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02 September 2019

The Director
Investigations 2
Anti-Dumping Commission
55 Collins Street
Melbourne
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By email

Dear Director

Hyundai Steel Company
Review 499/Continuation 505 –Statement of Essential Facts
Comments re determination of variable factors

As you know we act for Hyundai Steel Company ("Hyundai Steel") in the concurrent variable factors review ("Review 499") and continuation inquiry ("Continuation 505") concerning certain hot rolled structural steel sections exported from Korea, Japan, Thailand and Taiwan (hereinafter, "the Reviews").

We refer to the Statement of Essential Facts published for Review 499 ("SEF 499") which provides details of preliminary determinations on several issues relevant to the consideration of whether Hyundai Steel's exports were dumped and the degree of any such dumping. The SEF for Continuation 505 ("SEF 505"), was published on the same day as SEF 499, and states that the Commission intends to rely on the SEF 499 variable factors findings in Continuation 505, where relevant.[1]

In this submission we provide Hyundai Steel's comments in relation to the determination of the variable factors as set out in SEF 499. Naturally, these comments are equally applicable to SEF 505, given its reliance of SEF 499 with respect to the determination of those variable factors.

[1] SEF 505, at page 25.

A Incorrect determination of date of sale

The Commission changed the date to be used as the date of sale of Hyundai Steel's Australian sales from the date of Bill of Lading to the date of commercial invoice, presumably in light of the Commission's consideration of the evidence presented by Hyundai Steel, which shows material terms of its Australian sales were established by its sales contract with the customers, and not established by the shipment of the goods. Hyundai Steel welcomes this progress on this important issue. However, that change still falls short of the legal requirement. The date of sale for Hyundai Steel's Australian sales should be established by reference to the sales order date, being the date when the material terms of the sales were established.

SEF 499 summarises its reasoning for this revision as follows:

> *The Commission considers that:*
>
> - *the possibility that customers can cancel orders if certain conditions are not met;*
> - *the time delays between the receipt of an order and the invoicing and export of the goods;*
> - *the differences in volumes and time frames between orders and exports; and*
> - *the fulfilment of a sales order by multiple shipments;*
>
> *collectively indicate that the details of orders can change between receipt of the order and invoicing and delivery of the goods.*
>
> *In this review, the Commission considers that the above findings, together with the inconsistent treatment of the date of sale by Hyundai for its Australian export and domestic sales, indicate that the sales order date does not best reflect the material terms of Australian export sales.*[2]

With respect, this reasoning does not support the inference that Hyundai Steel's *"sales order date does not best reflect the material terms of Australian export sales"*. Taking these reasons in turn:

1. ***Possibility that customers can cancel orders if certain conditions are not met*** - the possibility that a customer can cancel an order under a sales contract with Hyundai Steel if certain terms of the contracts are not met has nothing to do with the validity of either the sales order or the sales contract and the ability of the sales contract to establish the material terms of the sale. Further, the theoretical possibility of the cancellation of an order is a redundant consideration, for the purpose of determining the date of sale of the order concerned, because no export transaction that led to an exportation to Australia in the review period was cancelled.

2. ***Time delays between the receipt of an order and the invoicing and export of the goods*** - it is unclear why the gap between the sales order and the issuance of an invoice with respect to the order undermines the nature of the sales order as a legal document that establishes the material terms of the sale between the contracting parties. If anything, the gap highlights the necessity and correctness of using the sales order date as the date of sale, because the invoice date would become too divorced from the point in time when the material terms of the sale, including the price of the sale, was established.

   It is well established that Hyundai Steel's Australian sales are made to order. This means Hyundai Steel entered into sales agreement with its customers with the understanding that the goods would be produced, and then shipped, at a future time. That *"time delays between the*

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[2] SEF 499 at page 29.

receipt of an order and the invoicing and export of the goods" exist is unremarkable. This is not relevant to the determination of the date of the sale. The relevant consideration is whether the material terms of the sale, such as the price, quantity or the kind of goods being sold changed during any such "time delay". The fact that an invoice is not issued until the goods are ready for delivery does not detract from the proposition that the material terms of the sale have been established at an earlier point, ie at the sales order date. This is a simple principle, as reconfirmed by the Anti-Dumping Review Panel in Review 2018/80.

3. *Differences in volumes and time frames between orders and exports* - Hyundai Steel notes that there was no difference in the quantity of any particular sale between the sales order date and Hyundai Steel's final delivery of the goods to its Australian customer. This is evidenced by the Australian sales samples. It was explained at the verification and in previous inquiries. It is standard practice in the industry.

   If this observation is a reference to the situation where a particular sales order might be fulfilled via different shipments, then this is an issue of logistics and production planning, and does not change the material terms of the sale as established at the time of the sales order.

   Further, the "time frames" for delivery inevitably fluctuate based on production arrangements and shipping schedules. Such variances are common place in international trade of steel products. These variances are commercial facts and circumstances that have no relevance to the material terms of the sales, being the price, volume and specification of the goods.

4. *Fulfilment of a sales order by multiple shipments* - as mentioned above, fulfilment of a sales order via multiple shipments does not detract from the fact that the material terms of the sale are established at the time of the sales order. The material terms are not changed due to these shipping realities.

   In any case, such circumstances are specifically allowed for in Hyundai Steel's sales contracts with its customers. As an example, clause 4(2) of the sales contract provided to the Commission for sample package SN 4462 states:

   [CONFIDENTIAL TEXT DELETED – contract term about shipment][3]

   In such circumstances, a separate commercial invoice is issued for each shipment. However this does not mean that the material terms of the sale were only "established" when each such shipment was made. These shipments and invoices represent Hyundai Steel's fulfillment of the material terms of the sale, as established and confirmed at the time of receiving the sales order.

5 *Inconsistent treatment of the date of sale by Hyundai for its Australian export and domestic sales* - this observation is incorrect. Hyundai Steel's basis for determining the date of sale for its Australian sales and domestic sales are entirely consistent. In each case the date of sale is determined *"on the date of the transaction or agreement that… best establishes the material terms of the sale of the exported goods"*. The fact that such determination would lead to the use of the date of tax invoice as the date of sale for Hyundai Steel's domestic sales, and the date of the sales order for its Australian sales, is a result of the different sales practices in the different markets. There is no *"inconsistent treatment"*.

   As advised to the Commission, the sales procedures for Hyundai's domestic sales and its Australian sales are different. For domestic sales [CONFIDENTIAL TEXT DELETED – domestic

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3 Please refer to page 4 of sample package SN 4462.

sales process]. In contrast, Australian sales are made to order, and the material terms of the sales as confirmed through each sales order are final and binding upon the parties, without the desire or the need for further negotiations or changes.

Lastly, we note the following statement in the SEF:

> *The Commission notes references made by Hyundai to footnote 8 of the World Trade Organization Anti-Dumping Agreement (the Anti-Dumping Agreement) and its reflection in section 269TAF(1). Hyundai submits that in so far as the determination of the exchange rate is concerned under section 269TAF, the bill of lading date can have no bearing on pricing behaviour and consideration, nor on the actual financial impact of currency conversion.*
>
> *Footnote 8 of the Anti-Dumping Agreement and section 269TAF(1) pertain to the comparison of the export prices of the goods exported to Australia with corresponding normal values of like goods if that comparison requires a conversion of currencies. If that is required, section 269TAF(1) states that the conversion is to be made using the rate of exchange on the date of the transaction or agreement that best establishes the material terms of the sale. The Commission considers that section 269TAF(1) describes how the date for a currency conversion should be determined, if that is required. The Commission does not consider that this provision assists in determining the date at which export price should be determined under section 269TAB. There is no reference to section 269TAB in section 269TAF. In any event, section 269TAF(1) does not specify a particular date for a currency conversion, but states that the conversion is to be made using the rate of exchange on the date that best establishes the material terms of the sale of the exported goods. It does not define what the material terms of sale are in every case, as suggested by Hyundai.* [underlining supplied]

We note that the applicable principle for the date of sale determination as prescribed in Footnote 8 of the ADA is in relation to the term *"date of sale"*. It is not confined to the *"date of sale"* for currency conversion purposes. In any case, insofar as currency conversion is required, which is the case for Hyundai Steel's Australian sales, the requirement under Section 269TAF(1) and Footnote 8 of the Anti-Dumping Agreement is clearly applicable to the relevant export transactions and the export prices established under Section 269TAB, and ultimately the calculation of the dumping margin. The notion that Section 269TAB itself does not refer to the determination of "date of sale" is neither determinative nor informative to that objective. The criteria for establishing the date of sale as prescribed in Footnote 8 of the Anti-Dumping Agreement and Section 269TAF(1) of the Act should be applied for the same determination of date of sales where it is called for under other relevant sections of the Customs Act, such as Section 269TACB or Section 269TAC(8). This was confirmed by the ADRP in Review 2018/80:[4]

> *305. For the reasons discussed above I consider that the correct and preferable decision is that the order confirmation date (for domestic sales) and the pro forma invoice date (for Australian sales) best establishes the material terms of sale as reflected in the definition in Footnote 8 of the ADA. Therefore, in comparing the normal value with the export prices as required by s.269TACB, I considered that the operative dates should be the order confirmation date as the date of sale of Nervacero's domestic sales and the pro forma invoice date as the date of sale of Nervacero's Australian sales.*

We also note the SEF 499's comment that the meaning of *"material terms of sale"* is undefined. Is this intended to imply that these words are meaningless and that the determination of the date of any sale by the Commission is entirely at large? The meaning of the phrase *"material terms of sale"* is sufficiently

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[4] See ADRP Report 2018/80, at para 305

clear, given that the purpose of the determination is work out the export price of the goods (where currency conversion is relevant), and to ensure a fair comparison between the export price and the normal value. This goes to the fundamental exercise of determining "dumping", by *comparing* an exporter's export pricing behaviour with its *corresponding* domestic pricing behaviour as required by Section 269TACB of the Act. Accordingly, we respectfully submit that Hyundai Steel's view that the price, volume and specification are the material commercial factors of any sale in the circumstances of the goods here under consideration, and that the date on which they are agreed is the date of their sale, is uncontroversial and undisputable. This is consistent with the position set out in the Commission's *Dumping and Subsidy 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.* [underlining supplied]

Hyundai Steel has once again demonstrated, through every randomly selected sales samples, that the price and quantity of its Australian sales are confirmed and settled at the time of sales order, not subject to further changes, and remains unchanged at the time of issuance of commercial invoice.

Accordingly, we respectfully urge the Commission to revisit its view concerning the date of sale of Hyundai Steel's exports, and to recognise that the sales order date best establishes the material terms of the sale of those exports. If the Commission still have any doubt about this fact, Hyundai Steel can offer to provide the relevant sales documents for *all* of its Australian sales during the period of review for the Commission's further examination.

B Consistent physical difference based adjustment is required

We note that SEF 499 departs from the approach in Investigation 223 and Review 465 with respect to adjustments to the normal value that are required to account for the physical differences between Hyundai Steel's exports of the goods under consideration ("the GUC") and the like goods sold in the domestic market.

SEF 499 states the following:

> *However, the MCC structure has been applied in order to identify and address difference in selling prices of HRS. Despite the presence of physical differences between various models of HRS, the Commission did not find in Hyundai's verified sales data, or in other evidence, that physical differences of models within respective MCC groups influenced prices.*
>
> *The Commission also notes that the respective standard in Korea has recently been altered. In previous investigations and reviews pertaining to Hyundai, the models of Korean HRS were differentiated on the basis of ultimate tensile strength. The renaming of the Korean standard based on yield strength is more closely aligned to the Australian standard which emphasises yield strength and which Australian end users refer to and require to be met. The MCC structure in this review includes categories based on yield strength and also accommodates categories for tensile strength. The MCC structure was not available to be applied in Investigation 223 or in Review 465. The Commission considers that the MCC structure applied in this review is appropriate, facilitates close matching of Australian export models with domestic models and*

> *ensures that adjustments to normal value are only required when a physical difference is shown to influence price.*[5]

We refer the Commission to Hyundai Steel's submission dated 13 June 2019:

> *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.*

As noted in the second paragraph above, the revision of the Korean Standards in fact contributed to the reversal of the direction of the adjustment. However, the fact that an adjustment is favourable or unfavourable to an exporter in the determination of its dumping margin is irrelevant to the obligation to make such an adjustment as requested and as verified. The reasons for an adjustment, as adopted by the Commission in Investigation 223 and Review 465, have not been affected or removed. That is, the normal value and the export price *"are not in respect of identical goods"*, and the physical differences affect their fair comparison, as the Commission has previously and consistently considered to be the case.

Accordingly, Hyundai Steel respectfully urges the Commission to adopt the consistent reasoning and methodology as recently confirmed in Review 465, and to apply an adjustment to the normal value on the same basis.

C Errors relating to "ordinary course of trade" determination

SEF 499 rejects Hyundai Steel's submission concerning the methodology adopted by the Commission in applying the ordinary course of trade test ("the OCOT test"). Particularly, the contested issues concern the treatment of SG&A and inland freight.

In relation to the former, SEF 499 notes:

> *…the Commission considers that SG&A expenses are of a general nature and include some expenses that may only be incurred annually (for example, staff bonuses). As such, the Commission considers that SG&A expenses should be calculated on an annual basis, rather*

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5 SEF 499 at page 31.

> *than the manner proposed by Hyundai, being the application of an annual SG&A average ratio to the relevant quarterly sales revenue.*

Hyundai Steel notes that its submission was premised on the need to use a consistent cost basis. The Commission has conducted the OCOT test based on a comparison of quarterly CTMS and the prices of corresponding transactions. Therefore it would only make sense for the quarterly CTMS to be based on the quarterly selling general and administrative cost ("SG&A"), rather than an annual SG&A. Hyundai Steel submitted that the quarterly SG&A should be calculated by applying the annualised SG&A ratio to the per quarter sales revenue. This would achieve the purpose of treating periodical expenses such as staff bonuses in a manner that is more closely linked to the time at which they were paid, and to maintain consistency in the use of quarterly CTMS. Hyundai Steel's method is not affected by expenses that may only be incurred annually.

In relation to the treatment of inland freight, the SEF states:

> *The Commission considers that conducting the OCOT test at an ex-works level produces an accurate result because delivery expenses are based on actual expenses on a line by line (transactional) basis. Hyundai has stated that sales are made and invoiced on a delivered basis and the actual invoice charges (which are inclusive of transportation) should be used and compared to a CTMS inclusive of transportation costs. As such, they would be treated in a manner consistent with other elements of the CTMS, being the weighted average full cost for the review period as mandated by 269TAAD(3). The Commission does not consider this appropriate.*

Hyundai Steel respectfully disagrees that its request for the OCOT test to be conducted as required by Section 269TAAD(3) is not "appropriate". The use of weighted average cost to conduct the OCOT test *must* be appropriate, because it is the legal requirement under Section 269TAAD(3).

D Exclusion of the amount of interim dumping duties

In this regard, we refer the Commission to Hyundai Steel's submission dated 27 June 2019. In that submission, Hyundai Steel demonstrated the distortive effect of the deduction of interim dumping duties ("IDD") from export prices in variable factor reviews, and drew the Commission's attention to the practices adopted by investigating authorities in other jurisdictions to avoid such distortions. Hyundai Steel submitted that the Commission should adopt the same approach towards IDD and export price as the US Department of Commerce, noting that such method can be accommodated by calculating the export price under Section 269TAB(1)(c) of the Act.

SEF 499 does not disagree with this reasoning. Rather, the Commission considers that Section 269TAB(1)(c) cannot be applied, because of its view that Hyundai Steel is not the importer of the relevant sales:

> *In section 5.5.1.1 of this report, it is explained that for the sales by Hyundai on duty paid terms, the export price has been ascertained under section 269TAB(1)(a). For these duty paid sales, the delivery term is of a kind that the risk and beneficial ownership of the goods is transferred to the buyer upon loading on the ship. The Commission considers that the payment of IDD does not change the point at which risk and beneficial ownership passes to the buyer and therefore considers the Australian customer to be the importer of the goods for Hyundai's duty paid sales.*

> *In accordance with 269TAB(1)(a), the Commission has deducted all the post-exportation costs from the import price of the goods in order to determine the export price for the goods at the FOB level. This includes the IDD, which is a charge arising after exportation.*[6]

The observation that *"[f]or these duty paid sales, the delivery term is of a kind that the risk and beneficial ownership of the goods is transferred to the buyer upon loading on the ship"* is incorrect. As shown in clause 4 of the sales contract for the sampled duty paid sales, the sales term between Hyundai Steel provides that the title and risk to the goods are passed to the Buyer after the vessel arrives in Australia, not "upon loading on the ship".

Clause 13(2) of the contract also states:

> [CONFIDENTIAL TEXT DELETED – contract clause about duty payment].

Consistent with these sales terms, Hyundai Steel is also identified as the importer of such sales on the N10S customs declaration form.[7]

Accordingly, Hyundai Steel submits that it should be recognised as the importer of such sales. It is the importer of record for customs declaration purposes, and has the contractual right [CONFIDENTIAL TEXT DELETED – contractual rights as importer].

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

Yours sincerely

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6 SEF 499 at page 32

7 Ibid, at page 45