of subsections 269TAF(3) to 269TAF(6) are that an exporter faces a lag in responding to exchange rate changes and this should be recognised in anti-dumping investigations. Where there has been 'sustained movement' in exchange rates during the period of investigation, a 60 day period is given to the exporter to respond to*

6 Customs Legislation (World Trade Organization Amendments) Bill 1994, Explanatory Memorandum

> *those currency changes and, if seeking not to be dumping, has the opportunity to set new export pricing levels.*
>
> *The actual exchange rate movements in that 60 day period are disregarded so that dumping findings of a 'technical' nature might be avoided. This typically arises where the sales to Australia take place during a period in which there has been a sustained movement in the rate of exchange, and reflected in an appreciation of the value of the foreign currency in which the domestic sales in the exporting country are denominated compared to the currency in which the exporter's selling price to Australia is denominated.*
>
> *Where it is established that there has been a 'sustained movement' in the exchange rate, the previously applicable rate of exchange may be applied for a period of 60 days.*[7]

The Oxford Dictionary defines the word "sustained" as:

> *Continuing for an extended period or without interruption.*[8]

And the Oxford Dictionary defines the word "movement", as applicable to the present context, as:

> *A change or development.*[9]

Therefore, taken together, the plain and ordinary meaning of *"sustained movement"* is a change or development continuing for an extended period or without interruption. Further, the reference to 60 days in Section 269TAF(4) indicates that an uninterrupted change or movement should last more than 60 days to be considered as being "sustained" for an extended period. If such condition exists, then a sustained movement exists.

We recall that Hyundai Steel has established:

- that there was a continued downward movement of the value of the USD against the KRW (that is, appreciation of KRW against USD), from about KRW1200 to the US dollar to about KRW1110 to the US dollar from the second half of January to early April 2017, representing an appreciation of the KRW against the USD of approximately 7.5%;

- the exchange rate then maintained at the appreciated rate band at around KRW1120 to KRW1140 from April onwards, before resuming to normal fluctuation within a wider band from June 2017 until the end of the POR.

Given that the sudden and sustained appreciation of the KRW lasted more than 60 days, from the second half of January to early April, and that the exchange rate then maintained itself at the appreciated level, a sustained movement situation is evident during that part of the POR.

Accordingly, Hyundai Steel requested that the exchange rate used to convert the USD export price of all sales on and from 1 February 2017 to 31 March 2017 be fixed at the rate of 1183.17, which is the average exchange rate for January 2017.

The sustained movement condition is further highlighted in the Commission's own analysis, which shows that the average weekly USD to KRW exchange rate was consistently lower than the prior "eight week moving average" during February, March and April:

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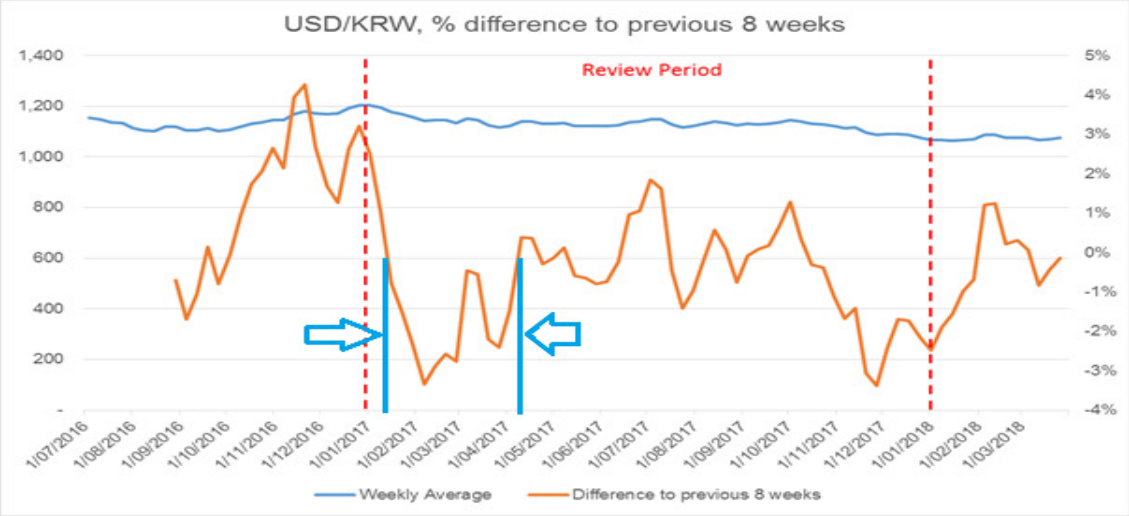
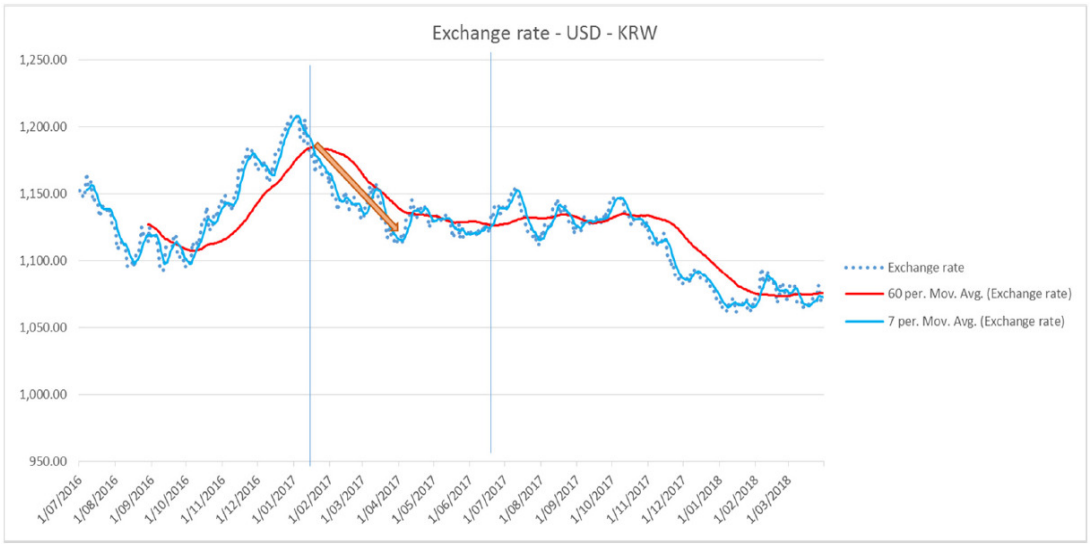
7 The Commission's Manual at page 121.
8 See https://en.oxforddictionaries.com/definition/sustained
9 See https://en.oxforddictionaries.com/definition/movement



The comparison between the weekly average and the prior eight weeks moving average clearly shows that there was a sustained movement of appreciation of KRW to USD (showing as USD to KRW rate going lower in this chart) over more than two months. Every week the KRW appreciated against the USD, as shown by the fact that the trend of the *"Difference to previous 8 weeks"* line in the above chart, between the arrows (being the relevant 60 day period), is always below 0%. The movement of appreciation of KRW against USD was sustained, and was extended, and continued, for more than 60 days.

Afterwards, the exchange rate stayed at this appreciated level for an even longer period as shown by the below chart:



The fact that during this period the KRW to USD exchange rate continued to appreciate, by more than 7.5%, is undeniable, not *"overemphasised"* as suggested by the Commission, and cannot be watered down by using a large scale to flatten the chart.[10]

10 Verification Report, page 15.

It would appear that the only reason that the Verification Report denied that a sustained movement of exchange rate existed in the early part of the POR was the adoption by the Commission of a method prescribed in the US investigating authority's manual:

> *Nevertheless, the verification team has tested whether there was a sustained exchange rate movement in the review period by applying the methodology used previously by the Commission (in Investigations 240 and 341), which is based on the methodology used by the United States anti-dumping investigating authority.*
>
> *The Commission's methodology is as follows:*
>
> - *calculate weekly averages of actual daily exchange rates;*
> - *calculate an eight week moving average of those weekly rates (benchmark rate);*
> - *where the weekly average exceeded the benchmark rate by more than five per cent, that week is identified as a period of unusual movement; and*
> - *count the number of consecutive weeks of unusual movement.*
>
> *A sustained movement is considered to be a period of eight consecutive weeks of unusual movement.*
>
> *…*
>
> *The verification team's analysis shows that there were no weeks of unusual movement during the review period. The team therefore finds that Hyundai Steel Steel's claim is not substantiated.*[11] [footnote omitted]

With respect, Hyundai Steel submits that the Commission has erred in applying this standard of determination, which is unfound in Australian law or the Anti-Dumping Agreement, and inconsistent with the plain language of Section 269TAF(4). As demonstrated above, there is nothing in Section 269TAF(4), nor the ADA, nor the Commission's Manual, which imposes any specific criteria or special meaning to the term *"sustained movement"*. That is, a sustained moment under Section 269TAF(4) does *not* refer to *"unusual movement"*, nor to a movement that entails a weekly appreciation of the local currency of more than 5% for more than 8 consecutive weeks. These criteria give the term *"sustained movement"* an extremely restricted meaning, and one that is inconsistent and unsupported by the ordinary language of that Section.

The US methodology is specific to, and reflective of, the US anti-dumping system. It is not part of the Australian legislation. It is incumbent on the Commission to interpret and apply Australian law and to determine an appropriate and reasonable methodology that does not contradict the law. In that regard, the question is a relatively simple one – has there been a sustained movement in the currecy in which the export price is denominatd against the exporter's local currency.

As stated in the Commission's Manual, the purpose of this section is to recognise that where there is a sustained change in the exchange rate, it will take an exporter time to adjust its pricing. This was precisely the situation faced by Hyundai Steel from end January to early April of 2017. The KRW appreciated substantially and in a sustained manner, by 7.5%, and stayed at the appreciated level. That is, for a sales contract entered into by Hyundai Steel in the second half of January 2017 but invoiced in early April, the export price it was entitled to receive at the date of invoicing reduced by 7.5% in KRW terms. This is indeed the kind of technical dumping the sustained movmenet rule is intended to avoid – as acknowledged by the Commission's Manual:

11 Verification Report, page 16.

> *The actual exchange rate movements in that 60 day period are disregarded so that dumping findings of a 'technical' nature might be avoided. This typically arises where the sales to Australia take place during a period in which there has been a sustained movement in the rate of exchange, and reflected in an appreciation of the value of the foreign currency in which the domestic sales in the exporting country are denominated compared to the currency in which the exporter's selling price to Australia is denominated.* [underlining supplied]

We submit that it is not open to the Commission to adopt a highly restrictive approach relied upon in a foreign jurisdiction when it appears to contradict the plain words of the Australian law concerned. The US policy and the criteria for deciding whether there has been a "sustained movement" is not found in Australian law, and cannot be imputed into the Act. If a narrow meaning of the words "sustained movement" in line with the US approach was intended, that meaning must be derived from the words of the legislation. In current circumstances, as provided above, a plain reading of the text of the legislation dictates that a sustained movement is "a change or development continuing for an extended period or without interruption". It is on this basis that we submit Section 269TAF(4) is to be interpreted.

Accordingly, we ask that the Minister determine that:

- the rate of exchange between the KRW and the USD underwent a sustained movement from late January 2017 to early April 2018; and
- the exchange rate used to convert the USD export price of all Hyundai Steel's Australian sales of the goods under consideration should be fixed for a period of 60 days on and from any days between 18 January to 1 February 2017.

Yours sincerely

Charles Zhan
Senior Associate