17 February 2020

BY EMAIL: **adrp@industry.gov.au**

Panel Member Fisher
Anti-Dumping Review Panel
C/- Legal, Audit & Assurance
Department of Industry, Science, Energy and Resources
10 Binara Street
Canberra City ACT 2601

Dear Panel Member,

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

SUBMISSION OF THE AUSTRALIAN INDUSTRY

OneSteel Manufacturing Pty Limited, trading as 'Liberty Primary Steel' (**Liberty Primary**), an applicant for *Review of a Ministerial decision* made under subsection 269ZDB(1)[1], specifically, the decision of the Minister following a review of anti-dumping measures concerning the goods contained in public notice, ADN 2019/125.[2] Liberty Primary is the sole member of the Australian industry producing like goods to the goods the subject of this Ministerial decision, and makes the following submission in response to the applications of the exporters, Siam Yamato Steel Co Ltd and Hyundai Steel Co., Ltd.

A. SIAM YAMATO STEEL CO LTD (SYS)

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 which defines 'like goods'.

The applicant exporter appears to be arguing that the identification of like goods for the purpose of the ascertainment of normal value under s.269TAC(1) need only include 'identical' goods where in sufficient volumes in the ordinary course of trade (**OCOT**):

[1] All legislative references in this submission are to the *Customs Act 1901*, unless otherwise stated.
[2] Published on 11 November 2019.

> "SYS contends that where there are relevant domestic sales of identical goods then the normal value needs to be determined on those identical goods provided they satisfy the sufficiency and OCOT tests."[3]

The idea that like goods that are not "identical", but "closely resembling those goods under consideration" may be entirely ignored has no basis in either domestic in domestic law or WTO jurisprudence. The following observation was recently made by Senior Member Fitzhenry on the question of the proper treatment of like goods within the determination of the normal value under s.269TAC(1):

> "In *Anti-Dumping Authority & Anor v Degussa AG & Anor* [[1994] FCA 677] 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."[4]

Therefore to narrow the scope of s.269TAC(1) to have regard to only "identical goods", and not the broader definition of "like goods" which includes "goods closely resembling" is incorrect. Clearly, a correct interpretation of the term "like goods" and its use within s.269TAC(1) cures the problem identified by both the Commission and applicant exporter in that there were insufficient domestic sales of "identical goods" in the third and fourth quarter of the investigation period. In these latter quarters, the determination of normal values having regard to "goods closely resembling" with necessary adjustments in the OCOT would presumably be sufficient.

Therefore, the applicant exporter's argument regarding the Commission's use of like goods to ascertain the normal value should be rejected.

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

The exporter applicant disputes the interest rate applied by the Commission to calculate an amount for an adjustment to the normal value under s.269TAC(8) for its claimed domestic credit expense. However, the exporter applicant's claim ignores that the primary focus when making adjustments is to ensure that due allowance is made for differences that affect price comparability, as reflected in s.269TAC(8).

Therefore, only differences in contracted credit terms that in fact exist between domestic and export sales may attract an adjustment. 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.

[3] ADRP Case No. 120, Application for Review – SYS, p. 7.
[4] ADRP Case No. 100, Letter to ADC (4 July 2019), pp. 5-6 at [15].

In other words, the exercise when determining whether credit terms affect price comparability would involve firstly comparing the agreed credit term days for particular domestic sales, to export sales, and if a difference exists, then determine the amount of difference, if any, that those different credit terms have on the price. The amount of any credit adjustment should not necessarily be calculated with regard to a particular reference rate, unless it can also be shown that such a credit/interest reference rate does in fact affect price outcomes/negotiations.

Applied here, the Commission in fact concluded that *"[it] did not find that the actual credit costs as claimed by SYS were incurred"*,[5] which strongly indicates that any difference between credit terms, agreed on the date of sale, did not in fact affect price comparability, as it was not likely an expense within the actual contemplation of the exporter applicant. In other words, there is no difference in price irrespective of the *agreed* credit terms, or *observed* settlement terms.

Therefore, the correct or preferable decision would be to not allow the making of any credit expense adjustment to the normal value.

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.

Liberty Primary considers that the following statement by the Commission may be relevant to the question of whether differences in *agreed* credit terms, in fact affected the exporter applicant's pricing decisions:

> "The Commission notes that a substantial proportion of 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 export sales that were subject to payment terms."[6]

Ground Four: The ascertained normal value was incorrect. Certain quarterly domestic sales of the most directly comparable goods that on a total weighted average net 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 and accordingly should have been included in the consideration of domestic selling prices under s.269TAC(1) of the Act.

The OCOT of domestic sales is not tested on a weighted average basis of quarterly sales, but rather on a sale by sale basis against the quarterly average cost to make and sell of those goods (by model). Therefore, it would not be the correct or preferable decision for individually unprofitable and

[5] Report No. 499, p. 46.
[6] ibid.

unrecoverable sales to be 'cured' and to be in the OCOT on the basis that they form part of a quarterly population of sales that on a weighted average basis represent a value that even if not profitable is recoverable "within a reasonable period".

Therefore, the applicant exporter's argument regarding the Commission's conduct of the OCOT should be rejected.

B. HYUNDAI STEEL CO., LTD (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.

Subsection 269TAC(8) does not support the exporter applicant's claim for an adjustment under it. The provision enacts the obligation under Article 2.4 of the WTO *Anti-Dumping Agreement* (**the WTO Agreement**) to make a fair comparison between the export price and normal value when determining dumping. As such s.269TAC(8) refers to the making of adjustments in circumstances where *"price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price"*. Relevantly, Article 2.4 provides:

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

The WTO jurisprudence on the circumstances in which adjustments are to be made for 'physical characteristics', must be related to differences which are demonstrated to affect price comparability.[7]

Therefore, the exporter applicant is wrong at law to assert that the Commission is obliged to make an adjustment for physical characteristics under s.269TAC(8) that is not proven to affect price comparability, but only cost differences.

The suggestion by the exporter that there is a *"need for a physical adjustment to be made to reflect the quantifiable cost differences and the associated market value of those differences, as the Commission has done in Report 223 and Report 465"* is entirely wrong at law and under WTO jurisprudence as Panel Member Blumberg correctly and helpfully highlighted in ADRP Report No. 80 (*Steel Reinforcing Bar Exported to Australia from Greece et Ors*) in response to the ground raised by the same representative firm for Hyundai (in that case acting for the exporter, Nervacero S.A), that the

[7] Appellate Body Report, *US – Hot-rolled Steel*, at [177].

exporter was entitled to a physical adjustment to its normal value based on cost differences between the domestic sales of like goods and the goods exported to Australia:

> "329. I refer again to the Panel's statement in *EC – Fasteners (China)* referred to above that, although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such comparison, and that if it is *'not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment'*.[8]
>
> "330. It appeared to me that the ADC's refusal to grant the adjustment based on lack of supporting evidence in Nervacero's own records of accounts, was reasonable in the circumstances. Nervacero's sub-ground of review relating to its claim for adjustment to account for physical differences between exported goods and the like goods therefore fails."

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

Furthermore, relevant to this claim for adjustment, the exporter applicant's assertion of a comparison being made between Grade AS/NZS 300 goods exported to Australia and the "mostly SS400" goods sold by the exporter in the Korean domestic market would serve to perpetuate a model matching error made for this exporter in INV 223 and REV 465 solely for the sake of "consistency". As referenced by the exporter applicant, the Commission's findings in REV 465 stated:

> "In the original investigation, various submissions from interested parties debated which grade sold by exporters on their respective domestic markets was most comparable to the Australian Grade G300. OneSteel submitted that the Korean SM490 was the grade most comparable to Australian Grade G300 on the basis of its specified yield strength and chemical requirements. Hyundai maintained that the Korean SS400 grade was most comparable to the Australian Grade G300 since Korean SS400 produced by Hyundai exceeded the minimum requirements for tensile and yield strength, **which was which was demonstrated by the specifications achieved and shown on mill certificates**."[9] [**emphasis** added]

Liberty Primary has consistently argued that a comparison of mill certificates against minimum export Standard requirements is fundamentally technically flawed[10] and has led to a highly erroneous finding that grade **SS400**, which has a minimum yield strength (the mandatory strength category in the MCCs) of **235-245MPa and no chemistry specifications** can be considered "most comparable" to **Grade AS/NZS**

[8] Original fn 138 [European Communities — *Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (WT/DS397/R), Para. 7.298.]
[9] REP 465 at p. 14.
[10] EPR Folio No. 505/004 and EPR Folio No. 505/020

300 with a minimum yield strength of 280-320MPa and enforces chemistry control for weldability through the specification of a maximum carbon equivalent value.

During this review inquiry, the Commission tested the claims of the exporters in relation to mill test certificates and their relevance:

> "In this review, the Commission has verified the original purchase orders and other relevant documentation related to sales and has conducted discussions with representatives of steel manufacturers. On the basis of this evidence, the Commission considers that it is the **usual practice for steel products to be manufactured, bought and sold on the basis of the grade of steel that is required and of the specifications in the standard that must be met.** The subsequent provision of mill test certificates may be requested by customers or relevant authorities to confirm that the required minimum specifications have been met."[11] [**emphasis** added]

Based on the evidence obtained, the Commission correctly concluded:

> "In this review, the Commission has not found evidence that indicates that purchasers place their orders for steel on the basis of mill test certificates. The Commission does not consider that mill test certificates provide sufficient indication of what a customer's requirements are, or of the negotiated terms of the sale. Despite a mill test certificate providing confirmation that the steel has satisfied the requirements of a particular grade, prices of steel and other terms of sales are not negotiated on the basis of those certificates. As such**, the Commission considers that the evidence found in this review indicates that it is not appropriate to classify like goods on the basis of mill test certificates**."[12] [**emphasis** added]

Having applied the appropriate model match grade comparison based on Standard requirements here, the Commission correctly concluded that:

> "The Commission has found in this review that despite the presence of physical differences between various models of HRS, the Commission did not find in Hyundai's verified sales data, or in other evidence, that physical differences of models within respective MCC groups influenced prices.
>
> "Further, the Commission could not identify;
> - a consistent correlation between the cost to make for the models sold domestically and the Australian models and the selling prices; and
> - a physical characteristic that resulted in the cost differences between the Australian export model and the equivalent domestic model to support Hyundai's submission that changes to the Korean standard may explain these cost differences."[13]

[11] SEF 499, p. 15 at [5.2.3]
[12] ibid., p. 16.
[13] ibid., p. 22 at [5.5.1.6]

Therefore, the applicant exporter's claimed adjustment to its normal value should be rejected.

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.

The exporter applicant's claim that the Commission's testing of the profitability and recoverability of individual transactions should occur at the 'delivered' level of trade, compared to the ex-works level is unsound. It is not fair or reasonable for the Commission to compare 'high value' delivered transactions (based on distance of customer or logistical complexity), to a weighted average 'delivery' expense across all domestic sales. To follow the approach proposed by the exporter would mean that domestic sales that are on an ex-works basis unprofitable and unrecoverable, are nevertheless treated as being within OCOT just because of the disproportionate value attributed to the transportation of the goods in the 'delivered' price agreed. Again, this is not the correct or preferable approach for the Commission to observe and is not consistent with Article 2.4 of the WTO Agreement, in relevant part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time." [emphasis added]

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.

Liberty Primary does not consider the parallels drawn with the practices of the US Department of Commerce on this issue either helpful or relevant. With respect, the United States administration operates a retrospective duty collection system based on the taking of cash deposits, not interim duties. On the other hand, the Australian system operates prospectively. Indeed, when the export price is determined deductively under s.269TAB(1)(b), the domestic law is clear on the deduction of taxes and duties paid by the importer as a prescribed deduction (refer s.269TAB(2)(a)).

Acknowledging that for this review of measures, the export price was not determined deductively, but under s.269TAB(1), we nevertheless do not understand how the exporter reasons within its dumping margin calculation table, that the non-deduction of interim duty paid exaggerates the dumping margin. For example, assume the following conditions:

- Ascertained normal value (ANV) = AU$110
- Ascertained export price (AEP) = AU$100
- Ad valorem rate = 10%

Therefore, assuming that a single transaction is made following the imposition of duties, i.e. within the first review period at a DDP price of AU$110 (assuming no other post exportation expenses or GST incurred), then the deductively determined export price would be calculated as follows:

- Price at first point of resale to an unrelated buyer in Australia (per unit):	AU$110
less amounts for:	
- Interim (or final) duty paid:	AU$10
- Deductive export price (FOB):	AU$100

Assuming the ANV for the Review Period remained fixed at AU$110, then the dumping margin for the Review Period remains 10%. Therefore, the applicant exporter's claimed approach to export price determination does not support the correct or preferable decision and should be rejected.

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

The exporter applicant makes the complaint that the Commission did not determine the *"USP [unsuppressed selling price] during the POI [investigation period]"*.[14] At the outset it is observed that the method of calculating a NIP is not prescribed in the legislation, however, in practice, the Commission usually uses the Australian industry's USP as the basis for the NIP.[15]

According to the decision in *Siam Polyethylene Co Ltd v Minister for Home Affairs*, per Rares J:

> "The non-injurious price had to be calculated by reference to the question of material injury, an assessment of its extent and the establishment of the causal link between dumping and the injury…"[16]

This is precisely the approach finally taken by the Commission. The use of the normal value in preference to prevailing prices in Australia during the investigation period to establish a USP, reflects the Commission's assessment of the material injury in the form of price depression and price suppression found to have been caused to the Australian industry by the exportation of goods at dumped prices during that period.

Whatever the arguments might be for using other methods to calculate the USP to determine NIP, the methodology proposed by the applicant exporter is more problematic.

Specifically, based on the Commission's assessment of market share by source,[17] the volume of undumped goods exported by Tung Ho constituted the minority of overall imports of the goods and as such is unlikely to have influenced overall market prices. This contention is supported by the Commission's finding that where Tung Ho's export prices decreased, Tung Ho's export volumes did not

[14] ADRP Case No. 120, Application for Review – Hyundai Steel, Attachment 2, p. 21.
[15] Dumping and Subsidy Manual (November 2018), p. 138.
[16] [2009] FCA 837 at [113].
[17] Report 505, p. 22 [Figure 7]

necessarily increase, in spite of the high degree of price elasticity in the Australian market for the goods.[18] The same could not be said of Hyundai:

> "The Commission considers that it is likely that the expiration of anti-dumping measures would improve the competitiveness of HRS exported to Australia from Korea and that this would encourage importers to acquire HRS from Korea at dumped prices and in greater volumes."[19]

Indeed, even Tung Ho stated that the dumped goods exported by Hyundai and others were suppressing their prices:

> "We submit the contrary would apply, due to the measures recommended in SEF for other exporters. Business acumen would evoke THS (likewise Liberty Steel) to be in a position to charge a higher competitive price to Australia…"[20]

Therefore, to calculate a NIP for Hyundai on the basis of a USP derived from the sales prices into the Australian market of the goods exported by Tung Ho, would not necessarily indicate a value which no longer causes injury to the Australian industry.

Furthermore, Hyundai expresses a misunderstanding of the operation the Australian industry's import parity pricing (**IPP**) mechanism when it suggests that *"Tung Ho's prices will become the benchmark for any such IPP exercise"*.[21] This is an entirely incorrect description of the operation of the Australian industry's IPP pricing model, which determines a customer specific, not market-wide, price based on unique offers made to customers, specifically. As the Commission has correctly stated it:

> "In the original investigation (223), the Commission found that OneSteel sets its prices by applying an Import Parity Pricing (IPP) process in which it must negotiate prices with reference to offers made in the HRS market for imported goods. It was found that HRS exported to Australia from the subject countries at dumped prices required Liberty Steel to match those prices. This resulted in OneSteel achieving lower prices than it might have otherwise and consequently experiencing material injury.
>
> "In its application for the continuation of measures, Liberty Steel stated that it continues to apply the IPP process and that pricing in the Australian market is driven by prices of HRS exported from Japan, Korea, Taiwan and Thailand. Liberty Steel also stated that known import offers in the market are used as a tool by customers to negotiate lower prices from Liberty Steel.

[18] Report 505, p. 36.
[19] ibid., p. 34.
[20] EPR Folio No. 505/039, p. 2.
[21] ADRP Case No. 120, Application for Review – Hyundai Steel, Attachment 2, p. 21.

> "The verification team found that Liberty Steel does continue to apply the IPP process and that the processes of price setting and negotiation described in REP 223 and in Liberty Steel's application remain in place."[22]

Therefore, it is not open to the exporter applicant to suggest that Tung Ho prices will necessarily form the new price for the Australian industry.

For the reasons outlined above, Liberty Primary considers that the grounds for review advanced by SYS and Hyundai as they relate to the Reviewable Decision are unsound and should be rejected.

FOR AND ON BEHALF OF

THE AUSTRALIAN INDUSTRY APPLICANT

[22] EPR Folio No. 505/008, p. 9.