Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal, Audit & Assurance

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By EMAIL

Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
GPO BOX 2013
Canberra ACT 2600

Dear Commissioner,

ADRP Review No. 120 – Hot Rolled Structural Steel Sections exported from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand

The Anti-Dumping Review Panel (Review Panel) is currently conducting a review of the decision of the Minister for Industry, Science and Technology (Minister) made on 5 November 2019 under section 269ZDB(1) of the *Customs Act 1901* (the Act), applying to Hot Rolled Structural Steel Sections (HRSS) exported from Japan, the Republic of Korea (Korea), Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand (Thailand).

The Review Panel accepted applications for review from the following applicants:

- OneSteel Manufacturing Pty Limited (OneSteel);
- Hyundai Steel Co., Ltd (Hyundai); and
- Siam Yamato Steel Co. Ltd (Siam).

As you are aware, I am conducting the review.

Pursuant to section 269ZZL of the Act, I require the following findings in Report 499, relating to relevant applicant's grounds of review, be reinvestigated:

(a) The finding as to the normal value determined for Siam, and in particular, the consideration of like goods and the adjustments for credit terms.

(b) The finding as to the normal value determined for Hyundai and in particular the consideration of the adjustment for physical specification differences between the prices for domestic sales and the export sales, and the assessment of the sales in the ordinary course of trade (OCOT).

(c) The finding as to the normal value determined for Tung Ho Steel Enterprise Corporation (Tung Ho) given there were sales of like goods that may have enabled the normal value for all sales to be determined pursuant to s.269TAC(1) of the Act with s.269TAC(8) of the Act adjustments as necessary.

(d) The finding as to the normal value determined for TS Steel Co. Ltd (TS Steel) given there were sales of like goods that may have enabled the normal value to be determined pursuant to s.269TAC(1) of the Act with s.269TAC(8) of the Act adjustments.

(e) Should the finding in relation Tung Ho and TS Steel be changed as a result of the reinvestigation, consideration be given as to whether this impacts the determination of the normal value for 'all other exporters' from Taiwan.

(f) The finding of the Non-Injurious Price (NIP) be considered in view of the finding of un-dumped exports by Tung Ho Steel and whether this changed circumstance impacted the findings in relation to the unsuppressed selling price (USP) and the NIP.

(g) The relevant dumping margins and relevant variable factors relating to each of the exporters mentioned above should there be any changes to the normal values in view of the reinvestigation findings.

I provide below a summary of my reasons for making the request under section 269ZZL of the Act:

Siam:

Normal value and like goods:

1.1. Siam contends that the Anti-Dumping Commission (ADC) did not correctly determine the normal value as there were identical goods sold on the domestic market to those exported to Australia and these transactions, given there were sufficient volumes in arms length transactions and in the OCOT, should have been used to determine the normal value under s.269TAC(1) of the Act rather than a broader category of 'like goods'.

1.2. The ADC, through its approach to model matching in the Model Control Code structure (MCC), grouped a range of domestic models including all those who had a yield strength grade of between 245 MPa and 325 MPa (including identical models exported to Australia) in its determination of the normal value.

1.3. The ADC, in its submission to the Review Panel, indicated 'The legislation does not require the Commission to only consider domestic sales of identical goods where they are present.' It also stated that 'The Commission notes that while the MCC framework facilitates closer matching of Australian and domestic models, its intent is not to confine model matching to identical models'.[1] OneSteel, in its submission, supports the approach adopted by the ADC in relation to the use of the MCC structure in assessing normal value.

1.4. Siam, in its submission to the Review Panel, claims that the ADC is wrong in law to extend the definition of 'like goods' to comparable goods when identical goods are available for consideration in the determination of normal value. It refers the Review Panel to Article 2.6 of the World Trade Organization Anti-Dumping Agreement (ADA) which defines 'like goods'. It also indicates that the definition of 'like goods' as specified in s.269T reflects this intent. It proposes that if non-identical goods are considered for normal value under s.269TAC(1) of the Act, the operation of s.269TAC(8) should lead to the same outcome as adjustments would be required to remove the differences to enable a fair comparison with the export price.

1.5. Outlined below are the relevant sections of the Act dealing with like goods and normal value (an extract) as well as the relevant provision in the ADA dealing with like goods.

s.269T(1) of the Act provides the definition of like goods:

> ' … *goods that are identical in all respect to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration* …'

Article 2.6 of the ADA states:

> '*Throughout this Agreement the term "like product" shall be interpreted to mean a product which is identical, ie alike in all respects to the product under consideration, or in the absence of such a product, another product which,*

[1] ADC submission to the Review Panel dated 17 February 2020 page 14.

although not alike in all respects, has characteristics closely resembling those of the product under consideration.'

s.269TAC *Normal value of goods*

(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

(1A) For the purposes of subsection (1), the reference in that subsection to the price paid or payable for like goods is a reference to that price after deducting any amount that is determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of the sales.

(2) Subject to this section, where the Minister:

(a) is satisfied that:

(i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or

(ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);

the normal value of goods exported to Australia cannot be ascertained under subsection (1); or

(b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);

the normal value of the goods for the purposes of this Part is:

(c) except where paragraph (d) applies, the sum of:

(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and

(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale; or

(d) if the Minister directs that this paragraph applies—the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transactions.

1.6. The concept of 'dumping' is considered to be the 'situation of international price discrimination involving the price and cost of a product in the exporting country in relation to its price in the importing country.'[2] Article 2.1 of the ADA indicates that dumping is when the export price of a product is less than its normal value, that is, the comparable price, in the ordinary course of trade for the like product in sales in the domestic market of the exporter. This concept is reflected in Australia's legislation in s.269TG of the Act, '... the amount of the export price of the goods is less than the amount of the normal value of those goods …'. This provision determines whether there is dumping, that is, price discrimination between the sales of the exported goods between the export and domestic market.

1.7. The intent of the comparison is to examine whether there is price discrimination between the two markets. In so doing the emphasis is on examining the 'like goods'.

1.8. The manner in which 'like goods' is expressed in s.269T of the Act (see above) with the use of the word 'or' after 'identical in all respects to the goods under consideration' rather than the word 'and' suggests identical goods should be considered in the first instance. If such goods are not available, consideration may then be given to a broader category of goods that '… *have characteristics closely resembling those of the goods under*

[2] Peter Van den Bossche, Werner Zdouc, the Law and Policy of the World Trade Organization, third edition, Cambridge University Press, 2013. Pages 676 to 677.

consideration'. This also reflects the intent and language of the words in the ADA, which clearly specifies '… or in the absence of such a product… '

1.9. The wording in s.269TAC(1) requires the consideration of the goods exported to Australia by the exporter to ascertain whether there are domestic sales of these goods.

1.10. There are areas in the Act that the reference to 'like goods' is broadened to a larger category given the nature of the comparison required. For example, when considering material injury to an Australian industry producing like goods (pursuant to s.269TG of the Act). The Australian industry is more likely to produce comparable goods to those exported rather than identical goods. However, when considering normal value, the exporter often does produce the same models for domestic and export markets. In such instances, the identical goods should be considered first for normal value purposes. In my view, broadening the scope of 'like goods' should only be enlivened when identical goods are not available.

1.11. Therefore, it appears that when there are identical goods sold in the exporter's domestic market to those exported to Australia, it is correct to use the identical goods (subject to meeting the other elements of s.269TAC(1) of the Act). From a pragmatic perspective it also reduces the need for the decision maker to consider whether an adjustment is required (s.269TAC(8)) to enable a fair comparison for any differences between the exported goods and the models of the 'comparable goods' sold on the domestic market.

1.12. I require the ADC to reinvestigate the normal value, noting Siam's submission that the normal value should be based on domestic sales of the identical goods, assuming such sales meet the other requirements of s.269TAC(1) of the Act.

Normal Value and credit adjustments under s.269TAC(8) of the Act

2.1 Siam contends that the interest rate used to calculate the adjustment for credit terms pursuant to s.269TAC(8) between the domestic sales and export sales was incorrect. Siam states the actual interest rate applied in setting prices should be used rather than by reference to a Thai bank commercial rate.

Section 269TAC(8) of the Act states:

> *Where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported:*
>
> *(a) relate to sales occurring at different times; or*
>
> *(b) are not in respect of identical goods; or*

(c) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;

that 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.

2.2. While Siam agrees that a credit terms adjustment should be made to reflect the difference between the prices for domestic sales and the export sales, it disagrees with the rate applied by the ADC in REP 499. Siam claims that its pricing arrangements in the Thai market is a complex process of negotiating a price that includes consideration of a range of factors including the customer relationship as well as payment terms.[3] Siam indicates that customers are given the option of [redacted] Siam states that the rate referred to in an 'internal company memo' is a valid rate applied to price negotiations and is relevant evidence that should not have been dismissed by the ADC. Siam also refers to the regulations dealing with what amounts should be used in constructing the cost to make and sell (CTMS) and the requirement to use the manufacturer's own records and costs.[4] It contends that the actual amount used by Siam in contract negotiation and price setting is appropriate for adjustment purposes.

2.3. The ADC, in REP 499, indicated that 'The Commission conducted further credit pricing analysis on SYS's (Siam) domestic sales by comparing the difference between cash net terms and other payment days and by controlling for variables such as month, MCC model and level of trade. The Commission did not find that the *actual* credit costs as claimed by SYS were incurred.[5] On this basis, the ADC did not consider the 'actual rate' claimed by Siam appropriate and instead used a Thai bank commercial rate.

2.4. The following paragraphs deal with my assessment of Siam's confidential domestic sales information presented at the verification visit conducted by the ADC, confidential information is redacted.

2.5. This information included price quotations showing [redacted] terms, purchase orders, invoices and bank statements for the transactions for each customer examined. In each case the amount invoiced was reflected in the relevant bank statement. The price quotations for each of the examples offered either a [redacted]

[3] Non-confidential conference summary held with Siam and ADC on 11 March 2020.
[4] Submission from Siam dated 17 February 2020.
[5] REP 499 Section 5.7.2.1 page 46.

[redacted] price as terms. In each case, the [redacted] reflected a [redacted]% (or [redacted]% pa) [redacted] from the [redacted] price.

2.6. The final invoices which included terms of [redacted] days, indicated the use of the [redacted] price. The invoices showing terms of [redacted] days indicated the use of the [redacted] [redacted]. There were also other discounts applied to some transactions.

2.7. The evidence presented suggests that Siam does apply the rate [redacted]% pa in establishing its prices, but it is not always applied to [redacted][6] Siam was asked to clarify its pricing process at the conference held on the 11 March 2020 as to why this variation of approach occurs. Subsequently it provided additional information clarifying the pricing (and credit) arrangements for the above-mentioned invoices. It also noted that it had examined all the domestic transactions of the identical models (export models) and the majority of these were sold at [redacted] [redacted]. This information was not subject to verification by the ADC.

2.8. While the credit pricing analysis undertaken by the ADC on Siam's domestic sales is not incorrect as far as it goes, it does not appear to account for the impact of the other discounts apparent in Siam's domestic sales. It was also undertaken in Review 499 and hence did not consider the further information on prices provided by Siam as a result of the conferences on the 18 February and 11 March 2020. From my perspective, it is unclear whether the removal of the 'other discounts' would change the results of the credit price analysis. While I understand the conclusions drawn from the credit price analysis, based on the examples viewed, there is evidence that the actual prices paid (based on the stated internal credit rate) are valid. I also do not agree entirely with the ADC's conclusion that 'The Commission did not find that the actual credit costs as claimed by Siam were incurred'.[7] Regardless, there is evidence that the credit rate advised by Siam was used, [redacted]

2.9. As a general comment, a company is entitled to charge a credit rate different to the prevailing interest rate in the country. It may do so to reflect the fact that it incurs financial as well as administrative expenses in providing such terms.

2.10 I require the ADC to reinvestigate the rate applied to the credit terms adjustment for domestic and export sales comparison purposes, considering the evidence on the credit rate supplied by Siam and the circumstances of its use.

[6] Non-confidential conference summary held with Siam and ADC on 11 March 2020.
[7] REP 499 Section 5.7.2.1 page 46.

***Hyundai**:*

Normal value and OCOT

3.1. Hyundai claims that as part of the ADC's findings in relation to normal value and whether certain transactions were recoverable, pursuant to s.269TAAD(3) of the Act (the 'recoverability test'), the ADC did not use the weighted average inland freight costs as required by s.269TAAD(3). Hyundai claims that if the calculation had been conducted using the weighted average inland freight costs, the inclusion of the additional sales found to be in the OCOT would have lowered the normal value.

3.2. The ADC advised in its submission to the Review Panel it had conducted its analysis of OCOT at an ex-works level (including the 'recoverability test'), therefore it had not added the inland freight costs on a transaction basis or weighted average basis. Its calculations involved deducting the inland freight cost from the domestic selling price and comparing costs at the ex-works level.[8]

3.3. The Review Panel sought clarification from Hyundai via a conference as to the extent of sales it considered had been excluded from the normal value calculation based on approach adopted by the ADC.[9]

3.4. Hyundai advised that it considered there were two flaws with the ADC approach to the OCOT test. Firstly, Hyundai questions whether it is legally correct to adjust the domestic selling price to remove the inland freight cost when the sales in the domestic market are made at a delivered price (vide s.269TAAD(1)). Secondly, Hyundai considers that the 'recoverability test' (pursuant to s.269TAAC(3)) requires the domestic selling price (of sales found to be at a loss when compared with the unit cost to make and sell at that time) to be compared with the weighted average cost of such goods over the investigation period, again at the delivered level. It claims that the ADC should have used the weighted average inland freight cost in its analysis. Hyundai provided its confidential calculations of the impact of the use of the weighted average inland delivery cost on the 'recoverability test' and the normal value determination.[10]

3.5. While the ADC did the OCOT comparison of prices and costs at the same level (ex-works price) I agree with Hyundai that s.269TAAD provides that the price in the domestic market is to be used for comparison and the costs are constructed to match this price. In this case, the price for most transactions was established at a delivered level. I can find

[8] Submission to the Review Panel by the ADC dated 17 February 2020, pages 6 to 7.
[9] Non-confidential conference summary held with Hyundai and ADC on 19 February 2020.
[10] Confidential spreadsheets supplied following the conference held with Hyundai and ADC on 19 February 2020.

no legislative authority to make deductions to the price for the purposes of undertaking an OCOT test. Accordingly, it appears that the cost (to make and sell) should have been constructed to the same level as the price in order to undertake the comparison for OCOT purposes.

3.6. The ADC commented at the conference held with Hyundai on 19 February 2020 that assuming the actual delivery costs are added to the unit cost to make, together with the other selling, general and administrative costs (SG&A), it would make no difference to the final comparison for OCOT purposes. I do not disagree with the ADC's comment.

3.7. In REP 499, the ADC commented that '… *where information on actual delivery expenses on a line by line basis is available, it is appropriate and preferable to have regard to the actual cost of delivery for each domestic sale in determining whether the domestic sale is made in the OCOT. This is the Commission's current practice, is consistent with s.269TAAD(3) and yields a more accurate and preferable application of the OCOT test. Importantly, having regard to the actual costs of delivery yields a more accurate cost of such goods as required under s.269TAAD(3)*'. I agree with the ADC's comments in this regard and consider this approach consistent with the legislation.

3.8. However as indicated above, I agree with Hyundai that the comparison of price and costs for the purposes of OCOT should have been undertaken at the delivered price level. Accordingly, this aspect of the OCOT test needs to be reinvestigated.

3.9. In relation to Hyundai's second point as to whether the ADC undertook the test at the weighted average cost level (as required by s.269TAAD(3)), I do not agree with Hyundai's assessment of the calculation method adopted by the ADC. Acknowledging that the ADC did the test at the ex-work level (and not at the delivered level), the calculation methodology itself was correct. The ADC used the total CTMS (the addition of all the individual CTMS transactions) and divided it by the total volume. Section 269T(5B) specifies how the calculation method of a 'weighted average' and this was adopted by the ADC. A weighted average calculation is not the addition of all the individual weighted average costs.

3.10. I examined the methodology and calculations undertaken by Hyundai in the information supplied following the conference held on 19 February 2020.[11] Hyundai's methodology involved applying the percentage of the SG&A including the total inland delivery costs to the cost to make to arrive at a CTMS for each transaction. The proposed methodology

[11] Non-confidential summary of conference with Hyundai and ADC held on 19 February 2020 and Hyundai.

explained by the ADC in REP 499 (see paragraph 3.7) involved adding the actual delivery costs incurred for all transactions to the cost to make and adding the SG&A percentage (with delivery costs excluded) to arrive at a CTMS. The difference between the two approaches relates to whether the actual delivery cost should be added at a transactional level or applied as part of the total SG&A percentage to arrive at the CTMS.

3.11. Hyundai provided the information on the inland delivery costs in its response to the exporter questionnaire. Hyundai allocated the inland delivery costs to products based on the total invoice cost, as invoices related to multiple products/sales and so an allocation on a per line basis was provided.[12] As indicated above the use of the actual delivery cost relating to each transaction proposed by the ADC is correct in my view. It reflects the differences in costs between differing destinations rather than an averaging of freight across all transactions. There appears to be no legislative restriction in using inland freight costs in this manner given it is from Hyundai's accounting records. I acknowledge that in certain circumstances, where delivery costs are unable to be allocated at a transactional level, it is appropriate to include as part of an overall SG&A percentage. However, as indicated by the ADC when actual direct costs relevant to particular transactions are available, it is preferable to use such costs in constructing the CTMS.

3.12 Unless I have misunderstood Hyundai's review application, the method described by Hyundai would involve each cost component that contributes to the CTMS being worked out on a weighted average basis prior to its inclusion in the CTMS. This is not what s.269TAAD(3) provides. It requires all the unit CTMS to be summed and divided by the total quantity to arrive at a weighted average CTMS for use in comparison with the unit prices for the recoverability test. The method of calculating a weighted average inland delivery cost in the method proposed by Hyundai is not valid in terms of s.269TAAD(3).

3.13. As noted above the ADC did the comparison at a different level to that specified in the legislation, to that extent it is not correct in law. Given the volume of sales involved and the fact there are a series of calculations to be undertaken to conduct the assessments of 'profitability' and 'recoverability' the OCOT should be reinvestigated.

Normal value and physical differences adjustment

4.1. Hyundai proposes that s.269TAC(8) of the Act requires that a comparison occur between the exported models and the domestic models to assess if there are physical differences

[12] Non-confidential summary of conference with Hyundai and ADC held on 19 February 2020 and Hyundai Response to Exporter Questionnaire Domestic sales listing.

and if so an adjustment be made to enable a fair comparison to assess if dumping has occurred. (see earlier reference to s.269TAC(8) of the Act)

4.2 Hyundai claims that there are physical differences between the models exported to Australia and the domestic models used for assessing whether dumping has occurred. It noted that in both the original investigation (Report 223) and a recent review (Report 465) the ADC had adjusted for physical differences between the exported goods and the domestic goods. However, in Review 499, it did not make any physical difference adjustment and Hyundai questions how the approach has changed when the goods are essentially the same as for these earlier matters.

4.3. The ADC stated:

> '*In the original investigation and in Review 465, the Commission found the most comparable domestic grade to the Australian export grade of AS300 was SS400, both of which were categorised as Grade Code B. However, the Commission considered that the two grades within Grade Code B were not identical in all respects and a physical adjustment was made to normal value for differences observed in the cost of production for the Korean domestic grades within Grade Code B and the AS300.*
>
> *Hyundai's submissions make references to differences in costs it incurred to produce the various grades of HRS. The Commission notes that the MCC structure has been applied to identify differences in selling prices of HRS.*
>
> *The Commission has found in this review that despite the presence of physical difference 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.*
>
> *Further, the Commission could not identify:*
>
> - *A consistent correlation between the cost to make for the models sold domestically and the Australian model and the selling prices; and*
> - *A physical characteristic that resulted in the cost differences between the Australian export model and the equivalent*

domestic model to support Hyundai's submission that changes to the Korean standard may explain these cost differences.' [13]

4.4. The Dumping and Subsidy Manual, November 2018 (Manual) indicates that there must be evidence that the particular difference affects the price comparability. It states that: 'However, there may be situations where direct evidence of price differences cannot be provided (eg models sold domestically and exported to Australian are different). …This is a means for calculating an adjustment that reflects the market value of the production cost difference.'[14] The price comparability in question as pointed out by Hyundai, relates to the exported goods and the domestic sales. The policy also indicates that the method by which the adjustment is to be calculated is based on actual costs incurred or selling prices achieved.[15]

4.5. There are examples where it is easy to distinguish a difference for adjustment purposes. For example, goods for export are packed differently to those sold domestically and it is assumed that this difference is embedded in the price. An adjustment for this difference is generally based on the costs of the different packing.

4.6. Another example relates to credit terms where the credit terms differ between the export sales and the domestic sales. In these circumstances, the Manual states 'The rationale is that it is reasonable to assume that these known actual credit periods were taken into account when setting prices'.[16] That is, there is an assumption that the prices have been adjusted to reflect the different costs associated with giving payment terms, regardless of whether there is evidence that the price has actually been modified. Both examples illustrate it is often assumed that businesses have regard to cost difference in setting prices, regardless of whether there is evidence of price modification.

4.7. In my view, there are three questions to be addressed when considering s.269TAC(8) adjustments as follows:

1. Is there a physical difference between the exported goods and domestic goods?

2. Does this difference affect the price comparability between the export goods and domestic goods?

[13] REP 499 Section 5.5.1.6 pages 32 to 33.
[14] Dumping and Subsidy Manual November 2018, Section 15.3, page 67.
[15] Dumping and Subsidy Manual November 2018, Section 15.3 page 65.
[16] Dumping and Subsidy Manual November 2018, Section 15.3, page 76.

3. If the answer to both of the above two questions is yes, what is an appropriate method to calculate the adjustment. Ideally it should be based on the price differences but if this cannot be established, costs may be used.

4.8. Each case must be judged on its own merits in terms of the evidence before the decision maker. Furthermore, an applicant has a clear responsibility to provide the necessary evidence to support the claimed adjustment.

4.9. In the circumstances of this case, it is evident that there are differences between the exported models and the models sold on the domestic market. They are not identical goods but are grouped in the same MCC code based on yield strength. Therefore, the answer to question one is that there are physical specification differences between the exported and domestic goods.

4.10. Hyundai indicated that there have been technical specification modifications and changes to production arrangements to the domestic models to meet the changed Korean standards but did not elaborate on the nature of these changes. Hyundai maintained that these changes had impacted both costs and prices.[17] On the other hand, the ADC was unconvinced that these changes affected price comparability and considered the Korean standards were now more akin to the Australian standards. The ADC provided Hyundai's confidential spreadsheets that summarised the cost differences between the domestic models and the exported models in 2018.

4.11. In relation to question two, Hyundai indicated that in the original investigation and the most recent review of measures for the period 2017 (Review 465), the ADC had accepted there were physical differences between the domestic goods and the exported models and made adjustments. It claims in this Review (499) that as these are largely the same export models and domestic models, as compared to the Review of Measures undertaken in 2017 (Review 465), it cannot understand the ADC's change of approach, when it accepted the adjustments made on costs previously.

4.12. The analysis undertaken by the ADC focuses on the price differentials between the sales of the domestic models in the same MCC code as the exported model. It has undertaken analysis of the price/cost relationship by model to ascertain if there is a direct relationship between cost and price within a particular MCC code. It indicated in REP 499 that physical differences of models within respective MCC groups did not influence prices'.[18] My concern with this statement is whether the analysis should have been conducted between different MCC groups in order to understand whether domestic prices of goods

[17] Non-confidential conference summary held with ADC and Hyundai on 19 February 2020.
[18] REP 499 page 33.

change between MCC groups which have different physical characteristics rather than only within a MCC grouping, notwithstanding that the exported models are within the same group. I'm also unsure as to the value of examining the cost/price correlation within a category as to whether this reveals much in terms of the price comparability difference between the exported model and the domestic model.

4.13. In my view, the evidence is not as clear as to whether the price comparability between the exported goods and domestic models has been affected, though it is evident from the figures supplied by Hyundai that there are cost differences in the Cost to Make (CTM) the goods.

4.14. I accept that there is an obligation on the applicant, Hyundai, to provide sufficient evidence that there is a price difference caused by the physical differences between the export and domestic goods. My view is that they attempted to do so on the basis of their earlier experiences with the original investigation and the recent review. This had not convinced the ADC which instead relied on the pricing analysis referred to above. I am not sure that I agree with the approach adopted by the ADC as I don't think the analysis addresses the correct question regarding price comparability between the exported goods and the domestic models used to establish the normal value.

4.15. I require the reinvestigation of the physical difference adjustment to deal with the three questions that should in my view be addressed in assessing whether an adjustment should be recommended as the current analysis has not provided sufficient clarity as the rationale for rejecting this adjustment.

One Steel:

Normal Value for Tung Ho and TS Steel

5.1. OneSteel contends that for exporters, Tung Ho and TS Steel from Taiwan, the ADC should have used s.269TAC(1) with s.269TAC(8) adjustments to determine the normal value rather than s.269TAC(2)(c). For both exporters, OneSteel indicates that the ADC advised that it was unable to '… quantify differences in cost or price to enable specification adjustments to be made under subsection 269TAC(8) for differences between the export and domestic models'.

5.2. The ADC indicated in its submission to the Review Panel that in relation to Tung Ho, for one model there were sales in the OCOT and a normal value was determined pursuant to s.269TAC(1). For three of the export models, there were insufficient domestic sales

made in the OCOT.[19] It was unable to quantify the differences in price or cost to enable a specification difference for adjustment purposes under s.269TAC(8) of the Act. It therefore constructed a normal value for these sales pursuant to s.269TAC(2)(c) of the Act. It indicated there were similar findings in relation to TS Steel, in that there were insufficient volumes of domestic sales of an equivalent model sold in the OCOT. In the case of TS Steel there were no sales of the exported model on the domestic market in the OCOT but there were sufficient volumes of sales of a model 'like' the exported model.[20]

5.3. OneSteel claims that once there is a finding that there are sufficient volumes of 'like goods' sold in the ordinary course of trade then it is not appropriate to undertake this test at the model level. One Steel referenced the Review Panel finding in ADRP Report No 110[21] which indicated '… *it was not open to the Commission to require that individual models also meet the sufficiency test in order to have their normal values determined under s.269TAC(1) of the Act*. The 'sufficiency test' referred to relates to the requirement to ensure there are sufficient sales of the like goods in the domestic market for use in determining the normal value.

5.4. OneSteel also referenced the Senior Panel Member, in relation to whether it was legally correct to determine a normal value under s.269TAC(2)(c) when there were sales of 'like goods' available as follows:[22]

> '*The approach taken by the [Commission] … would mean that the Minister had a broad discretion under s.269TAC(2) to disallow sales which were not considered to be comparable or relevant for determining a price under s.269TAC(1). I am unable to find such a legislative intention in s.269TAC(2) and it would be contrary to the otherwise prescriptive nature of the circumstances in s.269TAC(2) which allow the Minister to ascertain the normal value of exports under s.269TAC(2).*
>
> *In Anti-Dumping Authority and Anor v Degussa AG and Anor, the Full Court of the Federal Court confirmed that sales which fell within s.269TAC(1) could not be ignored on the basis of some criteria not found in the legislation. It is the words of s.269TAC(1) to which regard must be had. While the decision in Degussa was distinguished by the Court in Pilkington (Australia) v Minister of State for Justice and*

[19] ADC submission dated 17 February 2020, page 12.
[20] Non-confidential conference summary with the ADC held on 18 February 2020.
[21] ADRP Report No 110 Steel Reinforcing Bar exported from the Republic of Turkey September 2019, page 15 at [28].
[22] ADRP Review No 100 Wind towers exported from the People's Republic of China, letter from the Senior Panel Member to the ADC requiring a reinvestigation dated 4 July 2019 pages 5 to 6 at [14] and [15].

Customs, on the basis of subsequent changes to the legislation, this does not affect the comments with respect to s.269TAC(1) and s.269TAC(2) on this point.'

5.5. I also considered my recent request for reinvestigation for ADRP Review No 108 on a similar issue.[23] Outlined below is a relevant extract:

Subsection 269TAC(2)(a) requires that:

- *there be an absence of sales of like goods; or*
- *there be low volume of sales of like goods; or*
- *a situation in the domestic market that renders such sales in that market as being unsuitable,*

in order to proceed to establish a normal value under s.269TAC(2)(c) or (d). In addition, I draw your attention to the Changshu Longte judgment[24] which states:

Subsection (2) (of s.269TAC) can only operate if the Minister has reached at least one of the three states of satisfaction identified in paras (a) and (b) of subs (2).

While I note that the Dumping and Subsidy Policy Manual suggests that an example of absence of or low volume could be a circumstance where 'there may be no comparable models on the domestic market and it may not be practicable to make the required specification adjustments for the purposes of comparing normal value to export price',[25] I am not convinced that this meets the state of satisfaction contemplated in s.269TAC(2)(a).

The question of whether an adjustment can be calculated under s.269TAC(8) of the Act does not, in my view, operate to exclude sales of like goods available for consideration under s.269TAC(1), for the purposes of s.269TAC(2)(a) or (b).

Furthermore, I note that there has been a recent reinvestigation request from the Review Panel dealing with a similar issue.[26] In that case, the Senior Panel Member highlighted that '… "relevant sales" for the purpose of determining a price under

[23] ADRP Review No 108 Steel Reinforcing Bar exported from the Republic of Korea and Taiwan (with the exception of Power Steel Co. Ltd) requiring a reinvestigation dated 16 September 2019.
[24] *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2019] FCAFC 122 at paragraph 54.
[25] Dumping and Policy Manual November 2018, page 34.
[26] Request for Reinvestigation for 2019_100 Wind Towers exported from People's Republic of China and the Republic of Korea by the Anti-Dumping. Review Panel.

s.269TAC(1) are the sales described in that subsection, that is, "like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not sold by the exporter, by other sellers of like goods". Further explanation as to the rationale is provided in the request for reinvestigation so I do not need to repeat that here.

I also note the observation made in the Steelforce Trading judgment[27] when dealing with whether the Commissioner was able to determine an actual amount realised in a particular situation for the purposes of determining a normal value pursuant to s.269TAC(2)(c). In that case, His Honour indicated that s.269TAC(6) 'explicitly provides a methodology where, inter alia, s.269TAC(2)(c)(ii) has been unable to be applied'.

5.6. For the reasons outlined above, the normal values for Tung Ho and TS Steel should be reinvestigated to ascertain whether the domestic sales are suitable for consideration according to s.269TAC(1)

Normal value and other exporters from Taiwan

6.1. Should the reinvestigation findings in relation to the normal values for Tung Ho and TS Steel be modified, to the extent that this impacts the normal value finding for 'other exporters', this also should be reinvestigated.

NIP

7.1. Hyundai contends that the ADC is mistaken in its view that there is no suitable method to determine the USP and NIP, and therefore treating the normal value for each exporter as its NIP. Hyundai states that the NIP, under s.269TACA(a), is to be the minimum price necessary to 'prevent the injury, or recurrence of the injury, or to remove the hindrance'. It refers to the findings in both REP 499 and REP 505 in relation to the NIP.

7.2. Hyundai notes that the NIP finding reflects that adopted in the original investigation (REP 223) and the more recent review of measures (REP 465). Hyundai proposes that there has been a significant change in circumstances in this review that makes the previous approach (and adopted in this case) unreasonable. The change relates to the finding that the largest exporter from Taiwan, Tung Ho, has been found not to be dumping during the

[27] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC20 at paragraphs 97 and 102.

review period. Furthermore, the Minister determined not to secure the continuation of anti-dumping measures on exports by Tung Ho.[28]

7.3. The Act does not specify how the NIP is to be calculated. However, the Manual outlines the policy regarding the methods (hierarchy based) by which the NIP may be calculated. It indicates it is usually derived from an USP, which is based on a selling price in Australia that the Australian industry could expect to achieve in a market unaffected by dumped exports.[29] Deductions are made to the USP to bring it to a level that enables its comparison with the export price: usually at the free on board level. When it is not possible to find such a selling price in Australia then a price may be constructed based on the Australian industry's cost to make and sell (CTMS) plus a profit.

7.4. In circumstances where neither of the above two methods are considered appropriate, the selling prices of un-dumped imports in the Australian market may be used. The Manual indicates that 'the appropriate approach will be considered on a case-by-case basis'. It suggests that care must be taken when using the Australian selling price data for goods from other countries, as the prices may have been affected by dumping or may not be in volumes that would influence the market price.

7.5 The Manual also indicates that the ADC will not generally change its approach from the original investigation unless there has been a change of circumstances.

7.6. The ADC in Rep 499 does not appear to have analysed whether the changed circumstances, identified by Hyundai, relating to whether un-dumped exports by Tung Ho should have been considered for USP purposes. Could the ADC reinvestigate its finding in relation to the NIP for the relevant exporters to canvas whether the NIP should have been based on the USP of un-dumped sales by Tung Ho in the Australian market.

If you have any issues in relation to the reinvestigation or if you consider that a conference under s.269ZZHA of the Act would assist in obtaining the further information the subject of the reinvestigation, please contact the Secretariat.

The Review Panel is also undertaking a review of the Minister's decision to secure the continuation of anti-dumping measures of Hot Rolled Structural Steel Sections exported from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd and Tung Ho Steel Enterprise Corporation) and the Kingdom of Thailand, in ADRP Review 2019_121. A

[28] ADN 209/126 dated 5 November 2019.
[29] Dumping and Subsidy Manual, November 2018, pages 137 to 140.

similar reinvestigation request to this one, has been sent to you given the other review has similar grounds.

Please could you report the result of the reinvestigation within 90 days, that is, by **Monday, 15 June 2020.**

If you require more time, including time to allow interested parties the opportunity to comment on an aspect of the reinvestigation, please contact the Secretariat.

Thank you for your assistance.

Yours sincerely,

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
17 March 2020