5 July 2019

The Director - Investigations 2
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

BY EMAIL: investigations2@adcommission.gov.au

Dear Director,

Public Record Case No. 505 - Hot rolled structural steel sections from Japan, Korea, Taiwan and Thailand
Application by: OneSteel Manufacturing Pty Limited

SUBMISSION OF THE APPLICANT

OneSteel Manufacturing Pty Limited, trading as 'Liberty Primary Steel' (**Liberty Primary**), being the applicant for *Continuation of a Dumping Duty Notice*[1] concerning *hot rolled structural steel sections from Japan, Korea, Taiwan and Thailand* (**HRS**) refers to the recent submission of the exporter, Hyundai Steel Company (**Hyundai Steel**), made in this matter[2] and responds as follows. References to headings and sub-headings correspond with those contained in the exporter's submission.

Alleged 'Incorrect determination of date of sale'

At the outset, Liberty Primary observes that the exporter is either disingenuous or misleading when it contends that:

> 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.[3]

An appraisal of Hyundai Steel's own historic representations to the Anti-dumping Commission (**Commission**) and other investigating authorities reveals anything but the exporter's consistency on this point. Indeed, the evidence verified by both the Commission and overseas investigating authorities has consistently supported the conclusion that the exporter's sales to both domestic and export customers have been subject to a high degree of changeability up until the point of despatch and delivery – typically aligning with the date of invoice where issued at the point of delivery. In other words, the invoice date best reflects the date on which the exporter or producer establishes the material terms of sale (e.g., price and quantity) which are no longer then subject to change.

[1] Refer ADN No. 2019/021 (11 February 2019).
[2] EPR Folio No. 505/015 (17 June 2019).
[3] EPR Folio No. 505/015, p. 1.

Following the imposition of measures in relation to hot rolled structural steel sections in July 2002, Hyundai Steel (formerly, 'INI Steel Company Ltd') applied for a review of variable factors relevant to the anti-dumping measures applying to structural steel exported from Korea by Hyundai.[4] In the original investigation, Hyundai Steel admitted that changes could be made to the material terms of sale in the period between the order and invoice dates.[5] However, within 18 months of the original dumping duty notice being published, Hyundai Steel then asserted that for the review period (CY 2003), there could be no changes to price or volume from the date of order confirmation[6] and sought to assert that that the order date was the date of sale.

In the subsequent dumping investigation (No. 223), Hyundai then again claimed that the date of sale for export sales was the invoice date, before, again reversing its position in the subsequent review of anti-dumping measures (Review No. 465).[7] In Review No. 465, the Commission made a number of compelling findings of fact, which entirely demonstrated Hyundai's vacillating position on the date of sale as nothing short of opportunistic:

> The verification team has examined Hyundai Steel's claims and makes the following findings:
>
> - The sales order is an entry in Hyundai 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.
> - 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.
> - 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.
>
> For these reasons 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. The analysis above is contained the export sales analysis attachment.[8]

The Commission's findings in Review No. 465 were consistent with the conclusions of the United States (US) Department of Commerce's investigation concerning *Certain Hot-Rolled Steel Flat Products From the Republic of Korea* on this question:

> In its questionnaire responses and accompanying sales data files, Hyundai Steel reported the earlier of shipment date or the date of invoice as the appropriate date of sale. Invoices are generally issued after shipment so the date of shipment is the appropriate date of sale for Hyundai Steel's U.S. sales. Hyundai Steel issues invoices at this time because price and/or quantity remains subject to change up until shipment.

[4] Trade Measures Report No. 79, *Structural Steel Review, Korea* (6 August 2004), p. 7.
[5] Refer Trade Measures Report No. 79, *Structural Steel Review, Korea* (6 August 2004), p. 7.
[6] Trade Measures Report No. 79, *Structural Steel Review, Korea* (6 August 2004), pp. 7-8.
[7] EPR Folio No. 465/010, p. 13.
[8] EPR Folio No. 465/010, p. 14.

> Hyundai Steel submitted documentation for sales in which the material terms of sale changed following receipt of the customer's order and estimated that this occurs in a good percentage of sales. [emphasis added] [9]

In the current continuation inquiry (No. 505), the Commission again found similar evidence to that previously found in Review No. 465, specifically, that the export sale date occurs significantly after receipt of the customer's order:

> …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.[10] [emphasis added]

There is nothing 'unsustainable' in the position reached by the Commission on the question of the exporter's date of sale in this matter. The Commission has to date had proper regard to the evidence which supports the conclusion that the material terms of the sale were not settled until the 'bill of lading' date being the time at which the fundamental terms and conditions (i.e. quantity and delivery date) of the sale are in fact known. This conclusion, based on the evidence before the Commission, may be inconvenient for the exporter, but it reflects the most reasonable conclusion capable of being reached on the evidence, that is, that in the case of Hyundai Steel, the terms and conditions of sale are not settled until the date of delivery.

Therefore, the Commission has reached the correct or preferable decision in relation to the export date of sale as being, on the evidence, the 'Bill of Lading' date.

Claimed 'Physical difference-based adjustment to normal value'

At the outset, as a matter of correct interpretation of the domestic law, s.269TAC(8) enacts the obligation under Article 2.4 of the *Anti-Dumping Agreement* to make a fair comparison between the export price and normal value when determining dumping. As such s.269TAC(8) refers to the making of adjustments in circumstances where "price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price". Relevantly, Article 2.4 provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability…

The WTO jurisprudence on the circumstances in which adjustments are to be made for 'physical characteristics', must be related to differences which are demonstrated to affect price comparability.[11] Therefore, the exporter is wrong at law to assert that the Commission is obliged to make an

[9] Department of Commerce, 'Non-Confidential Attachment C - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea', p. 27.
[10] EPR Folio No. 505/010, p. 15.
[11] Appellate Body Report, *US – Hot-rolled Steel*, at [177].

adjustment for physical characteristics under s.269TAC(8) that is not proven to affect price comparability, but only cost differences.

The suggestion by the exporter there is a *"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"* is entirely wrong at law and under WTO jurisprudence as Panel Member Blumberg correctly and helpfully highlighted in ADRP Report No. 80 (Steel Reinforcing Bar Exported to Australia from Greece et Ors) in response to the ground raised by the same representative firm for Hyundai Steel (in that case acting for the exporter, Nervacero S.A), that the exporter was entitled to a physical adjustment to its normal value based on cost differences between the domestic sales of like goods and the goods exported to Australia:

> 329. I refer again to the Panel's statement in EC – Fasteners (China) referred to above that, although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such comparison, and that if it is "not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment."[12]
>
> 330. It appeared to me that the ADC's refusal to grant the adjustment based on lack of supporting evidence in Nervacero's own records of accounts, was reasonable in the circumstances. Nervacero's sub-ground of review relating to its claim for adjustment to account for physical differences between exported goods and the like goods therefore fails.

Therefore, to make an adjustment to the normal value as the exporter asserts on the basis of cost differences with no demonstration that the differences affect price comparability is not the correct or preferable decision and must be resisted by the Commission.

Furthermore, the exporter's disclosure of the likely model match concluded by the Commission between the Grade AS/NZS 300 exported to Australia and the "mostly SS400" goods sold by the exporter in the Korean domestic market shows a model matching error made for this exporter in INV 223 and REV 465 is about to be perpetuated again for the sake of "consistency". As referenced by the exporter, the Commission's findings in REV 465 stated:

> 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.** [13] [emphasis added]

[12] Original fn 138 [European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (WT/DS397/R), Para. 7.298.]
[13] REP 465 at p. 14

Liberty Steel has consistently argued that a comparison of mill certificates against minimum export Standard requirements is fundamentally technically flawed[14] and has led to this highly erroneous finding that grade SS400, which has a minimum yield strength (the mandatory strength category in the MCCs) of 235-245MPa and no chemistry specifications can be considered "most comparable" to Grade AS/NZS 300 with a minimum yield strength of 280-320MPa and enforces chemistry control for weldability through the specification of a maximum carbon equivalent value.

Liberty Steel requests a review of grades mapped to MCCs for Hyundai based on a Standards comparison and seeks disclosure of grades determined to be most comparable to the export grade.

Exporter claims concern calculation of the OCOT test

The suggestion that there is anything unreasonable in the Commission's use of annual average selling, general and administration (**SG&A**) expenses is without foundation. Unlike cost to make (**CTM**) expenses, SG&A expenses may fluctuate between quarters based on arbitrary allocations and accounting treatments across the annual financial period. It is not uncommon for the final quarter prior to the end-of-fiscal period to be 'loaded' with adjustments and allocations. To not take the annual average SG&A expense and allocate it to the quarterly CTM expenses for the goods will result in under allocations of SG&A in earlier quarters, and over allocation of SG&A expenses in the final quarter. This is not the preferable approach for the Commission to observe, and should be resisted.

Secondly, the exporter's suggestion that the Commission's testing of the profitability and recoverability of individual transactions should occur at the 'delivered' level of trade, compared to the ex-works level is unsound. It is not fair or reasonable for the Commission to compare 'high value' delivered transactions (based on distance of customer or logistical complexity), to a weighted average 'delivery' expense across all domestic sales. To follow the approach proposed by the exporter would mean that domestic sales that are on an ex-works basis unprofitable and unrecoverable, are nevertheless treated as being within OCOT just because of the disproportionate value attributed to the transportation of the goods in the 'delivered' price agreed. Again, this is not the correct or preferable approach for the Commission to observe.

Should the Commission seek clarification of any of the matters raised in this submission, please do not hesitate to contact your Australian industry representative on record.

FOR AND ON BEHALF OF

THE AUSTRALIAN INDUSTRY APPLICANT

[14] EPR Folio No. 505/004 and EPR Folio No. 505/020