

13 June 2019

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By email

Dear Director

Hyundai Steel Company Hot rolled structural steel sections – variable factors

As you know we act for Hyundai Steel Company (“Hyundai Steel”) in the concurrent variable factors review and continuation inquiry concerning certain hot rolled structural steel sections exported from Korea, Japan, Thailand and Taiwan (hereinafter, “the Reviews”).

The Commission conducted an on-site verification of Hyundai Steel’s information at its premises in Korea. This was followed by the publication of a verification report in relation to Hyundai Steel (“the Verification Report”) stating a preliminary finding of a dumping margin of 10.3%.

After reviewing the draft verification report, Hyundai Steel immediately but respectfully expressed its disagreement with the verification team’s preliminary views and methodologies in a number of aspects. Some of the issues were addressed in the published verification report, but some persist. These issues, in Hyundai Steel’s view, affected the Commission’s determination of the relevant variable factors, resulting in a significantly inflated dumping margin.

The verification team advised Hyundai Steel that it did not intend to make further changes to the margin calculation, and invited Hyundai Steel to make submissions to the case management team, on the issues affecting the dumping margin calculation after the publication of the verification report.

The purpose of this submission is to draw the Commission’s attention to these issues.

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PUBLIC RECORD

A Incorrect determination of date of sale

The Verification Report determined the dumping margin by using the date of the bill of lading with respect to each shipment of Hyundai Steel's sales to Australia as the date of sale of the goods in the shipment. This is wrong.

Hyundai Steel has consistently submitted, both in this Review and in the recently concluded variable factors review concerning the same product, that the date of sale should be the sales order date as recorded in Hyundai Steel's financial system.

The basis for Hyundai Steel's submission is that the sales orders best reflect the date when the material terms of the sale of the exported goods were established between Hyundai Steel and its Australian customers.

In supporting this proposition, Hyundai Steel sought to address the Commission's potential concerns regarding this issue as provided in the Dumping and Subsidy Manual ("the Manual"). The Manual provides:¹

In establishing the date of sale, the Commission will normally use the date of invoice as it best reflects the material terms of sale. For the goods exported, the date of invoice also usually approximates the shipment date.

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. [underlining supplied]

Hyundai Steel explained to the verification team that sales orders were used to confirm or implement the production and shipment of orders based on the sales agreements entered into between Hyundai Steel and its customers. Sales order are entered into Hyundai Steel's integrated sales system to generate a production order, and ultimately to issue a commercial invoice.

Hyundai Steel provided relevant sales documents for each of the samples selected by the Commission. Those documents show that the material terms of the sales, such as the specification of the goods, price and quantity, as recorded in each of the sales orders, were not subject to further negotiation with customers, and were carried through to the completion of every Australian sale Hyundai Steel contracted with its customers.

¹ The Manual, at page 66.

Thus, consistently with the Manual, Hyundai Steel demonstrated the material terms of the sales were established by the confirmed sales orders. Accordingly, with respect, we see no reason why the sales-order based date of sale should not be accepted.

In addition to the already quite clearly stated principle from footnote 8 of the Anti-Dumping Agreement, Section 269TAF(1) of the *Customs Act 1901* (“the Act”) and the Manual itself, we also draw the Commission’s attention to the jurisprudence on this issue as laid down by the Anti-Dumping Review Panel (“ADRP”) in Review 2018/80. In particular, the ADRP confirmed that the central issue in the determination of the date of sale is the contractual relationship and transactional behaviours which signified the forming of the sales contract that established the material terms of the sale between the parties, rather than focusing on the timing of a later commercial invoice, or of accounting practices for completing a particular sales entry:

296. I considered Nervacero’s counter arguments to the ADC’s contentions in this regard to be persuasive. It appears to me that, for all the reasons submitted by Nervacero, and from a review of the Supply Agreement, the pro forma invoice date is far more significant in the sales transaction than the date of the commercial invoice. I do not consider that one party’s internal accounting practice should be determinative of the date of when parties come to agreement on the sale. It is inconceivable that there would not be serious legal consequences if the date of sale was considered to be date of invoice and if, for example, an order was cancelled or the price per tonne was changed just before shipment date, that is, after the issuance of the pro forma invoice and prior to the issuance of the commercial invoice.²

In our view, in light of Hyundai Steel’s sales practices, and the supporting documents, and the now well established and clarified position concerning the determination of the date of sale of exports, the Commission must determine such date by reference to the sales order date of Hyundai Steel’s Australian sales.

Hyundai Steel is perplexed by the decision to use the date of the bill of lading of a shipment – the date when goods are loaded cross the rail of the ship for exportation to Australia – as the date that the material terms of each sale were established. The Verification Report offers the following comments:

In establishing the date of sale section 15.3 of the manual notes that the Commission will normally use the date of invoice as it best reflects the material terms of sale. However, the verification team has determined that the ‘Bill of Lading’ date best reflects the material terms of the sale and as such has been determined as the date of sale. While Hyundai Steel had presented the ‘sales order’ date as the date of sale, this was deemed to not reflect the material terms of the sale as the date was significantly earlier than when invoiced, shipped to the customer and entered into the sales ledger. The verification team found that on average a sale is entered into the sales ledger after its invoice date and prior to the ‘Bill of Lading’ date.

In our view this position is unsustainable, in light of the clear language of the legislation, the Commission’s own policy position, and the clarification by the ADRP. Issuance of a bill of lading indicates the physical movement, and is a document of title, and assists to define the point at which risk in the goods passes to the consignee, as per the Incoterm used in the contract. This is a key milestone in the carrying out or completion of a sales contract, especially from the perspective of the seller in the

² ADRP Report 2018/80.

discharge of its contractual obligations. To claim that material terms of a sale are not established until the bill of lading is issued is not legally correct and defies international trade practices.

The distortive effect of the date of sale determination used in the Verification Report has had a material effect on the dumping margin calculated by the Commission. To demonstrate that effect, we provide the following simple table to illustrate the impact on the comparison between an export price agreed in a fictional transaction and a domestic price that changes at the different time points.

	Contract date	Invoice date	Shipment date
	01/01/2019	31/03/2019	31/04/2019
Export price	105	105	105
Domestic price	102	106	110

As shown, the domestic prices at the date of shipment can be far removed from the domestic price at a time that a contract for the order is entered into. The use of the bill of lading date as the date of sale is in conflict with the principles of fair comparison that underpin the dumping margin consideration.

The Commission’s Manual also recognises that it is not logical to wait until completion of a transaction to recognise that the material terms of the contract have been established:

Using the contract date for export sale is most likely to have application in situations where the production process takes a long time—for example, manufacturing items of heavy capital equipment causing delivery to occur well after the sale has taken place.³

This is not only relevant for heavy capital equipment. In circumstances where there is a long period of time between contract and delivery, where the key terms such as price and quantity do not change, it is the contract originally entered into that causes the delivery. It is not the delivery that establishes the material terms of the contract. Reliance on a length of time as a basis not to use Hyundai Steel’s sales order date as the date of sale, as was the case in the verification report, must be considered incorrect.

We offer these further comments in response:

- The material terms of Hyundai Steel’s sales were established when the sales order was issued. Saying these details only become “finalised” when the goods are shipped to the customer is to confuse performance of a contract with its pre-existing material terms;
- The fact that Hyundai Steel and its customers entered into sales agreements, as confirmed by individual sales orders, at a much earlier date than when the goods were invoiced or shipped, is irrelevant. Not only is this a common practice in international trade, it must also be remembered that the sales behaviour of dumping must be assessed at the time the seller has a contemporaneous domestic price available for comparative consideration.
- A sales ledger entry is made in accordance with relevant accounting and internal management rules, and is irrelevant to the question of the date on which the material terms of the sale concerned were entered into with the external customer.

³ The Manual, at page 67.

- In so far as the determination of exchange rate is concerned under Section 269TAF, the bill of lading date can have no bearing on the pricing behaviour and consideration of Hyundai Steel, nor the actual financial impact of currency conversion.

We respectfully request the Commission to withdraw its use of the bill of lading date as the date of the sales concerned. The correct approach is to determine the date of sale of Hyundai Steel's Australian sales by reference to the date of the sales orders, both for the purpose of determining the "corresponding" normal value under Section 269TACB and for currency conversion purposes under Section 269TAF.

B Physical difference based adjustment to normal value

The Verification Report did not adjust the normal value to account for the physical/grade differences between the goods exported by Hyundai Steel to Australia and those sold in the domestic market during the period of review ("POR"). We submit that this is incorrect, and is inconsistent with the established position which formed the basis of the notice that is now being reviewed.

The history and most recent position on this issue was helpfully summarised in the Commission's Report 465, issued not more than six months ago:

Hyundai's exports of HRS to Australia comprised of various shapes and dimensions, all of which were certified to the Australian Grade G300. The Australian Grade G300 has an equivalent minimum tensile strength falling within Grade Code B.

In the original investigation, various submissions from interested parties debated which grade sold by exporters on their respective domestic markets was most comparable to the Australian Grade G300. OneSteel submitted that the Korean SM490 was the grade most comparable to Australian Grade G300 on the basis of its specified yield strength and chemical requirements. Hyundai maintained that the Korean SS400 grade was most comparable to the Australian Grade G300 since Korean SS400 produced by Hyundai exceeded the minimum requirements for tensile and yield strength, which was demonstrated by the specifications achieved and shown on mill certificates.

The Korean SS400 grade falls in the same Grade Code B as the Australian G300 grade, however, the Korean SM490 grade falls within Grade Code C.

The Commission's finding in REP 223 was that the SS400 grade was the most comparable grade to the Australian G300 grade and therefore the closest subset of like goods for calculating normal values.

While the SS400 grade was found to be the most comparable grade to the Australian G300 grade by the Commission, the two grades are not identical in all respects. Therefore, where cost differences were able to be quantified, between the SS400 grade sold by exporters on their respective domestic markets and the Australian G300 grade, an upwards adjustment to the normal value was applied on the basis of physical differences.

In the case of Hyundai, a physical adjustment was made to the normal value for observed differences in the cost of production for the Korean domestic grades within Grade Code B and the Australian G300 grade. This cost difference, consistent with the Commission's Dumping and Subsidy Manual (the Manual), was multiplied by Hyundai's gross profit margin on the relevant

goods to ensure that the adjustment to normal value reflected the market value of the cost difference.

This summary is equally applicable to the current review.

The introduction and implementation of the MCC in the current review has not changed the fact that Hyundai Steel exported Grade AS/NZS 300 to the Australian market during the POR, and that largely the same group of goods, mostly SS400, were sold in the domestic market. Indeed, the matching outcome arrived at by using the MCCs is largely consistent with the outcome generated by Hyundai Steel's pre-MCC model matching method, and which was adopted in Report 223 and Report 465.

The use of MCCs in this review does not detract from the need for a physical adjustment to be made to reflect the quantifiable cost differences and the associated market value of those differences, as the Commission has done in Report 223 and Report 465. The physical differences between Hyundai Steel's Australian sales and the relevant domestic sales suitable for normal value purposes in the current review do not differ to the situation before the Commission and the Minister in either Review 465 or Investigation 223, either materially or as a matter of principle. The only thing that has changed is that during the POR the domestic goods sold by Hyundai Steel which are in the same MCC as Grade AS/NZS 300 now attract a higher cost of production to the goods exported to Australia. Hyundai Steel has explained the possibly contributing factors for this change – such as the revision of the applicable Korean product standards and associated production arrangements in response to those changes.

The fact that this has caused a reversal in the direction of the cost differences does not cast the underpinning rationale for a physical and cost-based adjustment into doubt. The Commission has verified Hyundai Steel's costs and satisfied itself that they are accurate and in accordance with Korean GAAP. Indeed, Hyundai Steel notes that if such an adjustment had not been made in Investigation 223, then Hyundai Steel's dumping margin would have been calculated as *de minimis*, and no anti-dumping measures would have been imposed.

Accordingly, Hyundai Steel asks the Commission to be consistent with its own previous approach and rationale in this review of the variable factors.

C Calculation issues concerning the “ordinary course of trade” test

Hyundai Steel has identified two issues in the Commission's calculations relating to the ordinary course of trade of Hyundai Steel's domestic sales transactions (“the OCOT test”).

The first issue relates to an inconsistency in the calculation of the domestic cost to make and sell (“CTMS”). In conducting the OCOT test, the Commission compared the line-by-line transaction prices firstly with the CTMS of the corresponding MCC and the corresponding quarter to determine the profitability. The profitability was then compared with the weighted average MCC CTMS for the POR, in order to determine “recoverability”. The use of quarterly CTMS for the OCOT test is consistent with the approach to determine the normal value, which was also conducted on a quarterly basis. However, in constructing the relevant quarterly CTMS for Hyundai Steel's domestic sales, the Verification Report used the quarter based weighted average cost to make (“CTM”), and the POR average cost for selling general and administrative expenses (“S”). That is, the quarterly CTMS was based on the quarterly CTM, and the annual average S. Hyundai Steel submits that the Commission should undertake the OCOT test by using the correct quarter based CTMS for each MCC, to maintain consistency and accuracy in the calculation.

The second issue relates to the Verification Report's implementation of the OCOT test with respect to the "ex-work prices" of Hyundai Steel's domestic sales, rather than with respect to the "price paid" by Hyundai Steel's domestic customers.

As the Commission is aware, most of Hyundai Steel's domestic sales were made on [CONFIDENTIAL TEXT DELETED – shipping terms]. That is, [CONFIDENTIAL TEXT DELETED – shipping term and pricing]. [CONFIDENTIAL TEXT DELETED – sales terms]. Accordingly, any expenses [CONFIDENTIAL TEXT DELETED – sales terms and expenses], being of the same nature as other selling costs incurred for making such sales. Accordingly, Hyundai Steel submits that it is incorrect to "work out" ex-works based prices for each of Hyundai Steel's domestic sales for the purpose of examining the "price paid" or the price for the goods sold by Hyundai Steel in the domestic market. The actual invoice prices charged by Hyundai Steel and paid by its customers must be used. The transportation cost, which is Hyundai Steel's cost for selling those goods, should be treated in a manner consistent with the other elements of the quarterly/POR CTMS, on a weighted average basis.

We note that both of the approaches suggested above would also be more consistent with the Commission's practices in previous reviews and investigations involving Hyundai Steel.

We respectfully request the Commission to review each of the issues demonstrated in this submission, and to make the relevant corrections to the variable factors and margin determination accordingly, prior to the issuance of the Statement of Essential Facts.

Hyundai Steel will maintain its full cooperation with the Commission should any further information or clarification be required.

Yours sincerely



Charles Zhan
Senior Associate