Australian Government
Anti-Dumping Review Panel

ADRP Report No. 120

Hot Rolled Structural Steel Sections exported from Japan, the Republic of Korea, Taiwan (except by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand

February 2021

https://www.adreviewpanel.gov.au

Contents

Abbreviations

Term	Meaning
ABF	Australian Border Force
Act	*Customs Act 1901*
All other exporters from Taiwan	OneSteel's ground refers to 'all other exporters' from Taiwan this includes uncooperative and all other exporters from Taiwan as referred to in ADN 2019/125
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AUD	Australian Dollar
ADA	World Trade Organization Anti-Dumping Agreement
CIF	Cost, Insurance and Freight
CTM	Cost to Make
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
DDP	Delivered Duty Paid
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
FOB	Free on board
GAAP	Generally accepted accounting principles
Goods	the goods described in the report, referred to as Hot Rolled Structural Steel Sections (HRSS)
HRSS	Hot Rolled Structural Steel Sections
Hyundai	Hyundai Steel Co., Ltd. (exporter)

Incoterms	International Commercial Terms are a series of standard trade terms used in sales contracts for international and domestic contracts of sale of goods. They are published by the International Chamber of Commerce
IDD	Interim dumping duty
Korea	The Republic of Korea
Liberty Steel	On the 29 July 2019, Liberty Steel was re-named. Since that date it has been known as OneSteel Manufacturing Pty Ltd (OneSteel), trading as Infrabuild. In this report it is referred to as OneSteel.
Manual	Dumping and Subsidy Manual, November 2018
Minister	The Minister for Industry, Science and Technology
MCC	Model Control Code. ADN 2018/128 advised that the Commission would implement this framework to enable better comparisons of export price with the normal value.
NIP	Non-injurious price
CIO Regulation	*Customs (International Obligations) Regulation 2015*
OneSteel	OneSteel Manufacturing Pty Ltd
OCOT	Ordinary course of trade
REP 499	The report published by the Commission in relation to the Review of Anti-Dumping Measures applying to Certain Hot Rolled Structural Steel Sections exported to Australia from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand dated 11 October 2019
Reinvestigation Report	Reinvestigation of certain findings in Report Nos. 499 and 505 relating to Hot Rolled Structural Steel Sections exported to Australia from Japan, the Republic of Korea, Taiwan (except for exports by Feng Hsin Steel Co Ltd) and the Kingdom of Thailand dated 15 January 2021.
REQ	Response to Exporter Questionnaire
Review Panel	Anti-Dumping Review Panel

Reviewable Decision	The decision of the Minister dated 5 November 2019 in ADN 2019/125 indicating that different variable factors relevant to the determination of duty would now apply to exports to Australia from Japan, Korea, Taiwan (except for Feng Hsin Steel Co. Ltd) and Thailand.
Review Period	1 January 2018 to 31 December 2018
Siam	Siam Yamato Steel Co., Ltd. (exporter)
SEF 499	Statement of Essential Facts Review of Measures 499
SG & A	Selling, General and Administration Expenses
Thailand	Kingdom of Thailand
TS Steel	TS Steel Co. Ltd
Tung Ho	Tung Ho Steel Enterprise Corporation
US DOC	United States of America Department of Commerce
USP	Unsuppressed selling price

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (the Minister) following a review of anti-dumping measures in respect of Hot Rolled Steel Structural 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 Reviewable Decision). The applicants for the review are:

    (a) Hyundai Steel Co., Ltd. (Hyundai);

    (b) OneSteel Manufacturing Pty Ltd (OneSteel);[1] and

    (c) Siam Yamato Steel Co,. Ltd (Siam).

2. The Anti-Dumping Review Panel (Review Panel) accepted 13 grounds in total for this review:

    - two relating to the normal value for Hyundai;
    - two relating to the export price for Hyundai;
    - one relating to the non-injurious price (NIP);
    - one relating to the normal value for Tung Ho Steel Enterprise Corporation (Tung Ho);
    - two relating to the normal value for TS Steel Co. Ltd (TS Steel);[2]
    - one relating to the normal value for 'other exporters from Taiwan'[3]; and
    - four relating to the normal value for Siam.

    Certain grounds succeeded in establishing that the Reviewable Decision was not correct or preferable.

[1] On 29 July 2019, Liberty Steel, the original applicant, was renamed and is now known as OneSteel Manufacturing Pty Ltd. In this report, reference will be made to OneSteel.
[2] OneSteel had one ground that included three separate issues. I have separated it into three.
[3] OneSteel's ground refers to 'all other exporters' from Taiwan this includes uncooperative and all other exporters from Taiwan as referred to in ADN 2019/125.

3. For the reasons set out in this report, I recommend that the Minister revoke the Reviewable Decision in relation to exports from Korea, Taiwan and Thailand and substitute a new decision:

    - That there is a new variable factor in terms of the NIP for exports by Hyundai from Korea;
    - That there are new variable factors in terms of the normal value and the NIP in relation to exports from Taiwan (except for exports by Feng Hsin Steel Co., Ltd) by Tung Ho and TS Steel;
    - That there is a new variable factor in terms of the NIP for exports by 'all other exporters' from Taiwan; and
    - That there are new variable factors in terms of the normal value and the NIP for exports from Thailand by Siam.

Introduction

4. The applicants applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the decision of the Minister following a review of anti-dumping measures pursuant to s.269ZDB(1) of the Act in respect of HRSS exported from Japan, Korea, Taiwan (except for exports by Feng Hsin Steel Co., Ltd) and Thailand. The Minister determined to modify the dumping duty notice applying to the above-mentioned exports to fix different variable factors for the determination of the dumping duty.

5. The applications were accepted and notice of the proposed review, as required by s.269ZZI, was published on 17 January 2020.

6. Pursuant to s.269ZZK of the Act, a report must be provided no later than 60 days following the publication of the notice of review (17 March 2020), unless a reinvestigation report is required (under s.269ZZL(1) of the Act).[4] A reinvestigation report was required, and the report was provided on 15 January 2021.

[4] Pursuant to s.269ZZK(3).

7. The Senior Member of the Review Panel directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

8. There are two reviews being undertaken by the Review Panel in relation to HRSS. Both reviews have been allocated to the one Panel Member. This report relates to a review of measures which was dealt with by the Anti-Dumping Commission (ADC) in REP 499. The second review relates to a continuation inquiry, was dealt with by the ADC in REP 505, and is the subject of a separate Review Panel report.[5] Both reviews have common grounds, though the continuation review has additional grounds relating to material injury. There will be instances in this report where reference is made to REP 505, notwithstanding that the Reviewable Decision in this review is dealt with by the ADC in REP 499.

Background

9. The original anti-dumping measures were imposed by public notice on 20 November 2014 following the then Parliamentary Secretary to the Minister for Industry's consideration of ADC Report No 223. Exports of HRSS during the original investigation period (1 October 2012 to 30 September 2013) were found to have dumping margins ranging up to 19.5%. The dumping margins (and effective duty rates) from the original investigation, or altered after subsequent reviews, are shown in the Table One at paragraph 11 below.

10. On 3 January 2019, the ADC initiated a review of anti-dumping measures in relation to HRSS exported to Australia from Japan, Korea, Taiwan (except for exports by Feng Hsin) and Thailand. The review period was stated as 1 January 2018 to 31 December 2018 (review period).

11. On 12 August 2019, the ADC published the Statement of Essential Facts No. 499 (SEF 499) noting that an extension of time had been granted to publish the SEF and the final report.[6] The final report (REP 499) was published on 11 November

[5] ADRP Report 2019_121 refers.
[6] REP 499, Section 2.1, page 3 outlines the information regarding the extension of timeframes in this matter.

2019. Following the review of measures, the Minister fixed the effective rates of interim dumping duty (IDD) as outlined in Table One below.

TABLE ONE

Country	**Exporter**	**Previous rate of dumping duty or other measures**	**Effective rate of IDD found in REP 499**	**Duty Method**
Japan	JFE Bars and Shapes Corp	12.2%	12.2%	combination
Japan	Uncooperative exporters	12.2%	12.2%	combination
Korea	Hyundai	9.9%	4.7%	combination
Korea	Uncooperative exporters	13.9%	7.9%	combination
Taiwan	Dragon Steel Corp	Floor price	9.0%	combination
Taiwan	TS Steel Co Ltd	4.7%	-1.6%	floor price
Taiwan	Tung Ho Steel Enterprise Corp	Floor price	-1.6%	floor price
Taiwan	Uncooperative exporters	7.9%	12.3%	combination
Thailand	Siam	Floor price	5.0%	combination
Thailand	Uncooperative exporters	19.5%	7.7%	combination

12. The goods to which this application relates are:

Hot rolled structural steel sections in the following shapes and sizes, whether or not containing alloys:

- *universal beams (I sections), of a height greater than 130 mm and less than 650 mm;*
- *universal columns and universal bearing piles (H sections), of a height greater than 130 mm and less than 650 mm;*
- *channels (U sections and C sections) of a height greater than 130 mm and less than 400 mm; and*
- *equal and unequal angles (L sections), with a combined leg length of greater than 200 mm.*

Sections and/or shapes in the dimensions described above, that have minimal processing, such as cutting, drilling or painting do not exclude the goods from coverage of the investigation.

The measures do not apply to the following goods:

- *hot rolled 'T' shaped sections, sheet pile sections and hot rolled merchant bar shaped sections, such as rounds, squares, flats, hexagons, sleepers and rails; and*
- *sections manufactured from welded plate (e.g., welded beams and welded columns).*

Conduct of the Review

13. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the Reviewable Decision, if satisfied that the decision is the correct or preferable one or revoke it and substitute a new specified decision. In addition, s.269ZZK(1A) of the Act requires that, if the Review Panel is

recommending a new specified decision, it must be materially different from the Reviewable Decision.

14. In undertaking the review, s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it were the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

15. Subject to certain exceptions,[7] the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e. information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister. In addition, to 'relevant information', the Review Panel may have regard to conclusions based on relevant information contained in the application for review and submissions received under s.269ZZJ of the Act.

16. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information, and to conclusions reached at the conference based on that relevant information.

17. Pursuant to s.269ZZHA of the Act, conferences were held in relation to this matter. These conferences are listed in Attachment One. A non-confidential summary of the information obtained at the conferences was made publicly available in accordance with s.269ZZX(1) of the Act.

18. On 17 March 2020, pursuant to s.269ZZL of the Act, I required the Commissioner to conduct a reinvestigation in relation to specific findings that formed the basis of the Reviewable Decision. A number of extensions were sought and approved by the Review Panel.[8] A reinvestigation report was provided on 15 January 2021. A copy of the confidential version of the Reinvestigation Report is at Attachment Two.

19. In conducting this review, I have had regard to:

[7] See s.269ZZK(4).

[8] The ADC requested and was granted three extensions for the provision of the reinvestigation report. Copies of this correspondence is on the Review Panel website.

- The review applications and documents submitted with the application;
- Submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information;
- REP 499, and its confidential attachments, and information referenced in the report including the Response to Exporter Questionnaires (REQ) and information created during the investigation, such as verification reports and submissions to investigation 499;
- Information from REP 223 and REP 465;
- Information from the Reinvestigation Report; and
- Relevant information obtained at conferences.

Grounds of Review

20. The grounds of review relied upon by the applicants, which the Review Panel accepted, are as follows:

    (a) Hyundai:

    Ground One: The Minister did not apply physical difference-based (non-identical goods) adjustments in arriving at the normal value under s.269TAC(8) of the Act in a consistent manner.

    Ground Two: The Minister made errors relating to the determination of the domestic sales of like goods in the ordinary course of trade (OCOT) under s.269TAAD(3) of the Act.

    Ground Three: The Minister incorrectly determined the export price with respect to the goods that were exported by Hyundai to Australia and imported by Hyundai into Australia.[9]

[9] Non-confidential conference summary held with Hyundai on 8 January 2020 to clarify the information presented in its application on grounds two and three.

Ground Four: The determination of the non-injurious price was not correct or preferable.

(b) OneSteel:

Ground One: There are errors in the determination of the dumping margin for Hyundai Steel, in particular, incorrect determination of the date of sale for the export sales to Australia.

Ground Two: The Commissioner's determination of the normal value for the verified exporters from Taiwan being (a) Tung Ho Steel Enterprise Corporation (Tung Ho) and (b)TS Steel Co. Ltd (TS Steel) under s.269TAC(2)(c) of the Act was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2). The incorrect determination of normal values will have a consequential effect on the determination of normal values for (c) 'all other exporters[10]'.

Ground Three: The Minister's decision to direct that the normal value of the goods exported to Australia by TS Steel be adjusted for differences in the exporter's domestic credit costs is not supported by s.269TAC(9) and is therefore not the correct or preferable decision.

(c) Siam:

Ground One: The normal value was incorrect as the Commission failed to base normal value on relevant quarterly domestic sales of identical goods and absent relevant identical domestic sales, on the most directly comparable quarterly domestic sales to the goods exported to Australian in accordance with s.269T of the Act which defines 'like goods'; and

Ground Two: The normal value was incorrect as whilst the Commission determined the normal value for Siam in accordance with s.269TAC(1) of the Act, and correctly accepted the need to adjust normal value to reflect domestic credit costs in accordance with s.269TAC(8) of the Act, the

[10] This refers to the category in ADN 2019/125 for Taiwan of uncooperative exporters and all other exporters.

Commission wrongly considered a hypothetical rate of domestic credit rather than the actual effective rate; and

Ground Three: The normal value was incorrect as whilst the Commission determined the normal value for Siam in accordance with s.269TAC(1) of the Act, and made adjustments to the normal value, it should not have included an export credit adjustment in the ascertained normal value, and

Ground Four: The normal value was incorrect. Certain quarterly domestic sales of the most directly comparable goods that on a total weighted average nett selling price when compared to the total weighted average cost to make and sell were profitable, it was open to the Commission to properly consider if those actual sales at a loss were in fact recoverable within a reasonable period of time in accordance with s.269TAAD(3) of the Act.[11]

Consideration of Grounds

Hyundai

Ground 1: The Minister did not apply physical difference-based (non-identical goods) adjustments in arriving at the normal value under s.269TAC(8) of the Act in a consistent manner.

Claims

21. Hyundai claims that its exported models are of a different grade to the models sold domestically and that a specification adjustment should be made for the physical differences between these goods to enable the comparison of the export price with the normal value.

22. Hyundai indicated that the approach adopted by the ADC in REP 499 by not allowing a physical difference adjustment is both incorrect and unreasonable. It states that it relates to the same models as the original investigation and the recent

[11] The Review Panel sought clarification of Siam's Grounds Three and Four through a conference held on 8 January 2020.

review of measures (REP 465 for the period 1 January 2017 to 31 December 2017) and an adjustment was allowed in both these matters. Hyundai states that the ADC has modified its approach to this adjustment without reason.

23. Hyundai states that this relates to the product SS400: the most equivalent grade to the AS300 exported to Australia. It claims the only change between the different periods was the approach adopted by the ADC in respect to model matching in REP 499.

ADC Findings in REP 499

24. The ADC indicated that Hyundai had proposed that there should be adjustments made to the domestic selling prices to account for the physical differences between the domestic models and the exported models. However, the ADC did not consider the differences between the models affected price comparability.

25. 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 HRSS. The Commission notes that the MCC structure has been applied to identify difference in selling prices of HRSS.*
>
> *The Commission has found in this review that despite the presence of physical difference between various models of HRSS, the Commission did not find in Hyundai's verified sales data, or in other evidence, that physical differences of models within respective Model Control Code (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*.[12]

26. The ADC indicated that its policy and practice emphasised that an adjustment for physical characteristics should be based on evidence that such differences affect the different selling prices for different characteristics. It also noted that in situations where direct evidence of price differences cannot be provided, adjustments may be based on cost differences (as adjusted for gross margin).

27. The ADC considers that the MCC structure '… facilitates closer matching of the Australian export models with domestic models while recognising that adjustments to normal value may be required when a physical difference is shown to influence price'. In this review, the ADC did not consider the price had been impacted by the difference and hence an adjustment for physical differences was not required.

28. The ADC also noted that the Korean Standard had been altered recently and renamed based on yield strength. It indicated this is more aligned to the Australian Standard which also emphasises yield strength.

Submissions

29. The ADC in its submission discusses the difference in approach between REP 499 and the earlier review (REP 465) and the original investigation in relation to the findings on a physical difference adjustment.[13] The ADC advised that the model matching adopted in REP 499 using the MCC structure focussed on yield strength, whereas earlier reviews had been based on certain characteristics such as tensile strength, shape and product dimensions.

30. The ADC does not consider Hyundai substantiated (with evidence) that the physical and cost differences (based on semi-finished goods only) demonstrated that the

[12] REP 499 Section 5.5.1.6 page 33.
[13] ADC submission dated 17 February 2020 pages 4 to 6.

price comparability had been affected. Further, it did not consider that Hyundai had adequately explained why the cost differences had changed in this period as compared with the earlier review and original investigation. The ADC also indicated that it had undertaken further assessment of the prices and costs of the different grades within the MCC and found that these were not necessarily correlated. For example, the [redacted]. (confidential sales and cost information).

31. OneSteel in its submission refers to both Article 2.4 of the World Trade Organization (WTO) Anti-Dumping Agreement (ADA) and s.269TAC(8) of the Act in relation to the need to make adjustments to enable a fair comparison between the export price and the normal value.[14] OneSteel referred to the findings in ADRP Report No. 80 in relation to whether an adjustment can be made to reflect quantifiable cost differences.[15] This refers to the Review Panel's finding to not allow a particular ground on the basis that the applicant had not provided sufficient supporting evidence from the applicant's records of accounts that an adjustment should be made based on price comparability.

32. OneSteel also states that earlier decisions on adjustments should not be followed just for 'consistency purposes'. There needs to be examination of the models in terms of their specifications to ensure that there are differences that affect price comparability. It supports the ADC findings in terms of the need for there to be differences affecting price comparability.

Analysis

33. 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*

[14] OneSteel submission dated 17 February 2020, pages 4 to 5.
[15] ADRP Report No 80 (Steel Reinforcing Bar exported to Australia from Greece and others paragraphs 329 to 330).

(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. (my emphasis)

34. Section 269TAC(8) provides that the Minister can direct that an adjustment be made if the domestic goods are not identical to the exported goods so that the difference would not affect the price comparison. Each case must be judged on its merits in terms of the evidence before the decision maker. Furthermore, the applicant has a clear responsibility to provide the necessary evidence to support the claimed adjustment. It is a well-established principle that there must be evidence that the particular difference affects the price comparability. The policy also indicates that an adjustment may be based on the actual costs incurred or the selling prices achieved.[16]

35. In the circumstances of the adjustment requested by Hyundai, it claimed there is a physical difference between the exported model and the closest comparable models sold domestically. Hyundai maintains that notwithstanding the changed Korean standard (mandatory for sales in 2018), there remained differences between the domestic models and exported models and the changes had impacted both costs and prices. It has expressed concern that the ADC has changed its approach from the original investigation and the most recent review of measures without adequate reasons.

36. Given the changed approach, I sought further information from Hyundai at conference about the nature of the specification differences.[17] Hyundai advised that the main difference in the Korean domestic models between the earlier assessments and the one undertaken in REP 499 relate to technical specification modifications with associated changed production arrangements to meet revised

[16] Dumping and Subsidy Manual November 2018, Section 15.3, page 65.
[17] Non-confidential Conference summary held on 19 February 2020 with Hyundai and ADC, pages 2 – 3.

Korean standards. Hyundai also commented the price analysis undertaken by the ADC with its focus on the price difference between the domestic goods and export goods indicates a dumping margin and does not address the specification differences between the goods. Hyundai maintains it provided evidence of cost differences related to domestic models and the exported models which has been ignored.

37. At the same conference, the ADC clarified there were slightly different models used in the 'domestic like goods' category in REP 499 compared with what was included in REP 465 (and the original investigation). It also commented that the revised Korean standard is more akin to the Australian standard with a focus on yield strength. The ADC provided its analysis of Hyundai's confidential spreadsheets that summarised the cost differences between the domestic models and exported models in 2018. It also commented that it did not find evidence '…that physical differences of models within respective MCC groups influenced prices'.[18]

38. The analysis undertaken by the ADC focused on the price differentials between the sales of the domestic models in the same MCC code as the exported model. It considered the cost/price 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.[19] I am not convinced whether only considering the cost/price correlation within the MCC category reveals whether there are differences in the price comparability between the exported model and the domestic models.

39. Information provided in Hyundai's Cost to Make (CTM) figures (supplied in its Review Application) suggests that the exported goods have a different CTM to the domestic models of same MCC category. It is also evident that Hyundai attempted to provide the information in the same format previously accepted for adjustment purposes by the ADC. The ADC was not convinced by this evidence, instead relying on the pricing analysis referred to above.

40. The approach adopted in REP 499 did not deal sufficiently with Hyundai's claim regarding the changed approach nor whether the differences in physical

[18] REP 499, page 33.
[19] REP 499, page 33.

characteristics between the exported models and the domestic models had affected the price comparison. On this basis, I required the ADC to reinvestigate the finding relating to the technical specification differences and whether an adjustment to enable the comparison between the export price and domestic selling price was required.[20]

41. The ADC reinvestigated this issue and made the following findings:

- There are specification differences between the exported model and the domestic models.
- The ADC was unable to directly examine the price comparability between the exported models and the domestic models as they had not been sold on the Korean domestic market.
- It re-examined the cost comparability analysis submitted by Hyundai between the domestic models and exported models on a CTM basis. Its analysis compared the weighted average semi-finished CTM for the grades sold domestically within the MCC sub-category BB (which has the same minimum yield strength and tensile strength as the exported model) with the weighted average semi-finished CTM of the exported grade.
- The difference in the weighted average CTM over the review period was almost two per cent, however the differences on a quarterly basis were much lower. The CTM of the domestic goods were higher (by around one percent) than the export price for the first three quarters but in the fourth quarter the exported model CTM was higher (by just under one percent). The differences were not consistently higher or lower and were considered negligible by the ADC. It concluded there was no basis to apply a specification difference adjustment.
- It also considered Hyundai's submission to the Preliminary Reinvestigation Report regarding the similar fluctuations in CTM between domestic and export grades in the earlier review of measures (REP 465) as compared to the current review of measures. It found that over the eight consecutive

[20] Letter to the ADC dated 17 March 2020 to reinvestigate certain findings, section 4.

quarters the pattern was inconsistent. Four were positive differences and four were negative. It considered this supported its conclusion that such differences were immaterial and inconsistent, and an adjustment was not warranted.

- The ADC remained of the view that the specification adjustment was not required as '… there was not a consistent and material cost difference between the domestic goods and the exported goods'.[21]

42. At conference, I sought additional information regarding the cost/price correlation analysis undertaken for Hyundai (and TS Steel and Tung Ho) attached to the Reinvestigation Report Confidential Attachment One, as well as the comments made regarding the additional CTM analysis undertaken of the export models and domestic models for the 12 months preceding the Review Period (as undertaken in REP 465).[22]

43. In relation to the Hyundai cost/price correlation, the ADC explained that the analysis was undertaken for individual models and it was identified there were 'large gaps' between the trend line and the price points. This was different to that shown for TS Steel and Tung Ho where there was a high level of correlation between costs and prices.

44. In the Reinvestigation Report, the ADC explained that it considered it reasonable to conclude that when domestic prices are highly correlated to movements in costs, it is probable that cost differences between models are reflected in corresponding price differences. If there is a high correlation, and it is assumed the export models are sold on the domestic market, the price would be set by reference to the CTM. This appears a reasonable assumption in my view.

45. In the circumstances of Hyundai, the ADC found there was a low cost/price correlation in the domestic models within the BB code. My understanding is that the ADC considers that if the export model had been sold on the domestic market, the

[21] Reinvestigation report dated 15 January 2021, pages 12 – 14.
[22] Non-confidential conference summary with ADC held on 22 January 2021.

difference in the specifications (of the export model) as reflected in its CTM would not necessarily be reflected in its price on the domestic market.

46. In the Reinvestigation Report, the ADC also conducted additional analysis of the quarterly CTM analysis relating to the export and domestic grades in the period preceding the Review Period as well as the Review Period.[23] At conference, I requested that the ADC advise the quantum of the differences in the earlier period given it had referred to both periods in its report.[24] The ADC provided the percentage differences in the quarterly CTM for the period under consideration in REP 465. It commented that there were similar differences to that found in REP 499. On this basis the ADC did not consider the CTM differences over the eight consecutive quarterly periods were material and were not consistent between quarters.

47. Given this additional information, I provided Hyundai the opportunity to comment.[25] Hyundai correctly pointed out that the Reviewable Decision relates to the Review Period, and its reason for referring to the earlier period in its review application was to demonstrate that the ADC had taken an inconsistent approach in relation to the technical difference adjustment between the two reviews. It commented that it does not agree with the ADC's conclusion that the CTM differences are immaterial and inconsistent in the review period. It again emphasised that the export model is different to the domestic models and s.269TAC(8) enables adjustments in such circumstances. It stated it is not about the quantum, nor whether it is a positive or negative difference but rather that a difference exists.[26]

48. It is acknowledged by both the ADC and Hyundai that the exported goods are not identical to the domestic models, notwithstanding they have similar yield strengths. The main point of contention appears to be regarding whether this has created a price comparability issue and why the ADC changed its approach between the period used in REP 465 (2017) and that used in REP 499 (2018).

[23] Following a submission by Hyundai to the Preliminary Reinvestigation Report.
[24] Non-confidential conference summary with ADC held on 22 January 2021.
[25] Non-confidential conference summary with Hyundai and ADC on 1 February 2021.
[26] Non-confidential conference summary held with Hyundai and ADC on 1 February 2021.

49. In relation to the changed approach between REP 465 and REP 499 (the review period) the following reasons are apparent:

    - The revised Korean standards had required modifications to the technical specifications of the domestic models for sales made in 2018 and this included different chemical composition and production arrangements.[27] Hyundai noted that the Australian model could not be sold in the Korean market as it did not have specifications that met the standard;[28]

    - The Korean standards were revised with a stronger focus on yield strength which is more akin to the Australian standard (mandatory for sales in 2018);

    - It appears that as 2017 was a period of transition to the new standards, it had a mix of models meeting the old standard and the revised standard, thus creating a different mix of models and variability within the group considered by the ADC in REP 465; and

    - The domestic sales used by the ADC in REP 499 included a slightly different sub-set of models as compared to the models examined in earlier reviews.[29] The ADC had also selected models using the MCC approach based on minimum yield strength, whereas earlier approaches had selected models focused on different features.

50. The reason for the change of the approach was not only related to the adoption of the MCC structure in REP 499 as proposed by Hyundai.

51. In relation to the price comparability issue, in the Reinvestigation Report, the ADC remained of the view that while there are physical differences between these models, these differences did not impact the price comparability. It based this decision on the low correlation of cost/price in domestic sales of the BB group and little in the way of evidence that a price differential would exist if such sales were made in the domestic market. As referred to in paragraph 45 above, I agree with

[27] Non-confidential conference summary held with Hyundai and ADC on 19 February 2020.
[28] Non-confidential conference summary held with Hyundai and ADC on 1 February 2021.
[29] Non-confidential conference summary held with Hyundai and ADC on 19 February 2020.

and adopt the Commissioner's reasoning that these differences did not impact price comparability.

52. In relation to the cost analysis:

    - Hyundai points to the CTM differences and that the models are manufactured to meet the different standards. The ADC considered the cost differential between the export and domestic goods was not consistent and not of a material amount.[30] I agree with the ADC that they were inconsistent and relatively minor amounts; and

    - Hyundai referred to specification adjustments being allowed in earlier reviews based on cost differences and that these cost differences remained apparent in 2018. An adjustment provided previously is not a sufficient basis to recommend an adjustment, given there have been changes in the models considered.

53. While the ADC places reliance on the immaterial differences in cost, in my view, the quantum of the cost difference is not the deciding factor, though a low quantum might suggest little in the way of difference between the goods. Rather, the question to be addressed is whether the difference between the exported goods and domestic goods affected price comparability. The ADC relied on the cost/price correlation to establish whether movements in costs within the domestic market affected prices in the absence of the availability of direct comparison. I agree with this approach.

54. With respect to the inconsistency of the cost difference during the period, I consider this is relevant. Generally, if a product has a different technical specification (due to difference in chemicals used or different features) it would be expected that this would have a consistent difference in the cost of manufacture. For example, if product A has an additional chemical added and product B does not have this added then it would be expected that that additional cost would consistently appear in the costings. I realise this is a simplification, but it would be expected that a difference in the specification of the goods would lead to a consistent cost

[30] Reinvestigation report dated 15 January 2021, page 14.

difference. This did not appear to be the case with these costings. The CTM between quarters had variability. When this is considered together with the minor cost difference, it suggests that the differences between the goods were relatively minor.

55. As referred to above, the adjustment is required to create a 'notional price' of what the export model would be sold for in the domestic market to enable a comparison with the export price to establish if there is dumping. In this case, I agree with the ADC that there is insufficient evidence to establish that the 'normal value without a specification adjustment' would impact the price comparability. In particular, there was insufficient evidence of:

    - the nature of the specification difference: Hyundai has not established with sufficient clarity the nature of the technical difference between the export model sold in the review period and domestic models in REP 499.
    - that the price comparability has been impacted as evidenced by the low cost/price correlation in the domestic market of the 'BB' models.
    - that the inconsistent cost differences during the Review Period were not conclusive regarding a technical difference.

    to conclude that an adjustment was necessary to enable a fair comparison.

56. On this basis, I consider there is insufficient evidence to recommend to the Minister to direct that a specification difference adjustment be made to the domestic selling prices as claimed by Hyundai.

57. Accordingly, this ground fails to establish that the Reviewable Decision was not correct or preferable.

Ground 2: The Minister made errors relating to the determination of the domestic sales of like goods in the OCOT under s.269TAAD(3) of the Act.

Claims

58. Hyundai states that the legislation requires the Minister to consider the use of loss-making sales for normal value purposes if the selling price of the loss-making sale is

above the weighted average costs of the goods over the period of the review. It claims that the ADC has not considered this aspect properly.

59. Hyundai further contends that as part of the OCOT determination, the ADC incorrectly dealt with inland freight costs for its domestic sales. It proposes that the use of a per transaction inland freight cost rather than the weighted average inland freight costs as required by s.269TAAD(3) of the Act is incorrect. It considers for the comparison purposes of s.269TAAD(3), the weighted average inland freight costs should have been used.

ADC Findings in REP 499

60. In REP 499, the ADC indicated that Hyundai had raised this issue in a submission. The ADC stated that where actual delivery expenses are available, it is accurate and appropriate to use these expenses for each domestic sale in determining whether the sales are in the OCOT. It claims using the actual expenses yields a more accurate cost to make and sell (CTMS) of the goods under consideration. It states this approach is consistent with the requirement in s.269TAAD(3) of the Act.

61. The ADC considers that Hyundai's suggested approach would lead to a less accurate outcome and disregards that domestic sales to differing delivery distances would have different delivery costs.

Submissions

62. The ADC in its submission, indicates that it did not include inland freight costs in the OCOT test as it had undertaken this analysis at an ex-works level.[31] Therefore, it was unnecessary to add the weighted average costs of the inland freight costs for the purposes of the s.269TAAD(3) 'test' as the comparison was undertaken at an ex-works level.

63. OneSteel, in its submission, challenges whether a more accurate result would eventuate if 'weighted average delivery expenses' were used across all domestic sales, as this does not take into account the distance of a customer from the factory or logistics complexity which would be accounted for when the actual delivery cost

[31] ADC submission dated 17 February 2020, pages 6 to 7.

is used.[32] It also notes that Article 2.4 of the WTO ADA indicates that the comparison should be undertaken at ' …the same level of trade, normally the ex-factory level, …'.

Analysis

64. Hyundai's claim centres on whether the calculation has been conducted correctly, and, whether using the weighted average inland freight costs would have enabled additional domestic sales to be included in the normal value. It claims this would have lowered the normal value.

65. Section 269TAAD deals with OCOT as follows:

> *(1) If the Minister is satisfied, in relation to goods exported to Australia:*
>
> *(a) that like goods are sold in the country of export in sales that are arms length transactions in substantial quantities during an extended period:*
>
> *(i) for home consumption in the country of export; or*
>
> *(ii) for exportation to a third country;*
>
> *at a price that is less than the cost of such goods; and*
>
> *(b) that it is unlikely that the seller of the goods will be able to recover the cost of such goods within a reasonable period;*
>
> *the price paid for the goods referred to in paragraph (a) is taken not to have been paid in the ordinary course of trade.*
>
> *(2) For the purposes of this section, sales of goods at a price that is less than the cost of such goods are taken to have occurred in substantial quantities during an extended period if the volume of sales of such goods at a price below the cost of such goods over that period is not less than 20% of the total volume of sales over that period.*

[32] OneSteel submission dated 17 February 2020, page 7.

(3) Costs of goods are taken to be recoverable within a reasonable period of time if, although the selling price of those goods at the time of their sale is below their cost at that time, the selling price is above the weighted average cost of such goods over the investigation period.

(4) The cost of goods is worked out by adding:

(a) the amount determined by the Minister to be the cost of production or manufacture of those goods in the country of export; and

(b) the amount determined by the Minister to be the administrative, selling and general costs associated with the sale of those goods.

(5) Amounts determined by the Minister for the purposes of paragraphs (4)(a) and (b) must be worked out in such manner, and taking account of such factors, as the regulations provide in respect of those purposes.

66. 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').[33]

67. 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 the approach adopted by the ADC.[34]

68. At the conference, Hyundai advised that it considered there were two flaws with the ADC approach to the OCOT test:

- 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)); and

- whether the 'recoverability test' (pursuant to s.269TAAD(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, at the delivered

[33] Submission to the Review Panel by the ADC dated 17 February 2020, pages 6 to 7.
[34] Non-confidential conference summary held with Hyundai and ADC on 19 February 2020.

level. It claims that the ADC should have used the weighted average inland freight cost in its calculation methodology.

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.[35]

69. The ADC, at the conference, commented that assuming the actual delivery costs are added to the unit CTM, together with the other selling, general and administrative costs (SG&A), it would make no difference to its finding in regard to the transactions considered to be in OCOT. Adding the actual delivery cost would make the comparison at a different level (that is, a delivered price versus an ex-works price). I do not disagree with the ADC's comment.

70. The information on the actual inland delivery costs referred to by the ADC was provided by Hyundai in its response to the exporter questionnaire (REQ). 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.[36]

71. The use of the actual inland 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. I acknowledge that in certain circumstances, where delivery costs are unable to be allocated at a transactional level, it is appropriate to use the inland delivery as part of an overall SG&A percentage. However, as indicated by the ADC when actual direct costs relevant to the transactions are available, it is preferable to use these costs in constructing the CTMS.

72. While the ADC performed the OCOT comparison of prices and costs at the 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 should be constructed

[35] Confidential spreadsheets supplied following the conference held with Hyundai and ADC on 19 February 2020.
[36] Non-confidential summary of conference with Hyundai and ADC held on 19 February 2020 and Hyundai Response to Exporter Questionnaire Domestic sales listing.

to match this price. In this case, the price for most transactions was established at a delivered level. I can find no legislative authority to make deductions to the price for the purposes of undertaking an OCOT test. Accordingly, the CTMS should have been calculated to the same level as the price (whether delivered or ex-works) to undertake the comparison for OCOT purposes. I note the ADC indicates its standard practice is to conduct this comparison at the ex-works level which is consistent with the relevant ADA provision.

73. 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 of weighted average costing was correctly undertaken and in accordance with the methodology specified in s.269T(5B) of the Act.[37] A weighted average calculation is not the addition of all the individual weighted average costs.

74. The main difference between the approach adopted by the ADC and that proposed by Hyundai (from information provided following the conference held on 19 February 2020)[38] 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.

75. As claimed by Hyundai, the ADC did the comparison for OCOT recoverability at a different level to that specified in the legislation. 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', I required the Commissioner to

[37] Section 269T(5B) provides that for the purposes of Part XVB the weighted average of any particular amount (costs or prices or other values) is calculated by the addition of the individual amounts multiplied by the quantity (number of goods) and dividing this by the sum of the total quantity. The reference to the 'weighted average cost of such goods' in s.269TAAD(3) of the Act is a reference to the costs in total for the period divided by the quantity of goods, not the individual elements that make up the costs.

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

reinvestigate the OCOT assessment to ensure it met the provisions of s.269TAAD of the Act.

76. The ADC reinvestigated this issue, modified its methodology to reflect the 'price' (at either the delivered level or ex-works as appropriate) and found there were no changes to the sales found to be in the OCOT. It concluded that the same transactions from REP 499 were suitable for use in normal value determination.[39]

77. I reviewed the calculations undertaken by the ADC and agree with its calculations.[40] I agree with the approach adopted by the ADC in relation to the sales found to be in OCOT and hence the sales considered suitable for use in the normal value determination.

78. Hyundai's ground fails for the reasons expressed above.

79. The above two grounds relate to whether the normal value was correctly determined for Hyundai. Hyundai did not establish in either ground relating to the normal value that the Reviewable Decision was not correct or preferable.

Ground 3: The Minister incorrectly determined the export price with respect to the goods that were exported by Hyundai to Australia and imported by Hyundai into Australia.

Claims

80. Hyundai claims that the export price for certain transactions for which it was both the importer and the exporter should be determined under s.269TAB(1)(c) and not s.269TAB(1)(a) of the Act. Furthermore, that there should not be a deduction of the interim dumping duty (IDD) in determining the export price.

81. Hyundai provides two reasons as to why it considers the approach adopted by the ADC is incorrect in relation to its status as the exporter and importer:

[39] Reinvestigation Report dated 15 January 2021. It calculated the OCOT test by using the actual invoice price with the CTMS on ex-works for sales made on that basis and, where the sales were on a delivered basis, it adjusted the CTMS to include the actual delivery expense for these transactions.
[40] The ADC inadvertently had not included the calculations with the confidential attachments to the Reinvestigation Report and these were provided to the Review Panel following the conference held with the ADC on 22 January 2021.

(1) Hyundai was shown as the [redacted] was able to [redacted] (confidential importation details); and

(2) that Hyundai's [redacted] (confidential importation and sales arrangements).

It proposes that this evidence supports its position that Hyundai is the importer in certain transactions.

83. In relation to deducting the IDD from the export price, Hyundai considers the ADC has effectively 'double counted' the IDD when imposing the variable factors. It claims that the '… amount of IDD represents the amount of duty required to offset the dumping margin' and '… the purpose of the review of measures cannot be achieved if the export price is adjusted downwards by the same extent as the IDD'. It states '… that the deduction of the IDD from the export price distorts the export price and creates a "double counting" of the 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'.[41]

84. Hyundai also refers to the practice of the US Department of Commerce (USDOC) in relation to this issue and provides a particular finding that illustrates this approach.[42] This indicates that the USDOC does not deduct anti-dumping duties as costs, expenses or import duties. Hyundai says that the USDOC adopts this approach to avoid the potential for 'double-counting'.

85. Hyundai also proposes that as the IDD is the amount collected once the variable factors are determined, it cannot be part of the determination of the variable factors.

[41] Hyundai application, page 12 reference to Hyundai's submission to the ADC EPR 505-018, pages 9 – 11.

[42] Hyundai application, page 12, Footnote 29 Attachment 1 – See issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India page 17.

It suggests that the IDD should be categorised as '… a contingent special duty, decided by the variable factors, and subject to finalisation through duty assessment procedures, rather than a finalised normal "post-exportation" charge which forms part of the determination of the export price, being one of the variable factors to be determined by the Minister'.[43]

86. Hyundai further claims that the IDD is not a duty of Customs and should not be treated as a prescribed deduction for the purposes of s.269TAB(1)(b) of the Act. Hyundai supports its approach by outlining the legislative authority for the collection of dumping duty and IDD as well as the relevant variable factors. It claims the only legislative authority specifically referencing the 'IDD' is in s.269X(5B) of the Act. Hyundai suggests without specific legal authority the IDD should not be deducted.

ADC Findings in REP 499

87. The ADC indicated that Hyundai made a small proportion of sales during the review period to an Australian customer on duty paid terms. The ADC determined that the Australian customer was the beneficial owner of the goods at the time of importation and therefore the importer for the purposes of s.269TAB of the Act. The ADC considered s.269TAB(1)(a) appropriate to determine the export price and deducted all the post exportation costs from the import price to arrive at the FOB level. This included deducting the IDD as a charge arising after exportation.

88. Hyundai made submissions to the ADC relating to the deduction of the IDD and proposing that the export price should be determined under s.269TAB(1)(c) of the Act for the duty paid transactions. The ADC's assessment for the particular sales in question is that '… the delivery term is of a kind where the risk and beneficial ownership of the goods is transferred to the buyer upon delivery of the goods on board the vessel. The Commission considers that the payment of the IDD does not change the point at which risk and beneficial ownership passes to the buyer'.[44]

[43] Hyundai application, page 15.
[44] REP 499, Section 5.5.1.6, page 35.

89. The ADC also noted in REP 499 that it agreed with OneSteel's submission that the IDD can be deducted whether the export price is determined under s.269TAB(1)(a) or s.269TAB(1)(c) of the Act.

Submissions

90. The ADC in its submission notes in relation to Hyundai that the IDD paid [redacted].[45] It considers that a deduction of the IDD from the selling price to the Australian customer (as well as other charges and costs arising after exportation) is therefore appropriate to arrive at an export price at FOB level.

91. OneSteel, in its submission, questions whether it is appropriate to suggest that the practices of the USDOC of not deducting the IDD is relevant, given the US system operates a retrospective duty collection system based on cash deposits.[46] It also refers to the fact that the export price was determined pursuant to s.269TAB(1)(a) of the Act, not s.269TAB(1)(b) (as referred to by Hyundai). It provides an example of the dumping margin calculation demonstrating that the export price at FOB level would be the same, regardless of the approach.

Analysis

92. There are two aspects of the export price being questioned by Hyundai: firstly, given the contractual terms of these transactions, whether Hyundai should be considered to be the exporter and importer, and the export price determined pursuant to s.269TAB(1)(c) of the Act with no deduction of the IDD. Secondly, whether it is correct to deduct the IDD from the Hyundai selling price in particular transactions.

93. An extract of the relevant provisions relating to 'export price', 'owner' and 'importer' are:

> s.269TAB Export price

[45] ADC submission dated 17 February 2020, pages 7 to 8.
[46] OneSteel submission dated 17 February 2020, page 7.

(1) For the purposes of this Part, the export price of any goods exported to Australia is:

(a) Where:

(i) the goods have been exported to Australian otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was an arms length transaction;

the price paid or payable for the goods by the importer, other than any part of the price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation; or

(b) Where:

(i) the goods have been exported to Australia otherwise than by the importer and have been purchased by the importer from the exporter (whether before or after exportation); and

(ii) the purchase of the goods by the importer was an arms length transaction; and

(iii) the goods are subsequently sold by the importer, in the condition in which they were imported, to a person who is not an associate of the importer;

the price at which the goods were so sold by the importer to that person less the prescribed deductions; or

(c) in any other case — the price that the Minister determines having regard to all the circumstances of the exportation.(emphasis added)

s.269T of the Act, definition of importer

‘ *“importer” in relation to goods exported to Australia, means: (a) if paragraph (b) or (d) does not apply—the beneficial owner of the goods at the time of their arrival within the limits of the port or airport in Australia at which they have landed*;

s.4 of the Act, definition of owner

“owner” in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.’

94. There are also a series of standard trade terms published by the International Chamber of Commerce for international sales transactions. These are referred to as Incoterms (International Commercial Terms). At Attachment Three are commonly used Incoterms relevant to this report.

95. Given the claims made by Hyundai regarding [redacted] (Confidential export sales transaction information)

96. Benjamin’s Sale of Goods outlines when property and risk transfers in relation to commonly used Incoterms in contracts.[47] It also explains the exceptions. It makes clear that in normal usage, property and risk, transfer at particular points in a sales contract, unless specifically excluded by the sales contract.

[47] J P Benjamin, Benjamin’s Sale of Goods ed M Bridge (Sweet and Maxwell, 10ed, 2017) CIF contracts pages 1646-1663 [19-099]-[19-124]; FOB contracts pages 1826 – 1851 [20-077] - [20-111] and Ex-Ship and Arrival contracts pages 1883 to 1897 [21-014] to [21-104].

97. For example, in CIF and FOB contracts, the property and risk transfers upon shipment and dealing of the documents and payment. Noting that the price in each Incoterm includes different cost elements. In the CIF contract, the overseas freight and international insurance as well as the cost of the goods are included. Whereas the FOB contract includes the cost of the goods and the freight up until placement on board the means of transport for export. In relation to DDP contracts the seller is responsible for all costs and risks in bringing the goods to the place of destination. However, if a contract between the seller and buyer specifies different arrangements, notwithstanding the use of a specific Incoterm on an invoice, the contract is the legally binding arrangement. It is evident that the contract as well as the conduct of the parties signals their intentions in relation to the transaction.

98. For certain transactions, Hyundai considers it is the importer and not as the ADC has found, the Australian customer.

99. For the purposes of considering who is the importer (pursuant to s.269T of the Act) it is necessary to consider who is 'beneficial owner' at the time of arrival of the goods in Australia. The owner in terms of s.4 of the Act and referenced in ACBPS Notice 2014/50, enables a range of entities to be classed as the 'owner' of the goods for the purpose of clearing the goods for home consumption in Australia. This is not necessarily determinative in terms of 'beneficial ownership' as required by s.269T.

100. In Hyundai's transactions, the following is relevant:

- The contract of sale between Hyundai and the particular Australian purchaser is stated as being [redacted] contract as outlined in the Incoterms definition (confidential importation and contractual information);

- The contract also includes the following clauses:

  [redacted]

[redacted]

(confidential contractual information)

101. This suggests that the contract terms are [redacted]. At conference with Hyundai, I sought further information regarding the contract terms relating to these transactions.[48] Hyundai confirmed that the transactions are [redacted]

102. Accordingly, the ADC, was in my view, correct in its finding that the Australian customer was the beneficial owner of the goods at the time of importation [redacted]. (confidential contractual information)

103. Although Hyundai [redacted] (confidential importation and contractual information). It was not the beneficial owner for the purposes of s.269T of Division XVB. In the circumstances outlined, this is the Australian customer.

104. Accordingly, the finding of the ADC to treat certain sales by Hyundai under s.269TAB(1)(a) of the Act is correct.

105. The second element of Hyundai's claim relates to whether it was correct to deduct the IDD in arriving at an export price at the FOB level.

106. Section 269TAB(1)(a) of the Act requires the deduction from the selling price between the exporter and the importer of transport charges after exportation and any other charges arising after exportation. In relation to the contract referred to by

[48] Non-confidential conference summary dated 19 February 2020 with Hyundai and ADC, page Two.

Hyundai, it is necessary to deduct all charges from the selling price incurred after the goods are placed on the vessel for export. In this case, this includes: [redacted]. (confidential importation and contractual information)

107. The anti-dumping system enables an entity who pays the IDD to obtain a duty assessment and seek a final duty liability assessment. In some circumstances, this means there may be refund of IDD if is found that an overpayment has occurred. If no application for duty assessment is made within a particular time, the IDD is deemed to be the final duty.[49] This process is undertaken after the original importation.

108. In the case of Hyundai [redacted] (confidential import contract information)

109. Hyundai proposes several reasons why it was incorrect for the IDD to be deducted from the price between Hyundai and the Australian buyer.

110. Hyundai claims that the IDD should not have been deducted as it is having a 'doubling effect' on the dumping margin. Hyundai provided a calculation example of how it considers this double counting occurs. The calculation example does not in my view, deal with all the processes associated with the export price. Firstly, the export price is determined by ensuring that the price is one that excludes any costs after exportation. A dumping margin is calculated using this export price. Secondly, that dumping margin is applied to the export price of future shipments to determine the IDD. The next step and the one not included by Hyundai relates to the final duty assessment. This step enables the final duty liability to be determined based on the ascertained export price (and normal value) for each of the consignments and a refund provided if there has been an overpayment.

[49] Section 269Y(4) of the Act refers.

111. The calculation portrayed in the Hyundai example does not take into account this final duty liability step but rather proceeds to the review of measures. It is at this stage that it considers the double counting occurs. In the example provided, if the duty assessment process had been undertaken there would have been a refund of the IDD as the normal value was shown as being at the same level as the export price. Thus, eliminating the 'double counting'. No double counting should occur if all the steps are undertaken in the process.

112. Hyundai also suggests that the deduction of the IDD is incorrect in law. It proposes that there is a particular provision in Division 4 (Dumping Duty or Countervailing Duty Assessment) which deals with circumstances where the Commissioner must not deduct the IDD in assessing the export price in a final duty liability determination.[50] This relates to the specific circumstances where an export price has been established based on the deductive method (s.269TAB(1)(b)).[51] This provision indicates that if there has been a change in any of the following: the normal value, in costs incurred between importation and resale and any movement in the resale price which is reflected in subsequent selling prices, the IDD should not be deducted in establishing the export price for final duty liability determination. This provision specifically refers to Article 9.3.3 of the ADA.

113. This is not the circumstances in this case. It does not involve a final duty assessment nor is it a case involving the deductive export price method used in export price determination pursuant to s.269TAB(1)(b).

114. I do not agree with Hyundai that the Division 4 reference has broader application. There is no other reference in the legislation regarding circumstances where the IDD must not be deducted for export price purposes. Given it is specifically mentioned in s.269X(5B), and in particular circumstances as to when it should be used, the absence of such a provision in the other sections dealing with export price appears to be a deliberate decision by the legislators. The words in s.269X(5)(b) also makes clear that the use of 'despite paragraph 269TAB(1)(b), not deduct the

[50] Section 269X(5B) of the Act.

[51] A calculation to determine an export price based on the price at which the importer sells the goods (in original condition) to a non-related party less the prescribed deductions to reach an export price at FOB level.

amount of the interim duty…' suggesting it would otherwise be an allowable deduction in s.269TAB(1)(b). This does not support Hyundai's claim.

115. Hyundai also proposes that the IDD is not a duty of Customs.

116. Section 7 of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) provides that 'Duties of Customs are imposed in accordance with this Act'. Section 8(3) of the Dumping Duty Act provides that an IDD is payable on goods the subject of a s.269TG(1) or (2) notice, pending a final assessment. Section 8(5) of the Dumping Duty Act deals with the calculation of the IDD. These references suggest that an IDD is a duty of Customs for the purpose of the Dumping Duty Act. I disagree with Hyundai's position that an IDD is not a duty of Customs.

117. Hyundai suggests that the types of charges specified in the deductions in s.269TAB(2) (to determine an export price under s.269TAB(1)(b)), has relevance in an assessment of the types of charges that should be deducted for an export price determined pursuant to s.269TAB(1)(a).

118. While there are some similarities in the types of deductions as the intent is to arrive at an export price at FOB level, there are a range of deductions specifically referred to in s.269TAB(2) that are not relevant in the circumstances of a s.269TAB(1)(a) export price. It is dealing with a 'price' established at a different level of trade. Therefore, the deductions relevant to s.269TAB(2) for determining a deductive export price are not really at issue in this case. In any event, duties of Customs are referred to specifically as a prescribed deduction in s.269TAB(2). It does not assist Hyundai's argument to suggest that it cannot be deducted in an export price determined pursuant to s.269TAB(1)(b).

119. I note that my colleague has also concluded that IDD is a legitimate deduction for the purposes of establishing an export price via the deductive method pursuant to s.269TAB(1)(b) of the Act.[52] He also dealt with the issue of whether the IDD should not be deducted in certain circumstances as outlined in s.269X(5B) of the Act.

[52] ADRP Report No 104 Certain Aluminium Extrusions exported from the People's Republic of China at [148].

120. The reasons provided by Hyundai as to why an IDD would not be considered a duty of Customs do not support this claim. I see no reason presented by Hyundai that the IDD could not be considered as an appropriate charge to be deducted from the selling price to determine an export price at FOB level, pursuant to s.269TAB(1)(a) of the Act.

121. I also considered the outcome of the alternate scenario presented by Hyundai regarding if determining the export price pursuant to s.269TAB(1)(c) of the Act would preclude the deduction of the IDD. As discussed above, the amount of the export price would more likely than not be identical regardless of whether determined pursuant to s.269TAB(1)(a) or TAB(1)(c) as the IDD would still be deducted to establish an export price at the FOB level. I note that the ADC and OneSteel also made this observation.

122. For the reasons outlined above, I do not agree with Hyundai that the IDD should not be deducted from its selling price to an Australian buyer to determine an export price pursuant to s.269TAB(1)(a) at the FOB level. Accordingly, I find no error in the deductions (charges arising after exportation) made by the ADC in determining the export price pursuant to s.269TAB(1)(a) of the Act.

123. I do not consider the Minister has erred in relation to the determination of the export price for the certain transactions referred to in this ground. Accordingly, this ground fails.

Ground 4: The determination of the non-injurious price (NIP) was not correct or preferable.

Claims

124. Hyundai claims that the ADC is mistaken in its view to treat the normal value for each exporter as its NIP on the basis that there was no suitable method to determine the unsuppressed selling price (USP) in the Australian market. The USP being the starting point for calculating the NIP in most cases.

125. Hyundai states 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 ADC findings in both REP 499 and REP 505 regarding the NIP and

considers the ADC has failed to 'genuinely and objectively' determine the NIP for the review period.

126. Hyundai suggests that by setting the NIP at the normal value level it is imposing a maximum dumping duty liability rather than as required by s.269TACA the minimum amount necessary to prevent injury.

127. Hyundai notes that this 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 approaches (and adopted in this case) unreasonable. The change relates to the finding that the largest source of exports during the review period is from Taiwan. The largest exporter from this source is Tung Ho who was found not to be dumping during the review period (as was one other Taiwanese exporter).[53] On this basis, Hyundai considers there has been a major change in the circumstances that should have been considered by the ADC in its report to the Minister. It suggests that the NIP should be based on Tung Ho's export price (an un-dumped price) or its normal value.

ADC Findings in REP 499

128. In REP 499, the ADC referred to both the original investigation (REP 223) and the review of measures (REP 465) which had indicated there was no suitable method of determining the USP and had found that the 'NIP for exporters would be a price equal to the respective normal value and that the lesser duty rule did not come into effect'.[54]

129. The ADC also indicated that during the review period the Australian market was impacted by dumping and accordingly, historical sales data is not a suitable for calculating the USP. It considered whether the cost plus profit approach could be used. It decided that the issues identified in the original investigation remained relevant. On this basis, it indicated that a suitable method had not been found to

[53] ADN 2019/126 dated 5 November 2019 provides the decision of the Minister regarding REP 505. The Minister decided to not secure the continuation of anti-dumping measures applying to exports by Tung Ho from Taiwan.
[54] REP 499, Section 6.3, pages 48 to 49.

establish the USP and that the approach outlined in REP 223 and in REP 465 remained valid. The NIP for exporters should be a price equal to the respective normal values.

Submissions

130. The ADC in its submission refers the Review Panel to Chapter 6 of REP 499.[55] The ADC also referred the Review Panel to a recent decision in Anti-Dumping Review Panel Report No. 80 which had considered the same methodology and approach taken by the ADC in an earlier review.[56]

131. OneSteel, in its submission, supports the approach adopted by the ADC in using the normal value for each exporter as the NIP.[57] It considers this approach deals with the effects of the injurious dumping. It does not agree with the use of Tung Ho's normal value (an un-dumped source during the review period). It proposes that as Tung Ho '… constitutes the minority of the overall imports of the goods and as such is unlikely to have influenced overall market prices'. It expresses concern that the use of Tung Ho's normal value may not be of a value that would remove the material injury caused by dumped imports.

Analysis

132. The intent of imposing anti-dumping measures is to remove the injury caused by dumping. Australia's legislation (reflecting the ADA) provides that a lesser duty (than the full margin of dumping) may be applied if it is sufficient to remove the injury caused by dumping. Section 269TACA provides that the NIP is the minimum price necessary to prevent the injury, or recurrence of injury or hindrance to the establishment of an Australian industry.

133. In the original inquiry (REP 223) the ADC considered the various methodologies outlined in the Manual and found there were issues with each of these. It recommended and the Minister accept that '… the Commission considers the NIP for each exporter is a price equal to the respective normal value. This redresses the

[55] ADC submission dated 17 February 2020, pages 8 to 9.
[56] ADRP Report No 80, pages 62 to 64 and pages 102 and 103 refer.
[57] OneSteel (now known as Liberty Steel) submission dated 17 February 2020, pages 8 to 9.

effects of the dumping without redressing the effects of any other factors affecting prices.'[58] It followed this approach in subsequent reviews of measures.

134. The Act does not specify how the NIP is to be calculated. However, the Manual outlines the policy regarding the methods (using the hierarchy) 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.[59] Deductions are made to the USP to bring it to a level that enables its comparison with the export price, usually at the FOB 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 CTMS plus a profit. 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.

135. 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.

136. 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.

137. Hyundai proposes that there has been a significant change in circumstances in this review that makes the previous approach (as adopted in this case) unreasonable. The change relates to the finding that the largest exporter from Taiwan, Tung Ho, had been found not to be dumping during the review period. Furthermore, the Minister determined not to secure the continuation of anti-dumping measures on exports by Tung Ho.[60] Hyundai claims that the ADC did not appear to consider the changed circumstances regarding the Taiwanese exporter in its NIP analysis.

[58] REP 223 Section 11.4, page 87.
[59] Dumping and Subsidy Manual, November 2018, pages 137 to 140.
[60] ADN 2019/126 dated 5 November 2019.

138. I agree with Hyundai's comment that this is a change of circumstance and as referred to the stated policy (see paragraph 136 above) it should be considered. On this basis, I required the ADC to reinvestigate the findings relating to the NIP.

139. The ADC, as a result of its reinvestigation, stated that it did not consider using Tung Ho's un-dumped selling prices a suitable method or appropriate to determine the NIP given that these prices had been affected by other dumped sources in the Australian market.[61] It proceeded to reconsider the hierarchy of methodologies outlined in the Manual.

140. The ADC considered the first methodology remained unsuitable as the Australian industry's selling prices were impacted by the prices of the dumped imports in the Australian market. It considered the second methodology based on the Australian industry's CTMS and profit and found it suitable as it establishes a USP which is '…specific to the circumstances of the Australian industry which would reasonably reflect a price at which it might reasonably sell its products in a market unaffected by dumping.[62] However, it did not include a profit in this calculation on the basis that the Australian industry had not made a profit in a number of years. I note that the ADC indicates that OneSteel has disagreed with the non-inclusion of a profit in the USP calculation.

141. The further analysis undertaken by the ADC in the Reinvestigation Report specifically considered the changed circumstances relating to Tung Ho and explained why the second methodology of the hierarchy was preferred for determining the NIP. I agree with the approach adopted as it enables the NIP to be established outside the influence of the prices in the Australian market.

142. I reviewed the NIP calculations in Confidential Attachment Three to the Reinvestigation Report and identified an error. At conference, the ADC acknowledged these errors and provided updated calculations which I subsequently reviewed.[63] This had the effect of lowering the NIP for each export source discussed in its Reinvestigation Report.

[61] Reinvestigation Report dated 15 January 2021, page 30.
[62] Reinvestigation Report dated 15 January 2021, page 30.
[63] Non-confidential conference summary held with the ADC dated 22 January 2021.

143. Following publication of the conference summary dated 22 January 2021, OneSteel raised a concern with the change of the NIP calculation in relation to the non-inclusion of a profit in the USP. Its concern related to the ADC advising that the NIP is now lower than the normal value for Siam.

144. I held a conference with the ADC and OneSteel on 5 February 2021 to obtain information regarding the changed NIP.[64] OneSteel noted that in the ADC's Preliminary Reinvestigation Report the ADC had made comment that the NIP would not be the operative measure for any exporter from any of these countries. It also commented that the ADC has said '… notes that it would therefore make no difference if an amount of profit greater than zero had been included in the NIP calculation.'[65]

145. OneSteel expressed its concern that profit, a critical element of the USP, had not been included in the calculation of the NIP (see also paragraph 140). It claimed that the reasons expressed by the Commission, regarding the profit not being included in the NIP, had changed since its report, as the NIP was now an operative measure for one exporter.

146. The final Reinvestigation Report is not published prior to the Minister's consideration of this report. OneSteel is unaware of the final findings in relation to the NIP only that there were errors identified as referenced in the conference summary dated 22 January 2021. While the findings in the final Reinvestigation Report are similar to those expressed in the preliminary Reinvestigation Report, there has been a difference emerge due to the calculation error identified.

147. In the interests of procedural fairness, I sought information regarding OneSteel's concern regarding the non-inclusion of profit in the calculation of the USP. OneSteel considers that a USP should be set at a level that would enable this price to support future investment by the Australian industry. It proposed options as to what it

[64] Non-confidential conference summary held with the ADC and OneSteel dated 5 February 2021.
[65] Preliminary Reinvestigation Report dated 27 August 2020, page 27.

considered an appropriate profit rate would be given HRSS has been unprofitable for some years as a result of the dumped imports.[66]

148. The reason expressed by the ADC in its Reinvestigation Report as to the non-inclusion of profit is based on the fact that HRSS production has not been profitable in the review period. It had examined the Australian industry and found that it had not been profitable during the period 2010 to 2018 (as referenced in REP 505). OneSteel had raised this issue in its submission to the ADC following the publication of the Preliminary Reinvestigation Report.

149. The ADC made the following comment in its findings in the Reinvestigation Report:

> *The Commission does not agree with this view, given that the Australian industry has not made a profit in any year examined by the Commission, dating back to 2010, which includes periods where there is no evidence that the market was affected by dumping. The view expressed by the European Commission is relevant to circumstances in different markets to the one being considered in this reinvestigation, and it's not apparent why that profit amount has any relevant to the Australian HRS market in the absence of dumpi*ng.[67]

150. I have further considered the issue of profit in light of OneSteel's comments. However, the reasons expressed by the ADC as to why it does not consider a profit should be included in the calculation of the USP remain valid. The Australian industry has not made a profit for a significant period, and in periods not impacted by dumped product. Accordingly, I consider the NIP (and the USP) have been correctly calculated.

151. The Minister must have regard (in certain circumstances) of the desirability of fixing a lesser amount of duty when the NIP of the goods is less than the normal value.[68] The revised NIPs (based on the Australian industry's CTMS with deductions to arrive at an FOB level for each country) were compared with the normal value for Tung Ho, TS Steel and 'all other exporters from Taiwan' , Hyundai from Korea and

[66] OneSteel suggested either the rate used by the European Commission or one published by the ABS for general manufacturing be considered suitable as a profit rate to be included in the USP.
[67] Reinvestigation Report dated 15 January 2021, page 31.
[68] Pursuant to s.8(5B) of the Dumping Duty Act: the so called 'lesser duty rule'.

Siam from Thailand. The NIP was higher than the normal value except for exports by Siam from Thailand: the ADC advised the NIP is lower than the normal value.[69]

152. Section 269ZDB(1)(iii) provides that the Minister may alter a notice to fix different variable factors in relation to a particular exporter or exporters in general, relevant to the determination of duty. As a result of the reinvestigation findings, my recommendations to the Minister are as follows:

    - The NIP for exports by Siam from Thailand be modified;
    - The NIP for Hyundai from Korea be modified; and
    - The NIP for TS Steel, Tung Ho and 'all other exporters' from Taiwan be modified.

153. Therefore, this ground has established that the Reviewable Decision in relation to the variable factor of the NIP was not correct or preferable.

OneSteel

Ground One: There are errors in the determination of the dumping margin for Hyundai Steel, in particular, incorrect determination of the date of sale for the export sales to Australia.

Claims

154. OneSteel claims that the ADC's approach to the use of the date of the purchase order rather than invoice date to establish the export prices for Hyundai is incorrect. It refers to Statement of Essential Facts Report No 499 (SEF 499) where the dumping margin of 9.5 per cent was determined based on the invoice date, whereas the purchase order date (in REP 499) has led to a dumping margin of 4.7 per cent.

155. OneSteel suggests that the Commission has not properly considered whether or not there were variances in the agreement between Hyundai and its importers, and additionally, has not applied the broader analysis as specified in the Manual. It

[69] Non-confidential conference summary with the ADC dated 22 January 2021.

refers to the approach adopted in Review Panel Report No 88 dealing with a claim that the Minister had erred by not making an adjustment to ensure that the export price and normal values were compared at the same time. That review dealt with circumstances surrounding a due allowance adjustment pursuant to s.269TAC(8) of the Act relating to the date of sale.[70]

156. OneSteel also suggests 'the Commission is misaligning the impact of the raw material prices the exporter would have had regard to when setting the export price to Australia 60-days or more days later, which are produced at or at about the same time as the like goods for sale into the domestic Korean market.' It suggests that the goods for domestic sale were probably produced at the same time and should not be subject to an adjustment for differences in raw material costs.

ADC Findings in REP 499

157. Following a submission by Hyundai in response to SEF 499, the ADC modified its approach to Hyundai's dumping margin calculation. It based the dumping margin calculation on the date of order rather than the date of the export invoice.

158. The ADC indicated that the Manual states that while the invoice date is normally used to establish the material terms of the sale, where evidence is provided that indicates that a different date better reflects the material terms of the export sale, that date will be used.[71]

Submissions

159. Hyundai made a submission that indicated that the approach adopted by the ADC in relation to the date of its export sales reflects 'the material terms of the sale'. It considers this is in accordance with the provision in s.269TAF(1) of the Act and Footnote 8 of the ADA. Hyundai stated that the factual circumstances of the sales contract must be considered, and the ADC has correctly assessed that the date of the purchase order to be the relevant date.[72]

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[70] ADRP Report No. 88 Certain Hollow Structural Sections exported from the People's Republic of China, the Republic of Korea and Taiwan [March 2019].
[71] REP 499, Section 5.5.1.6, pages 31 to 32.
[72] Hyundai submission dated 17 February 2020.

160. The ADC in its submission indicates that the reasons for the use of the date of order placement as establishing the material terms of sale for the export sales are outlined in REP 499 section 5.5.1.6.[73]

Analysis

161. The purpose of aligning the sales transactions used in establishing the export price and the normal value is to ensure that the sales do not relate to different times. This eliminates the need to make an adjustment pursuant to s.269TAC(8) of the Act for sales occurring at different times.[74] In addition, and as referred to by Hyundai, s.269TAF of the Act provides that, if required, currency conversion should be undertaken using the date of the transaction which, in the opinion of the Minister, best establishes the material terms of sales of the exported goods.

162. Initially, the ADC considered the date of invoice established the 'material terms of sale' of the exported goods. However, upon consideration of further information supplied by Hyundai it modified its approach to the use of the purchase order date as the date which best established the 'material terms of sale'.

163. I have considered Review Panel Report No 88 referred to by OneSteel given it suggests the same analysis should have been undertaken in this case. However, I note that the circumstances in that review are substantially different given it relates to an adjustment claim pursuant to s.269TAC(8) for sales occurring at different times.

164. The issue in this case relates to establishing the date that best reflects the 'material terms of the sale' based on an examination of the evidence as outlined in the Manual.[75]. It also refers to the need to examine 'whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date'. It proposes that consideration should be given to other factors involved in establishing the prices between the export and domestic sales associated with material costs, production schedules, lead times and contracts for material purchases.

[73] ADC submission dated 17 February 2020, page 12.
[74] The relevant provision is s.269TAC(8) and an extract is included in paragraph 33.
[75] Dumping and Subsidy Manual, November 2018, Establishing the date of sale, pages 66 to 67.

165. I reviewed the evidence relied upon by the ADC regarding whether the purchase order date best establishes the material terms of the sale between Hyundai and its Australian customers. I noted the time lag between order and shipping dates, and also the arrangements available to domestic customers regarding purchases generally being taken from inventory and monthly invoicing. This included the trends in relation to raw material costs and the manner in which pricing is established by Hyundai for export sales and domestic sales.

166. The evidence available (and considered by the ADC) suggests that it was appropriate to use the purchase order date as the date which 'best establishes the material terms' of Hyundai's export sales transactions. On this basis, the dumping margin was correctly calculated, and I find no error in the use of the date of the order placement.

167. This ground fails to establish the Minister erred in the determination of the dumping margin.

Ground Two: The Commissioner's determination of the normal value for the verified exporters from Taiwan being (a) Tung Ho Steel Enterprise Corporation (Tung Ho) and (b) TS Steel Co. Ltd (TS Steel) under s.269TAC(2)(c) of the Act was not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2). The incorrect determination of normal values will have a consequential effect on the determination of normal values for (c) 'all other exporters'.

Claims

168. OneSteel contends that for both exporters, Tung Ho and TS Steel, the ADC adopted similar approaches in using s.269TAC(2)(c) of the Act to determine the normal value when it should have used s.269TAC(1): based on domestic selling prices that were in the OCOT with appropriate s.269TAC(8) adjustments.

169. OneSteel states that the ADC found that while there were sufficient volumes of like goods sold in the OCOT in domestic sales, when examined on a model-by-model basis (relevant to the export model) there were insufficient sales in the OCOT. OneSteel suggests that the finding of the ADC for both exporters 'that it was unable to quantify differences in cost or prices to enable a specification adjustment…' is not a correct reason to determine that the normal value could not be ascertained under

s.269TAC(1) of the Act. It states that this is not authorised by the terms of paragraphs (a) or (b) of s.269TAC(2).

ADC Findings in REP 499

170. The ADC dealt with Tung Ho and TS Steel separately.

171. In relation to Tung Ho, the ADC found that the normal value of one exported model was established pursuant to s.269TAC(1) of the Act, but for three other export models there were insufficient volumes of domestic sales made in the OCOT. For these 'other' models, the normal value was determined pursuant to s.269TAC(2)(c) of the Act.

172. In relation to TS Steel, the ADC found there were insufficient volume of domestic sales made in the OCOT of the equivalent 'export' model to determine the normal value under s.269TAC(1) of the Act

173. The ADC advised that it was unable to quantify differences in cost or price to enable a specification adjustment to be made under s.269TAC(8) for both TS Steel and Tung Ho, and accordingly used the constructed method (pursuant to s.269TAC(2)(c)) to determine the normal value.

Submissions

174. The ADC referred to its findings in REP 499.[76]

Analysis

175. OneSteel contends that for both exporters, Tung Ho and TS Steel, the ADC should have used s.269TAC(1) with s.269TAC(8) adjustments to determine the normal value rather than s.269TAC(2)(c).

176. An extract of s.269TAC follows:

[76] ADC submission dated 17 February 2020, page 12.

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.*

(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); …*

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

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

(c) … 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; …

(14) If:

(a) application is made for a dumping duty notice; and

(b) goods the subject of the application are exported to Australia; but

(c) the volume of sales of like goods for home consumption in the country of export by the exporter or another seller of like goods is less than 5% of the volume of goods the subject of the application that are exported to Australia by the exporter;

the volume of sales referred to in paragraph (c) is taken, for the purposes of paragraph (2)(a), to be a low volume unless the Minister is satisfied that it is still large enough to permit a proper comparison for the purposes of assessing a dumping margin under section 269TACB. [emphasis added]

177. On 18 February 2020, I held conferences with the ADC in relation to TS Steel and with the ADC and Tung Ho to obtain further information in relation to the normal value methodology.[77] In relation to TS Steel, the ADC noted that while there were domestic sales of the exported model, these were not in the OCOT and there were other goods considered 'like' that were in sufficient volumes in the OCOT.[78] In relation to Tung Ho, the ADC commented on the 'challenges in assessing prices differences for adjustment purposes'.

178. OneSteel claims that once there is a finding that there are sufficient volumes of 'like goods' sold in the OCOT then it is not appropriate to undertake this test at the model level. OneSteel referenced the Review Panel finding in ADRP Report No 110[79] 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.

[77] Non-confidential conference summary with the ADC regarding TS Steel dated 18 February 2020 and non-confidential conference summary with Tung Ho and the ADC dated 18 February 2020.
[78] Non-confidential conference summary with the ADC regarding TS Steel dated 18 February 2020.
[79] ADRP Report No 110 Steel Reinforcing Bar exported from the Republic of Turkey September 2019, page 15 at [28].

179. 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:[80]

> '*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 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.*'

181. I also considered my recent request for reinvestigation for ADRP Review No 108 on a similar issue.[81] 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,*

[80] 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].

[81] 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.

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[82] 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',[83] 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.[84] In that case, the Senior Panel Member highlighted that '… "relevant sales" for the purpose of determining a price under 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[85] when dealing with whether the Commissioner was able to determine an actual amount

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[82] *Changshu Longte Grinding Ball Co., Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2019] FCAFC 122 at paragraph 54.
[83] Dumping and Subsidy Manual, November 2018, page 34
[84] 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.
[85] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC20 at paragraphs 97 and 102.

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'.

182. I agreed with the reasoning expressed by both my colleagues and the approach I adopted in ADRP Report No 108. On this basis, I required the ADC to reinvestigate its findings in relation to the normal values for Tung Ho and TS Steel.[86]

TS Steel

183. The ADC in its Reinvestigation Report found while there were no domestic sales of the identical model exported to Australia, there were domestic sales of a surrogate model, a like good, sold in the OCOT.[87] It noted that the domestic sales of the identical model to that exported to Australia were not suitable for further consideration. It conducted analysis to assess whether a specification adjustment was necessary to the domestic prices of the surrogate model to enable a comparison with the export price.

184. The ADC's analysis included an assessment of whether TS Steel's domestic prices are affected by differences in its costs to produce the goods. It found that TS Steel sets its domestic prices by reference to movements in the cost of production. It also examined whether there were CTM differences between the MCC categories. It noted '…shows a material, observable and consistent quarterly CTM difference between PAABLY sold domestically and PABBLY exported to Australia.'[88]

185. On this basis, the ADC concluded that it was appropriate to use the surrogate model for normal value purposes and make a specification difference adjustment to those prices to enable the comparison with the export sales. The physical difference adjustment was '…based on costs to reflect the impact on prices of the cost

[86] Letter to the ADC dated 17 March 2020 requiring a reinvestigation.
[87] ADC Reinvestigation Report dated 15 January 2021, pages 14 - 20.
[88] ADC Reinvestigation Report dated 15 January 2021, page 17.

differential between the two MCC's due to their different specification characteristics.'[89]

186. I held a conference with the ADC to clarify the TS Steel cost/price analysis referred to in the Reinvestigation Report.[90] I have reviewed the above-mentioned analysis as well as the determination of the normal value (in terms of methodology and calculations) undertaken by the ADC in the Reinvestigation Report. I agree with its conclusions. Accordingly, OneSteel's claim has established that the normal value should be based on the domestic sales of the surrogate model pursuant to s.269TAC(1) of the Act with specification difference adjustments pursuant to s.269TAC(8) of the Act. The revised dumping margin for TS Steel is negative 4.3 per cent.

187. On this basis, OneSteel's ground relating to TS Steel has established that the Reviewable Decision was not correct or preferable.

188. I recommend that the Minister determine that the normal value for TS Steel be based on the price paid or payable for like goods ascertained under s.269TAC(1) of the Act. To enable a comparison with the export price, the Minister must direct adjustments pursuant to s.269TAC(8) for:

- specification differences;
- Domestic credit expense;[91]
- export packaging;
- export inland transport; and
- export handling and other costs.

[89] ADC Reinvestigation Report dated 15 January 2021, page 17.
[90] Non-confidential conference summary dated 22 January 2021.
[91] OneSteel has a further ground relating to the domestic credit expense adjustment that it is dealt with separately. However, this recommendation for an adjustment deals with that ground.

The recommended adjustments for TS Steel are set out in Reinvestigation Report Confidential Appendix 4 Normal Value Calculation for TS Steel.

Tung Ho

189. The ADC in its reinvestigation report found there were sufficient volumes of sales of like goods sold by Tung Ho in the OCOT.[92] It noted that while there were low volumes of domestic sales in the OCOT of some of the models exported to Australia, there were domestic sales of sufficient volumes of surrogate models sold in the OCOT. It also noted the domestic models sold in low volumes equivalent to the export models, were sold in a single quarter of the review period. It indicated that a timing adjustment as well as a specification adjustment would be required to enable a comparison with the export price of the different models. The ADC provided details of the surrogate models it was proposing to use for normal value purposes, noting that these had the closest physical characteristics to each of the exported models.

190. The ADC conducted similar analysis to that undertaken with TS Steel in its assessment of whether Tung Ho's domestic prices were affected by differences in its CTM the goods. It found that Tung Ho sets its domestic prices by reference to movements in the cost of production.[93] It then examined whether there were CTM differences between the MCC categories. It found '…Tung Ho's verified cost data from the review period was presented at the MCC level and shows observable quarterly CTM differences between each of the MCC categories, specifically for the models exported to Australia.'[94] The available evidence suggests that Tung Ho sets it domestic prices based on changes in the CTM movements. I clarified Tung Ho's cost/price analysis at conference with the ADC.[95]

191. On this basis, the ADC concluded that it was appropriate to make a specification adjustment to the normal values based on the domestic sales of the surrogate models for three of the four exported models to account for the physical differences.

[92] ADC Reinvestigation report dated 15 January 2021, pages 20 to 28.
[93] I discussed with the ADC at conference on 22 January 2021 the methodology applied to Tung Ho in relation to the cost/price analysis.
[94] ADC Reinvestigation report dated 15 January 2021, pages 25 to 26.
[95] Non-confidential conference summary dated 22 January 2021.

The fourth model was equivalent to the exported model and so required no adjustment for specification differences.

192. I have reviewed the above-mentioned cost/price analysis and the normal value determination (methodology and calculations) undertaken by the ADC in the Reinvestigation Report and agree with its conclusions. Accordingly, I agree with OneSteel's claim that Tung Ho's normal value should be based on the domestic sales of the surrogate models for three of the four exported models pursuant to s.269TAC(1) of the Act with specification adjustments pursuant to s.269TAC(8) of the Act. For the export model that had an equivalent domestic model, the normal value remains based on that model pursuant to s.269TAC(1). The revised dumping margin for Tung Ho is negative 5.8 per cent.

193. On this basis, OneSteel's ground relating to Tung Ho has established that the Reviewable Decision was not correct or preferable.

194. I recommend that the Minister determine that the normal value for Tung Ho be based on the price paid or payable for like goods ascertained under s.269TAC(1) of the Act. To enable a comparison with the export price, the Minister must direct adjustments pursuant to s.269TAC(8) for:

- specification differences (for three of the four exported models);
- domestic packaging;
- domestic inland transport;
- export inland transport;
- export customs brokers fees;
- export bank charges and letter of credit fees;
- export inspection;
- export trade promotion service fees;
- export pier through fees;

- export port services charges;
- export bill of lading fee; and
- export handling fee.

The recommended adjustments for Tung Ho are set out in Reinvestigation Report Confidential Appendix 6 Normal Value Calculation for Tung Ho.

All other exporters (Taiwan)

195. OneSteel claimed that if there were changes to the normal values for Tung Ho and TS Steel this may impact the normal values for 'all other Taiwanese exporters'.

196. The ADC advised in its Reinvestigation Report that the normal value for 'all other exporters' from Taiwan remain unchanged.[96] It provided its calculations. I have reviewed the calculations and agree with the ADC's conclusion in the Reinvestigation Report that the normal value for 'all other exporters' remains the same.

197. On this basis, OneSteel's ground relating to the Reviewable Decision of the normal value for 'all other exporters' from Taiwan fails. The Reviewable Decision is the correct or preferable decision as it relates to this ground.

Ground Three: The Minister's decision to direct that the normal value of the goods exported to Australia by TS Steel be adjusted for differences in the exporter's domestic credit costs is not supported by s.269TAC(9) and is therefore not the correct or preferable decision.

Claims

198. OneSteel claims that should it be found correct that the normal value for TS Steel has been correctly determined pursuant to s.269TAC(2)(c) of the Act, there has been an incorrect adjustment applied to this amount by the deduction of the cost of domestic credit.

[96] Reinvestigation Report dated 15 January 2021, page 28.

199. OneSteel proposes that when calculating a normal value under s.269TAC(2)(c) (referred to as the constructed method) it is calculated using the CTM of the exported models with the addition of the domestic SG and A (including finance costs). It should reflect a 'theoretical' domestic sale made of the exported goods in the OCOT.

200. OneSteel suggests that the Minister should be satisfied that the credit expense incurred on domestic sales did not impact on whether these sales would have been profitable or not. It proposes that there is no evidence apparent that this was considered by the Minister and questions whether the deduction was authorised under s.269TAC(9) of the Act.

ADC Findings in REP 499

201. The ADC indicated that for TS Steel the normal value was determined under s.269TAC(2)(c) of the Act with s.269TAC(9) adjustments. One of the adjustments applied to the constructed CTMS value was a deduction of domestic credit expenses. The ADC indicated that an adjustment under s.269TAC(9) of the Act is to enable a fair comparison between the export price and the normal value. It considered that the domestic credit costs '…reflect the payment and credit terms in its domestic market and as such, application of these costs does not render the normal value no longer comparable to the export price….'.

Submissions

202. The ADC referred the Review Panel to its finding in REP 499 section 5.6.3 and restated there is 'no requirement for the costs applied for an adjustment to reflect only those of transactions in the OCOT.[97]

Analysis

203. Following the reinvestigation of TS Steel's normal value determination as outlined in paragraphs 183 to 188 above, the ADC has recommended that the normal value for TS Steel be determined pursuant to s.269TAC(1) with s.269TAC(8) adjustments. The ADC in its Reinvestigation Report indicates that only sales in the OCOT were

[97] ADC submission dated 17 February 2020, page 13.

used to determine the normal value.[98] To enable a comparison with the export price, adjustments were recommended, including one relating to the domestic credit expense. My recommendation on that ground supports the normal value being determined pursuant to s.269TAC(1) with s.269TAC(8) adjustments including the domestic credit costs. Accordingly, this ground given it relates to an adjustment pursuant to s.269TAC(9) is no longer relevant.

204. I would comment that s.269TAC(9) of the Act enables adjustments to be made to the value constructed under s.269TAC(2)(c) of the Act to ensure it is comparable to export price in a similar fashion to the operation of s.269TAC(8). Accordingly, if there are different elements in the export price in terms of the transactions occurring at different levels of trade, or the terms or circumstances of the export sale are different to the notional domestic price constructed under s.269TAC(2)(c), then adjustments are required.

205. There is no legislative requirement to test that each of the adjustments is in the OCOT. The intent is to create a notional price at the same level of trade and with same circumstances and terms as the export sale in order to enable a fair comparison. In this case, this means establishing a 'price' that reflects the credit terms applied to the export sale.

206. This ground is no longer relevant as the recommendation to the Minister relates to s.269TAC(1) not s.269TAC(2)(c) of the Act and s.269TAC(9) no longer applies.

[98] Reinvestigation Report dated 15 January 2021, page 20.

Siam

Ground 1: the Commission failed to base normal value on relevant quarterly domestic sales of identical goods and absent relevant identical domestic sales, on the most directly comparable quarterly domestic sales to the goods exported to Australian in accordance with section 269T of the Act which defines 'like goods'

Claims

207. Siam contends that it had sufficient domestic sales in the OCOT of identical models to that exported and these alone should be used in establishing the normal value for the review period, rather than a broader grouping of models included in the MCC category.

ADC Findings in REP 499

208. The ADC advised that the normal value was determined under s.269TAC(1) based on the domestic selling prices for like goods sold in the OCOT in arms length transactions. Adjustments were made pursuant to s.269TAC(8) of the Act.

209. The ADC noted that it had considered the sufficiency of the sales volume of models exported to Australia compared with Siam's domestic sales (vide s.269TAC(14) of the Act) and had assessed the total quantity of goods sold to Australia.

210. The Commission also stated: 'In the calculation of the dumping margin, the Commission is required to compare export prices to the corresponding normal values of like goods. The legislation does not require the Commission to only consider domestic sales of identical goods where they are present. The Commission has found the differences in physical characteristics between AS 300 and SS (SM400) did not give rise to distinguishable and material differences in price in the domestic market. It was therefore appropriate to also match SS(SM400) to the Australian export grades. 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.'[99]

[99] REP 499, Section 5.7.2.1, page 47.

Submissions

211. The ADC in its submission referred to its finding in REP 499.

212. OneSteel indicates that it is incorrect to narrow the scope of s.269TAC(1) to only include identical goods.[100] Its view is that the correct interpretation is the definition of 'like goods' includes 'goods closely resembling'. It also notes that there were insufficient sales of the identical goods in the third and fourth quarters which would require an adjustment.

213. Siam, in its submission, claims that the ADC is wrong in law to extend the definition of 'like goods' in the determination of the normal value to other than identical goods. It states, 'Where domestic sales of identical goods are profitable and are at sufficient volumes, these must be the sole basis on which to calculate normal value'.[101]

214. Siam further suggests that if 'alike' goods are considered, even when identical goods are available, the application of s.269TAC(8) would lead to the same outcome as an adjustment should be made to the 'alike' goods to reflect their differences. It refers to the definition is s.269T(1) of the Act which provides:

> ' …*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* …'

215. Siam outlines the reasons why it considers the ADC has adopted the wrong approach according to the legislation and also refers to Article 2.6 of the ADA. It proposes that the ADA makes clear that identical goods should be considered and only fall back to 'alike' goods when identical goods are not available.

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

[100] OneSteel in its submission dated 17 February 2020, now advises that OneSteel Manufacturing Pty Ltd, is trading as Liberty Primary Steel (Primary Steel). I refer to them as OneSteel.
[101] Siam submission dated 17 February 2020, page 2.

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

216. Siam proposes that it is the legislation that must guide the Minister's decision not a procedural framework of the MCC.

Analysis

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

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

219. Both the ADC and OneSteel are of the view that the normal value does not need to be based only on the identical goods.[102]

220. 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.

221. Paragraph 177 details the relevant sub-section relating to the normal value and paragraphs 214 and 215 contain extracts of the definition of like goods and the ADA respectively.

222. I held a conference with the ADC and Siam on 18 February 2020 to obtain further information on the range of goods included in the determination of normal value as Siam had multiple concerns with what models had been considered.

[102] ADC submission and OneSteel submission.

223. 'Dumping' is 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'.[103] 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 OCOT 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 …'.

224. The intent of the comparison is to examine whether there is price discrimination between the export and domestic markets with the emphasis on examining the 'like goods'.

225. The way 'like goods' is expressed in s.269T of the Act relies on the use of the word 'or' after 'identical in all respects to the goods under consideration' rather than the word 'and'. This suggests that identical goods, if available, 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 consideration'.* This reflects the intent and language of the words in the ADA, which clearly specifies '… or in the absence of such a product… '

226. 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.

227. 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, the Australian industry is more likely to produce comparable goods to those exported not necessarily the identical goods.[104]

228. However, when considering the normal value, an exporter often does produce the same models for domestic and export markets. Broadening the scope of 'like goods'

[103] 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.
[104] Pursuant to s.269TG of the Act.

to goods closely resembling should only be enlivened when identical goods are not available, or do not meet all the elements of s.269TAC(1).

229. Therefore, for normal value purposes, if there are identical goods sold in the exporter's domestic market to those exported to Australia and they are in sufficient quantities, in the OCOT and in arms length transactions, the selling prices of these goods should be used. If such goods are not available, the scope is broadened to include goods closely resembling such goods. From a pragmatic perspective this 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 'comparable goods' models sold on the domestic market.

230. I required the ADC to reinvestigate Siam's normal value, noting its 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.

231. The ADC, in its Reinvestigation Report, found that there was sufficient volume of domestic sales of the identical goods exported to Australia made in the OCOT and in arms length transactions to base the normal value on these sales.[105] Accordingly, the ADC recalculated the normal value based on these sales. It noted that there were low volumes of domestic sales in two quarters but overall, there were sufficient sales on which to base the normal value.

232. The Reinvestigation Report also dealt with comments from Siam proposing that an annual weighted average of the normal value and export price should have been used to calculate the dumping margin. The ADC had used the quarterly weighted average normal values with quarterly weighted average export prices. The ADC indicated it had analysed the costs and prices of the domestic model and export model and found variations between quarters. It stated that the use of quarterly weighted average normal values and export prices would provide a more accurate dumping margin.[106]

[105] ADC Reinvestigation Report dated 15 January 2021, pages 7 to 10.
[106] ADC Reinvestigation Report dated 15 January 2021, Section 2.1.4, pages 9 to 10.

233. At conference, I sought information clarifying the ADC's comments in this regard.[107] The ADC indicated that its normal practice is to use quarterly weighted average normal values for comparison with quarterly weighted average export prices and on occasion will use even shorter periods (monthly) to provide a more accurate assessment of dumping margins. I do not disagree with this approach and is considered consistent with the legislation.

234. I agree with the approach adopted in the ADC's Reinvestigation Report in using the domestic sales of the identical goods pursuant to s.269TAC(1). I also reviewed the calculations of the normal value in Confidential Appendix One of the Reinvestigation Report.

235. Siam's ground has established that the Minister erred in the determination of the normal value and that the Reviewable Decision was not correct or preferable as it relates to this ground.

Ground 2: whilst the Commission determined the normal value for Siam in accordance with s.269TAC(1) of the Act, and correctly accepted the need to adjust normal value to reflect domestic credit costs in accordance with s.269TAC(8) of the Act, the Commission wrongly considered a hypothetical rate of domestic credit rather than the actual effective rate.

Claims

236. Siam considers that while the ADC correctly identified the need to make an adjustment for domestic credit costs, it disputes the amount. The ADC used an amount of [redacted] per cent whereas Siam proposes that the actual amount of [redacted] per cent should have been applied in the s.269TAC(8) adjustment calculations. (confidential credit terms amounts)

ADC Findings in REP 499

237. The ADC indicated that it had made an adjustment for domestic credit costs based on the minimum lending rate for commercial banks in Thailand, rather than 'an interest rate set by an internal company notice'. The ADC indicates this approach is

[107] Non-confidential conference summary held with ADC dated 22 January 2021.

consistent with the policy set out in the Manual. Siam had made similar claims to the ADC as has been presented in its review application.

238. The ADC indicated it had undertaken further analysis of Siam's 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 Siam were incurred'.[108] On this basis it considered it appropriate to use the external lending rate.

Submissions

239. The ADC in its submission, referred to its findings in REP 499.[109] The ADC also noted that it conveyed to Siam in the verification report that its determination of the credit adjustment was different to that proposed by Siam and provided the worksheets with the calculation information.

240. OneSteel proposes that only '… observed differences in actual settlement terms (c.f. credit terms), not in fact agreed to when the price was set, cannot be said to affect price comparability, as the existence of the implicit credit expense was not anticipated by either party when agreeing to price'.[110] It therefore suggests that only if it can be shown the credit rate affected the price outcomes should an adjustment be made.

241. Siam, in its submission, claims that it provides the option of a cash or credit price in the domestic market.[111] The area of contention is the credit rate applied. It claims that it provided evidence of the rate used but the ADC erroneously rejected this rate. Siam claims that the actual amount negotiated as part of the contract of sale must be used. It suggests that in other parts of the legislative framework it is clear that actual costs when established under generally accepted accounting principles (GAAP) must be used.

[108] REP 499, Section 5.7.2.1, page 46.
[109] ADC submission dated 17 February 2020, page 15.
[110] OneSteel submission dated 17 February 2020, page 2.
[111] Siam submission dated 17 February 2020, page 8.

Analysis

242. Siam contends that the interest rate used to calculate the adjustment for credit terms pursuant to s.269TAC(8) between the domestic and export sales was incorrect.[112] Siam states the actual interest rate applied in setting domestic prices should be used rather than by reference to a commercial Thai bank rate. Both the ADC and Siam agree that a credit terms adjustment is warranted, they merely disagree on the quantum of the adjustment.

243. I held two conferences with the ADC and Siam to obtain further information regarding the pricing arrangements including the credit adjustment (18 February and 11 March 2020). I also reviewed Siam's confidential domestic sales information presented at the verification visit conducted by the ADC.

244. Siam claims that its pricing arrangements in the Thai market is a complex process of negotiating a price that includes consideration of the customer relationship as well as payment terms.[113] Siam indicates that customers are given the option of [redacted] and the rate referred to in the internal company memo is the valid rate applied to price negotiations. It contends that the actual amount used by Siam in contract negotiation and price setting is appropriate for adjustment purposes.

245. The evidence presented to the ADC suggests that Siam does apply the rate [redacted] in establishing its prices, but it was not always applied to [redacted].[114] Siam was asked to clarify its pricing process at the conference [redacted].[115] (Confidential pricing information) Subsequent to the conference, Siam provided additional information regarding the pricing (and credit) arrangements for certain of the above-mentioned invoices which had been presented to the ADC [redacted]. It also noted that it had examined all the domestic sales transactions of the identical models (to the export models) and the majority of these were sold at [redacted].[116]

[112] An extract of s.269TAC(8) of the Act is at paragraph 33.
[113] Non-confidential conference summary held with Siam and ADC on 11 March 2020.
[114] Non-confidential conference summary held with Siam and ADC on 11 March 2020.
[115] Non-confidential conference summary held with Siam and ADC on 11 March 2020.
[116] This latter piece of additional information was not subject to verification by the ADC but is considered relevant information as it was before the ADC in the investigation.

The ADC was present for Siam's further clarification on its pricing arrangements provided during the conferences on the 18 February and 11 March 2020.

246. Based on the examples viewed, there is evidence that the actual prices paid (based on the stated internal credit rate) are valid, though [redacted]. In my view, the pricing analysis undertaken by the ADC and expressed as 'The Commission did not find that the actual credit costs as claimed by Siam were incurred'[117] may have been [redacted] by [redacted] apparent in the prices.

247. Based on the evidence that the actual prices paid using the internal credit rate are valid, and the information provided regarding the circumstances of its use, I required the ADC to reinvestigate the credit adjustment rate used for the purposes of the s.269TAC(8) adjustment to the domestic selling prices.

248. The ADC, in its Reinvestigation Report, indicated that the '…evidence presented to the Anti-Dumping Review Panel, not previously presented to the Commission, indicates that the interest rated claimed by Siam in its application is applied in establishing its prices for the majority of transactions, rather than the interest rate used by the Commission in the credit terms adjustment pursuant to section 269TAC(8) in REP 499'.[118] The ADC accordingly modified the credit terms adjustment to the rate claimed by Siam and adjusted the credit terms to reflect a cash price for all transactions stated as [redacted].

249. The ADC has re-calculated the normal value, including the revised credit terms adjustment, to ensure that it is comparable to the export price of goods exported to Australia at an FOB level.

250. Siam's ground has established that the credit adjustment was not correctly calculated, and this impacted the determination of the normal value in the Reviewable Decision.

[117] REP 499 Section 5.7.2.1, page 46.
[118] ADC Reinvestigation Report dated 15 January 2021, page 9.

Ground 3: whilst the Commission determined the normal value for Siam in accordance with s.269TAC(1) of the Act, and made adjustments to the normal value, it should not have included an export credit adjustment in the ascertained normal value.

Claims

251. Siam indicated that this adjustment would not have a material impact on the current dumping margin but seeks clarification in the event of a future duty assessment. It provided, in a confidential format, the circumstances that led to an export credit adjustment being made by the ADC and indicated that [redacted]. (confidential export sales information)

ADC Findings in REP 499

252. The ADC noted that it had reconsidered its approach on the export credit adjustment following Siam's request. 'The Commission notes that a substantial proportion of export sales did not allow payment on credit terms. The Commission has reviewed its calculations and considers that in establishing export credit terms, it had appropriately taken into account sales that were not subject to payment terms as well as payments in respect of Australian exports sales that were subject to payment terms.'[119] It still applied an adjustment but indicated that the impact on the dumping margin would be negligible.

Submissions

253. The ADC advised that it took into consideration the relevant export transactions some which were subject to payment terms and others that were not.[120]

254. OneSteel in its submission referred to the ADC finding.

255. Siam claims there was [redacted].[121] [redacted]

[119] REP 499, section 5.7.2.1, page 46.
[120] ADC submission dated 17 February 2020, page 16.
[121] Siam submission dated 17 February 2020, page 10.

[redacted] accordingly an adjustment should not be made for export credit. (Confidential export sales information)

Analysis

256. A conference was held with Siam to clarify whether the approach adopted by the ADC would have material impact on the ascertained normal value as this had not been identified in its review application.[122] Siam advised that it would not have a material difference and confirmed that its intent was to ensure that future duty assessments applied an appropriate methodology in normal value determination.

257. The Review Panel advised that its authority pursuant to s.269ZZA of the Act related to the Reviewable Decision made under s.269ZDB(1) of the Act and did not extend to the methodologies that may apply in future duty assessments. The Review Panel noted that Siam acknowledged that it would have an immaterial impact on the ascertained normal value in REP 499. There was a related ground dealing with whether the correct credit term adjustment had been applied. I dealt with this claim as part of the overall consideration of the calculation of the credit terms adjustment pursuant to s.269TAC(8).

258. As a result of the Reinvestigation Report, the ADC recalculated the s.269TAC(8) adjustments relating to credit terms as described in paragraphs 242 to 250 above. At conference, the ADC confirmed that because of its reconsideration of the credit terms arrangements relating to export and domestic sales contracts, no adjustment for export credit terms was required in the revised normal value determination.

259. This ground has been dealt with as a result of the previous ground on credit adjustment.

Ground 4: with respect to certain quarterly domestic sales of the most directly comparable goods that on a total weighted average nett selling price when compared to the total weighted average cost to make and sell were profitable, it was open to the Commission to

[122] Non-confidential conference summary with Siam held on 8 January 2020.

properly consider if those actual sales at a loss were in fact recoverable within a reasonable period of time in accordance with s.269TAAD(3) of the Act.

Claims

260. Siam claims there were certain domestic sales of a particular model [redacted] that the ADC treated as being not in the OCOT. Siam indicated that [redacted] were very profitable. It suggests that if all the sales of goods identified in the [redacted] were considered together then they would have been classed as profitable. The prices from these sales were excluded from consideration of normal value pursuant to s.269TAC(1). Siam indicates that of all relevant domestic sales, [redacted] per cent were profitable. (confidential domestic sales information)

261. Siam considers that s.269TAAD(3) proposes that in circumstances where the selling price is above the weighted average cost of such goods over the investigation period then such selling prices should be considered in the OCOT and be used for s.269TAC(1) purposes in establishing the normal value. Siam advised that if a different approach had been adopted to the OCOT test, this would have made a significant difference to the dumping margin.[123]

ADC Findings in REP 499

262. The ADC advised that the normal value was determined under s.269TAC(1) based on domestic selling prices for like goods sold in the OCOT in arms length transactions. Adjustments were made pursuant to s.269TAC(8) of the Act.

Submissions

263. The ADC advised that the grouping used for normal value purposes did not include the category submitted by Siam.[124]

[123] Non-confidential conference summary held with Siam on 8 January 2020.
[124] ADC Submission dated 17 February 2020, page 16.

264. OneSteel, in its submission, indicated that the OCOT test is on a transaction-by-transaction basis against a quarterly average CTMS not a weighted average basis of quarterly sales.[125]

265. Siam, in its submission, suggests that the OCOT has been incorrectly applied and this relates to the manner in which the ADC has applied the MCC structure. It proposes that the practices outlined in the Dumping Manual do not override the provisions of the legislation.

Analysis

266. Given the ADC advised in its submission that the models used for normal value purposes had not been included in the category submitted by Siam, I sought further information from Siam and the ADC at conference, as to what models had been included in the normal value determination.[126]

267. Siam advised that it considered only the identical goods should be used for normal value purposes (as per its Ground One) but if a broader category was to be used then it should include the model [redacted] The ADC advised that an adjustment had been made to the MCC structure applying to Siam and these models were now included in the [redacted] grouping used for normal value purposes in REP 499.[127]

268. I note that the OCOT test as proposed by Siam and outlined at paragraph 261 does not reflect the relevant legislative provision. OneSteel also made this observation.

269. Given the findings of the ADC's reinvestigation on the use of the identical goods in the normal value determination (Ground One), the issues regarding whether other model's sales were in the OCOT becomes redundant.[128] These models were no longer considered relevant for normal value determination.

270. Accordingly, this ground is no longer relevant as the basis of the determination of the normal value has been superseded by the outcome in Ground One.

[125] OneSteel submission dated 17 February 2020, pages 3 to 4.
[126] Non-confidential conference summary held with Siam and ADC on 18 February 2020.
[127] Non-confidential conference summary held with Siam and ADC on 18 February 2020, pages 2 to 3.
[128] Reinvestigation Report dated 15 January 2021, page 8.

271. In summary, Siam's four grounds all related to the determination of the normal value. For the reasons outlined above, the Reviewable Decision in relation to the normal value was not correct or preferable as a wider category of the goods were included in the normal value when sales of the identical models were available. The adjustments for domestic and export credit terms were also found to be incorrect. The revised dumping margin for Siam is 8.3 per cent.

272. I recommend that the normal value be based on the domestic sales of the identical models exported to Australia, pursuant to s.269TAC(1) given they were found to be in OCOT and in arms length transactions. I further recommend that the Minister make directions pursuant to s.269TAC(8) for the adjustment of those domestic selling prices to enable their comparison with the export prices:

- Domestic credit terms with the rate of [redacted] applied;
- Domestic inland transport;
- Domestic handling;
- Domestic commission;
- Domestic bank charges;
- Export inland transport;
- Export handling charges; and
- Export bank charges.

The recommended adjustments for Siam are set out in Reinvestigation Report Confidential Appendix One Normal Value Calculation for Siam.

Conclusions and Recommendations

273. Pursuant to s.269ZZK(1) of the Act and for the reasons given above, I consider that the reviewable decision was not the correct or preferable decision in relation to the variable factors as follows:

- Exports by Siam from Thailand in relation to the normal value and the NIP;
- Exports by Tung Ho and TS Steel from Taiwan in relation to the normal values and the NIPs;
- Exports by 'uncooperative exporters and all other exporters' from Taiwan in relation to the NIP; and
- Exports by Hyundai from Korea in relation to the NIP.

274. I recommend that:

- The normal value for Hyundai remains unchanged but the NIP be varied. The dumping margin remains at 4.7 per cent.
- The normal value for Siam be determined under s.269TAC(1) with directions made for necessary adjustments under s.269TAC(8) of the Act as referred to in paragraph 272. This would modify the dumping margin from 5.0 per cent to 8.3 per cent. I note that as a result of this change to the normal value, it is higher than the NIP. The difference between the export price and the NIP, expressed as a percentage is 7.8 per cent.
- The normal value for TS Steel be determined under s.269TAC(1) with directions made for necessary adjustments under s.269TAC(8) of the Act as referred to in paragraph 188. This modifies the dumping margin from negative 1.6 per cent to negative 4.3 per cent.
- The normal value for Tung Ho be determined under s.269TAC(1) with directions made for necessary adjustments under s.269TAC(8) of the Act as referred to in paragraph 194. This modifies the dumping margin from negative 1.6 per cent to negative 5.8 per cent.
- The normal value for 'uncooperative and all other exporters' from Taiwan remains the same but the NIP be varied. The dumping margin remains unchanged.

275. As required by s.269ZZK(1A) of the Act, consideration must be given as to whether the new decision is materially different to the Reviewable Decision. Each of the

recommendations outlined above, leads to the fixing of different variable factors, pursuant to s.269ZDB(1)(iii) of the Act, which is a materially different decision.

276. For the reasons set out in this report, I recommend that the Minister revoke the Reviewable Decision and substitute a new decision that:

- is the same as the Reviewable Decision as it relates to exports for Taiwan by 'uncooperative exporters and all other exporters' but with a new variable factor of the NIP;
- is the same as the Reviewable Decision for exports from Korea by Hyundai but with a new variable factor of the NIP;
- there are new variable factors in relation to the normal value and NIP for exports from Thailand by Siam;
- there are new variable factors in relation to the normal value and NIP for exports from Taiwan by Tung Ho; and
- there are new variable factors in relation to the normal value and NIP for exports from Taiwan by TS Steel.

Jaclyne Fisher
Panel Member
Anti-Dumping Review Panel
15 February 2021

ATTACHMENT ONE

Summary of Conferences

Date	***Participants***	***Regarding***
8 January 2020	Siam	Clarification of grounds three and four and what difference would have been made to the reviewable decision in relation to these grounds. Clarification of the wording in ground four given differences between the two review applications. Clarification of the confidential attachments to the continuation inquiry application.
8 January 2020	Hyundai	Clarification of a reference to an attachment, the material difference in relation to a particular ground (1(b)) and explanation of the content of a Table provided at page 12 of its application.
18 February 2020	ADC	Further information regarding the normal value methodology relating to like goods, credit adjustment and the benchmarking methodology in relation to TS Steel
18 February 2020	ADC	Further information on the confidential price undercutting analysis undertaken by the ADC in a summary graph and clarification of a comment in REP 505 (page 56) regarding variable factors associated with the NIP.
18 February 2020	Tung Ho, ADC	Further information regarding the normal value methodology relating to like goods, sufficiency of sales and specification adjustments in relation to Tung Ho
18 February 2020	Siam, ADC	Further information on goods included in the normal value determination and like goods (referencing the MCC methodology used by the ADC), the interest rate used by the ADC in the s.269TAC(8) adjustment and the confidential ADC analysis of credit terms impacts on pricing

		and explanation of the confidential spreadsheet relating to normal value
19 February 2020	Hyundai, ADC	Clarification regarding Hyundai's export transactions, the physical differences between domestic and export sales, clarification regarding the OCOT test methodology and the methodology used by the ADC in regard to normal value determination.
11 March 2020	Siam, ADC	Further information relating to credit terms information provided at the conference on 18 Feb 2020,
11 March 2020	ADC	Explanation of the confidential spreadsheet relating to Hyundai's cost and price information and clarification regarding the ADC's consideration of the un-dumped export prices in the assessment of the NIP. The ADC advised it does not generally use a single exporter's selling prices for confidentiality reasons.
20 July 2020	ADC	Clarification of the reinvestigation letter for 2019_121 regarding paragraph (h). The Review Panel advised that if there were changes to the dumping margins, the finding of whether the continuation of anti-dumping measures is required is to be reinvestigated. The ADC advised that there were changes and an extension would be requested to enable a preliminary reinvestigation report to be published.
17 September 2020	ADC	Request for extension of reinvestigation report
22 January 2021	ADC	To clarify aspects of the Reinvestigation Report regarding NIP calculations, Siam's normal value calculation, confidential specification difference analysis relating to Tung Ho, TS Steel and Hyundai.

1 February 2021	ADC, Hyundai	To seek comment from Hyundai regarding the cost differences in REP 465.
5 February 2021	OneSteel, ADC	Information regarding the calculation of the USP

ATTACHMENT THREE

Commonly used Incoterms

DDP (Delivered Duty Paid): the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

CIF (Cost Insurance and Freight): means that the seller arranges and pays for transport to named port. The seller delivers goods, cleared for export, loaded on board the vessel. However, risk transfers from the seller to the buyer once the goods have been loaded on board, i.e., before the main carriage takes place. The seller also arranges and pays for insurance for the goods for carriage to the named port.

FOB (Free on Board): means the seller delivers the goods, cleared for export, loaded on board the vessel at the named port of shipment. Once the goods have been loaded on board, risk transfers to the buyer, who bears all costs thereafter.

Ex-works: means this rule places minimum responsibility on the seller, who merely has to make the goods available, suitably packaged, at the specified place, usually the seller's factory or depot. The buyer is responsible for loading the goods onto a vehicle; for all export procedures; for onward transport and for all costs arising after collection of the goods.