Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
Australian Capital Territory 2609

Brisbane
Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
Queensland 4064

Melbourne
Level 39, 385 Bourke Street
Melbourne
Victoria 3000

Australia

Canberra +61 2 6163 1000
Brisbane +61 7 3367 6900
Melbourne +61 3 8459 2276

www.moulislegal.com

moulislegal
commercial + international

27 June 2019

The Director
Investigations 2
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

Hyundai Steel Company
Hot rolled structural steel sections – further submission on continuation of the measure

A Introduction

As you are aware, we act for Hyundai Steel Company ("Hyundai Steel") in the concurrent variable factors review and continuation inquiry concerning certain hot rolled structural steel sections ("HRSS" or "the GUC") exported from Korea, Japan, Thailand and Taiwan ("the Reviews"). The Reviews were instigated by Liberty OneSteel ("Liberty Steel" or the "Applicant").

In our submission dated 21 May 2019, (hereinafter, "the First Submission") we demonstrated that fundamental changes and improvements to the Australian industry have occurred, and continue to occur.[1] It was submitted that the Commission cannot be satisfied that the expiration of the measure would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure is intended to prevent. In this submission we provide

[1] See the First Submission, at EPR 505 Doc 011.

Moulis Legal Pty Limited ACN 614 584 539

further comments on the issues relating to the continuation of the measure, including an update on the Australian industry's acquisition of Steelforce, as raised in the First Submission.[2] Separately, we address a number of issues relating to operation of the measure, that is if the Commission decides to recommend that the Minister secure the continuation of the anti-dumping measures, particularly:

- The appropriate level of duty suitable for Hyundai Steel's exports, including the determination of the non-injurious price and the lesser duty rule under section 8 of the *Customs Tariff (Anti-Dumping) Act 1901* ("the Anti-Dumping Act"); and

- the appropriate treatment of the interim dumping duty ("IDD") in the Reviews.

B Effects of the Steelforce merger and the changing Australian industry

In our First Submission we identified the review conducted by the Australian Competition and Consumer Commission ("the ACCC") into the proposed merger between the Australian industry and Steelforce, and the effects that such acquisition would have on the Australian industry and the Australian market in relation to the GUC.

As an update on that issue, we draw the Commission attention to the ACCC's announcement on 13 June 2019, that it would not be opposing the acquisition.[3] This acquisition will unquestionably affect the constitution of the Australian industry and the Australian market. As noted in our previous submission:[4]

> *m. The Australian industry is in the process of acquiring Steelforce Holdings Pty Ltd. Steelforce is a major supplier of steel long products in Australia, including the goods under consideration. The acquisition will no doubt further strengthen OneSteel's market power in Australia and, we submit, is not the act of a weak and injured market player.*
>
> …
>
> *Hyundai Steel advises that its intention is to continue supply the GUC to the Australian market which meets the market demand unable to be filled by OneSteel. This maintains a good balance of supply and demand in the Australian market for HRSS. There is no incentive for Hyundai Steel to sharply or suddenly increase export volume to Australia. As demonstrated and explained during the verification visit, Hyundai Steel's HRSS production has been at near full realistic capacity (taking into account maintenance and the size mix). There is neither incentive nor capacity for Hyundai Steel try to capture further market share in Australia.*
>
> *This situation is also unlikely to change or affected by the section 232 tariff in the US as claimed by OneSteel. This is because Korean exporters enjoy a quota based on exports volume in previous years and are exempt from the general application of the tariff for exports within the quota, and the limited impact that the US market has on Hyundai Steel's overall production and sales of HRSS, given its well established and stable sales channels in both domestic and various overseas markets. In this regard, we draw the Commission's attention to the fact [CONFIDENTIAL TEXT DELETED – comments regarding Australian sales]. As OneSteel further integrates the Australian market and absorbs the distribution channels and customers of*

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2 See the First Submission, at page 10.

3 See https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/gfg-alliance-australia-liberty-house-group-steelforce-holdings-pty-ltd.

4 See the First Submission, at pages 10 and 17.

> *Steelforce into its own organisation, the Australian industry will have an even tighter grip of the Australian market for HRSS. If the Australian industry's production condition changes, and is capable and willing to meet the market demand and increase its sales volume, then it will be in an even better position to do so than before, as it [CONFIDENTIAL TEXT DELETED – comments about changes to Australian market]. On the other hand, if the Australian industry continues to face the same sweet dilemma it currently faces, and cannot fulfil the market demand due to its production constraints and commercial prioritisation, then the market is likely to be continue to be supplied by the merged OneSteel-Steelforce, with the same imports from Hyundai Steel. In either case, there is no probability of a recurrence or continuation of the material injury that the measure against Hyundai Steel is intended to prevent.* [underlining supplied]

In our view, the ACCC's decision does not address or rebuke the situation identified in our submission, and was silent on the relationship between the proposed acquisition and the impact of the current or future anti-dumping duties.

During the review period, as Hyundai Steel identified,[5] [CONFIDENTIAL TEXT DELETED – comments regarding Australian sales]. We respectfully ask the Commission to fully take into account this imminent change to the Australian industry, in addition to the other systemic changes to the Australian industry since the measure was originally imposed.[6] Insofar as Hyundai Steel's exports are concerned, the procurements by the current and about-to-be Australian industry [CONFIDENTIAL TEXT DELETED – comments regarding Australian sales]. This means that even if Hyundai Steel continues to supply the Australian market in the same way as it did in the review period, [CONFIDENTIAL TEXT DELETED – comments regarding Australian sales]. Another possible scenario is that [CONFIDENTIAL TEXT DELETED – comments regarding Australian sales]. Either way, this highlights the fact that the economic conditions and make-up of the Australian industry has evolved to a very different state to the one that this anti-dumping measure was put in place to protect. Thus, we believe that a continuation of the current measure is neither necessary nor warranted.

Accordingly, the measure should be allowed to expire in relation to the goods exported by Hyundai Steel. Liberty Steel, being the newly restructured and ever-expanding Australian industry, is not prevented from lodging a new application for dumping duty once the measure is discontinued.

C The dumping duty must not be excessive and unnecessary

We recall Hyundai Steel's position that its exportation of the goods, regardless of a dumping margin, is not presently causing any material injury to the Australian industry that the current measures were put in place to prevent, and is not likely to do so in the future.[7] In particular, our First Submission pointed out that:

- the Australian industry has gone through major and structural changes, and is not the same domestic industry when the measure was put in place and intended to protect;[8]

5 See Attachment 1 to the First Submission.

6 See First Submission, especially at B, C, E and F.

7 Ibid.

8 Ibid, at pages 3 – 4.

- the Australian industry's economic conditions have improved significantly, despite the continued and increased presence of imports subject to the measure;[9]

- the Australian industry's economic conditions concerning the goods has been and will continued to be affected by its own business decision to prioritise the production and sales of non-GUC, such as rails;[10]

- the goods exported by Hyundai Steel are required by the Australian industry and the Australian market which cannot be supplied by the Australian industry;[11] and

- the Australian industry is undertaking major investments and merger and acquisition activities which will further enhance its market power and market share such that this anti-dumping measure based protection is not necessary.[12]

We respectfully submit these factors must be taken into account by the Commission in ensuring that it complies with its obligation *"not [to] recommend that the Minister take steps to secure the continuation of the anti-dumping measures"* unless dumping and the recurrence of material injury in the future can be shown to be probable. In our view, the substantive changes to the Australian industry and its economic conditions require the Commission to find that it is no longer appropriate for the current anti-dumping measure to continue.

At the same time, these factors are also relevant for the purpose of determining the non-injurious price, and the appropriate measure that would sufficiently prevent recurrence of injury caused by dumping, should that still be the outcome of this inquiry notwithstanding our client's submissions. Section 8(5B) of the *Customs Tariff (Anti-Dumping Act) 1975* requires the Minister to consider setting the dumping duty at a level less than the dumping margin if such measure is sufficient to prevent recurrence of the injury to the Australian industry. This lesser duty rule requires the Minister to determine a non-injurious price ("NIP"). Section 269TACA(a) of the *Customs Act 1901* defines the non-injurious price as the minimum price necessary to prevent injury.

We submit that this guiding principle must be upheld in the determination of the NIP and the implementation of the lesser duty rule. This is especially important where the Australian industry's economic conditions are clearly affected by factors unrelated to dumping. In such scenario, imposing a duty at the same rate as the dumping margin would result in an overly punitive measure. It would automatically assume that injury, including the injury effects of other factors, is fully attributed to dumping alone. Such a measure would have the effect of imposing more than the minimum price necessary to prevent the recurrence of injury – given that injury attributable to dumping is less than the full extent of the dumping margin.

While the Act does not prescribe any specific method for calculating the NIP, one of the options recognised by the Commission is to determine the NIP based on the Australian industry's unsuppressed selling price ("USP"). The USP will usually be the selling price in the Australian industry calculated by reference to one of the following methods:[13]

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9 Ibid, at pages 7 – 10.

10 Ibid, at pages 11 – 14.

11 Ibid, at page 15.

12 See Section B of this Submission.

13 See Anti-Dumping Commission, *Dumping and Subsidy Manual* at pages 138 and 139.

1 Market approach: where the Commission uses a price that is determined at a time unaffected by dumping.

2 Constructed approach: where the Commission uses the Australian industry's cost to make and sell ("CTMS") and adds a reasonable rate of profit.

3 The selling prices of un-dumped imports in the Australian market.

We note Liberty Steel's comments in relation to the determination of a USP:

> *At the visit, Liberty Steel claimed that the Australian HRS market has been affected by dumping for a long time and that the market approach is not suitable.*
>
> *Liberty Steel claimed that the construction approach is the most suitable and that the rate for profit of 8 per cent for the steel industry would be appropriate because a recently concluded European safeguard inquiry determined this to be a minimum rate for the steel industry.*
>
> *Liberty Steel claimed that the selling prices of un-dumped imports in the Australian market approach is not suitable because it is impossible to assert that non-dumped goods are unaffected by dumped goods.*[14]

In our view, the Commission should find that the market approach and the selling prices of undumped imports are indeed suitable options for the determination of a USP.

Firstly, under the market approach, we submit that the Commission may refer to the weighted average of the Australian industry's prices for like goods from 2014 to 2016 as the basis of working out the USP. The original anti-dumping investigation was initiated on 3 December 2013, with a Preliminary Affirmative Determination imposing securities on the importation of the GUC published in the first quarter of 2014 and covering most of the exporters under investigation. This means that a dumping duty and the potential impact of that duty was effective in the market for most if not the entirety of 2014. This is supported by the fact that the former Australian industry member, OneSteel, was able to increase its price against the cost trend in that year:

[14] See EPR 505 Doc 008, *Verification Report – Australian Industry Liberty Steel* at page 19.

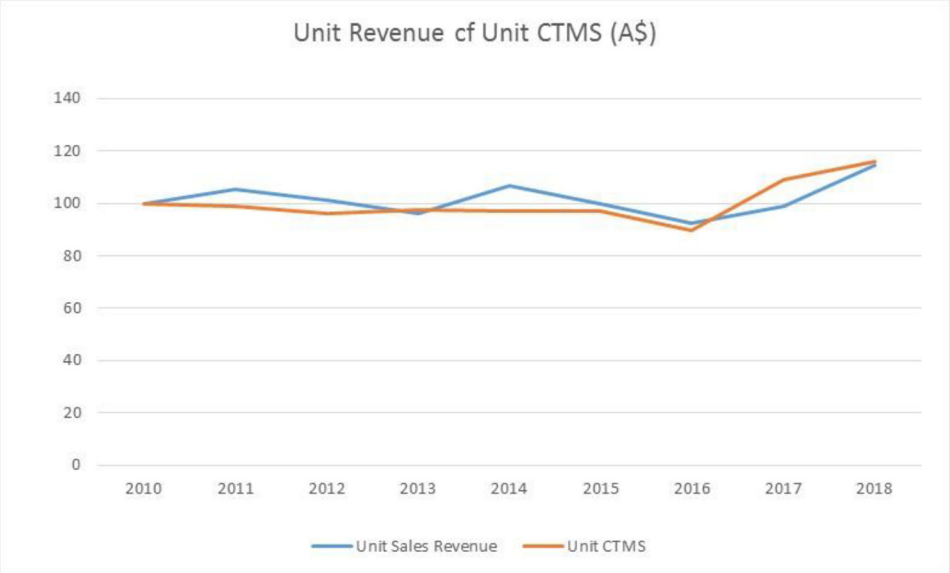

Figure 2 – Indices of Liberty Steel HRS Unit Revenue and Cost to Make and Sell[15]

The Australian industry also achieved the highest profitability and capacity utilisation rate in 2014:

Figure 3 –Liberty Steel Profitability[16]

15 See Australian Industry verification report, at page 10.

16 Ibid, at page 11.

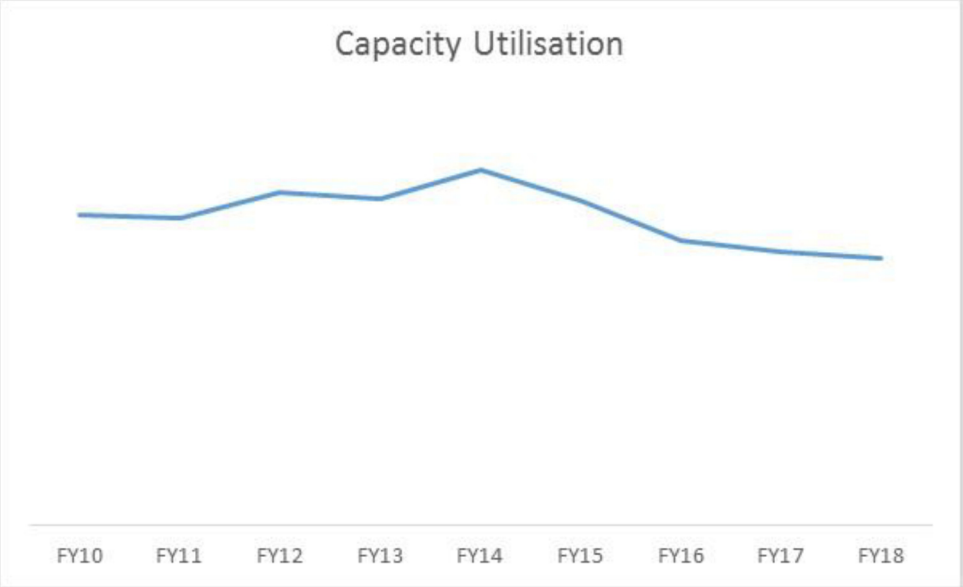

Figure 8 – Liberty Steel HRS Production Capacity Utilisation[17]

All of the above indicates that the Australian market for the GUC and the Australian industry producing like goods were unaffected by dumping during 2014.

The market continued to be unaffected by dumping in 2015 and 2016. This view is supported by the fact that the dumping duties were fully in operation to address any dumping, and that there is no evidence suggesting otherwise. This view is also supported by the outcomes in Review 345 and Review 346, which both concluded that the goods were not dumped by the relevant exporters during the review period of 1 January to 31 December 2015.

Further, we note that the Australian industry managed to keep its revenue trend above its cost equivalent throughout 2014 to 2016, and achieved high sales volumes in both 2014 and 2016:[18]

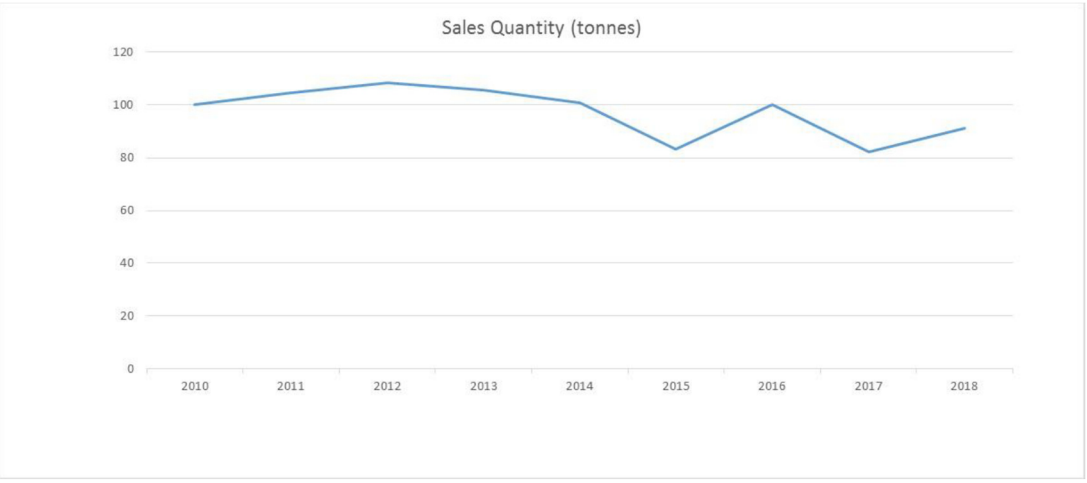

Figure 6 – Index of Liberty Steel HRS Sales Volume

17 Ibid, at page 14.

18 We take note that Liberty Steel's sales volume of the GUC in 2016 was at the same level of 2014, despite of a much lower capacity utilization rate in 2016.

The Australian industry's sales volume and market share plunged after 2016. However, in light of the existence of dumping measures, such decline was most likely triggered by the coinciding infrastructure and railway projects offered to and undertaken by the Australian industry from the second half of 2016. We discussed in detail the impact of these projects to the Australian industry's single rolling line facility in our First Submission.[19] The need for the Australian industry to prioritise highly profitable rail projects at the cost of lower throughput and higher unit cost for the HRSS (presumably because of the inefficiency/lower throughput as a result of needing to juggle different production on the single rolling line) appears inevitable, but is not related to dumping. Such special circumstances indicate the Australian industry's sales prices in 2017 and 2018 were significantly distorted by factors unrelated to dumping, and therefore are not suitable for determining the USP. For this same reason, we ask the Commission to also find that the Australian industry's cost to make and sell during 2017 and 2018 are unsuitable for the purpose of determining the USP.

Secondly, in relation to the use of un-dumped imports as the basis for determining a USP, we ask the Commission to reject Liberty Steel's claim that such *"approach is not suitable because it is impossible to assert that non-dumped goods are unaffected by dumped goods"*. This claim is without basis. Hyundai Steel notes that goods not subject to the measures have maintained a steady share of the Australian market since the original investigation and during the review period. The fact that such imports are not subject to dumping duty means that they must be treated as undumped imports, not capable of causing dumping-related injury to the Australian industry. For the opposite proposition to prevail, it must be supported by evidence.

Further, Hyundai Steel notes that imports from one of the major Taiwanese exporters, Tung Ho Steel ("Tung Ho"), and the Thai exporter, Siam Yamato Steel ("SYS"), were subject to floor price based dumping measures. The application of such measures automatically renders the goods imported from Tung Ho and SYS as unaffected by dumping, unless proven otherwise. Further, insofar as Hyundai Steel's exports to Liberty Steel are concerned, the export prices reflect Hyundai Steel's acceptance of Liberty Steel's pricing requirements, and thereby must also serve as a point of reference for determining the USP or non-injurious price.[20]

Lastly, in relation to Liberty Steel's argument that the USP should be constructed using its own CTMS plus a profit, we refer the Commission to our comments above concerning the unsuitability and distortion in Liberty Steel's production throughput and unit cost in 2017 and 2018, due to its decision to shift production to more profitable products manufactured on the same rolling line as the GUC. In addition, we submit that the 8% profit as claimed by Liberty Steel is inappropriate for several reasons:

- Liberty Steel has not provided any evidence as to the relevance of the profit rate it nominated to the Australian market for the GUC or to its own operation.[21] The European based data is therefore inappropriate and irrelevant for the context of the present Reviews;

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19 See First Submission, at page 15.

20 See First Submission, particularly at B.

21 We assume Liberty Steel's claimed European case is a reference to the European Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018 imposing provisional safeguard measures with regard to imports of certain steel products, available at http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157125.prov.en.L181-2018.pdf. The proposed profit margin in that investigation was determined by reference to market conditions in the European steel market. A market that is completely different to the Australian market by virtue of the European Union ("EU") customs system. It was also determined specifically by reference to EU production volumes and profitability. Further, that investigation related to twenty eight product categories, with only two of these categories related to hot rolled products.

- Liberty Steel's profitability in relation to its sales of like goods cannot be taken on its face value, given that a *"significant proportion of Liberty Steel's sales were made to related party customers"*; and

- the fact that Liberty Steel was unable to at least recover the cost of the like goods it sold in the domestic market – again, mostly made to its own related party without competition – and despite the imposition of dumping duties, indicates that an amount of profit above zero for the calculation of a USP is unwarranted.

Accordingly, we submit that if a constructive USP must be adopted, then it should be calculated based on Liberty Steel's weighted average CTMS between 2014 to 2016, in order to remove the cost distorting effect of Liberty Steel's own prioritisation of non-GUC production in 2017 and 2018, with a profit rate reflective of Liberty Steel's own circumstances during 2014 and 2016. The use of a CTMS based on a more "normal" production throughput level and higher production and sales volume is also warranted, in light of Liberty Steel's proposed acquisition of Steelforce, which would guarantee a substantial portion of the Australian market to be supplied by Liberty Steel's own production – if it is willing and capable to do so.

In conclusion, it is submitted that:

- the Commission should refer to Liberty Steel's sales prices during 2014 and 2016 as the basis for the USP;

- in the alternative, the Commission can determine the USP based on the prices of the undumped exports during the review period, including the prices of Hyundai Steel's exports to the Australian industry; and

- if the USP must be calculated on a constructive basis, the Commission should refer to Liberty Steel's cost of production during 2014 and 2016, with a profit ratio determined based on the actual profitability of Liberty Steel's own operation in Australia regarding the like goods at that time

D Treatment of interim dumping duty in the review

Hyundai Steel notes that for the purpose of determining variable factors for the review period, the Commission excluded the amount of interim dumping duties ("IDD") in the determination of export prices, where Hyundai Steel exported the GUC on a duty-paid basis. This treatment of the IDD has a very minor effect on the variable factors and dumping margin determined, given the small volume of goods sold on duty-paid terms. Nonetheless, as a matter of principle, and for the clarity of Hyundai Steel's future operation, Hyundai Steel takes this opportunity to express its concerns about the distortive effect of such an approach.

In Hyundai Steel's view, in a variable factors review or continuation inquiry – which is a review of the necessity for the dumping duty and its appropriate level under Article 11 of the WTO Anti-Dumping Agreement – it is the export price charged by an exporter such as Hyundai Steel and the impact of which that must be reviewed. The amount of dumping duty paid, either by the exporter or by the importer, represents the amount of duty required to offset the dumping margin and the level of dumping duty previously determined by the Commission. Such duty, and the formerly determined dumping margin, are the very subjects being reviewed. The purpose of the review cannot be achieved if the export price is adjusted downward by the same extent of the IDD. The IDD imposed is intended to reflect and offset the margin of dumping. The deduction of IDD from the export price distorts the export prices and creates a "double counting" of dumping margin by the existing dumping margin. The first

count being at the border when these duties are paid, and second count when they are removed in the process of reviewing the dumping margin.

Further, the deduction of IDD from the export price leads to a situation where the export price appears artificially low, thereby causing there to be an exaggerated dumping margin, unreflective of the actual differences between export price of the goods and their normal value. This potentially results in a situation where exporters are considered to be "dumping" in ever-greater amounts and are required to pay interim dumping duties in greater and greater amounts following each variable factors review because the dumping margin is artificially increased by the amount of interim dumping duty itself. This is so even if the un-deducted variable factors remain the same and dumping does not occur. From an injury perspective, the reduced export price also fails to reflect the actual impact of the exported goods on the Australian industry.

We illustrate this in the example below:

	Original investigation	Review period 1	Review period 2
Export price	100	110	110
Normal value	110	110	110
IDD		11	12.2
Export price reduced by IDD		99	97.8
Dumping margin	10%	11.1%	12.5%

As the above table shows, even though the exporter increased its export price to the same level as the normal value in response to the finding of dumping from the original investigation, and was thereby not dumping, the subsequent reviews fail to correct and update its dumping margin to 0%. Instead, the IDD deduction method means that the exporter is "trapped" with ever higher dumping margins, despite the fact that goods were exported into Australia at higher, un-dumped prices. The IDD deducted export price also fails to correctly reflect the actual market and price impact of the exported goods, thereby also affecting any accompanying injury assessment.

In Hyundai Steel's view, such treatment of the IDD is unfairly punitive and distortive. It undermines the function of a variable factors review and of a continuation inquiry as a mechanism intended to assess the necessity and the level of dumping duty required to offset dumping-caused injury. Based on the above example, an exporter must export the goods at 122.2 per unit, being 11% higher than the normal value, in order to achieve a 0% dumping margin.

Hyundai Steel notes that the double counting effect of deducting IDD from export price is recognised in the USA. Hyundai Steel respectfully refers the Commission to the following example of the practice of the US Department of Commerce ("USDOC") concerning this issue:

> *However, our longstanding practice is not to deduct antidumping duties as costs, expenses or import duties because antidumping duties are neither selling expenses nor normal customs duties. Equally significant, in order to follow the petitioner's suggestion, we would have to adjust the respondents' dumping margins to account for their dumping margins. That is, the petitioner would require that the margin calculations be performed as follows: 1) calculate the antidumping duty margins for the respondents; 2) determine the antidumping duties pursuant to those margins that, in the normal course of business, would be paid by the respondents acting*

> *as importers; 3) increase the dumping margin for each company by deducting that initial assessed amount from the respondents' export prices; and then 4) calculate new, higher antidumping duties to apply to each respondent. Such an outcome would impermissibly force the companies to pay additional duties that "doublecount" the antidumping rate which originally addressed the companies' pricing behavior. Moreover, this conclusion has repeatedly been upheld by the CIT. See, e.g., AK Steel, 988 F. Supp. at 607 (finding the Department's rationale that including antidumping duties would result in double-counting to be a reasonable justification for not including them in the Department's calculations); and Hoogovens, 4 F.Supp.2d at 1220 ("...an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer - it is an element of a fair and reasonable price").*[22]

In Hyundai Steel's view, the USDOC's rationale on this issue is reasonable and logical. Hyundai Steel respectfully asks the Commission to take the same approach towards IDD and export price determination in the current and future reviews. Hyundai Steel submits that the same non-deduction of IDD approach, recognising the special nature of IDD, can be accommodated in Australia under Section 269TAB(1)(c), where the exporter exported the goods on a duty paid basis, thereby also being the importer of the goods on the record.

E Conclusion

In this submission and our previous submission, we highlighted that the Australian industry has systemically and economically changed, in improved overall economic conditions, and that it continues to become less prone to injury following the Steelforce merger. The Commission is required to carefully examine the Australian industry being protected by the measures, the existence of material injury that the measure was originally intended to prevent, as well as the proper level of dumping duty necessary. In Hyundai Steel's view, the Commission should find that it does not have sufficient evidence to recommend the Minister to take steps to secure the continuation of the anti-dumping measures.

If the measure is to be continued, Hyundai Steel asks the Commission to carefully examine the non-injurious price options applicable to Hyundai Steel's exports. The Commission should ensure that the NIP is set at the minimum price necessary to prevent only dumping-caused injury, so that the Australian industry is not additionally protected by reason of factors unrelated to dumping. Hyundai Steel also requests the Commission to revise its treatment of IDD in the export price determination in this and future variable factors reviews, to avoid creating artificially high dumping margins and artificially low export prices in such reviews, and to fall in line with the practice of the USDOC as a counterpart investigating authority.

Yours sincerely

Charles Zhan
Senior Associate

+61 2 6163 1000

[22] Attachment 1 - See *Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India* page 17.