PUBLIC VERSION

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Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

Review of a decision by the Minister in relation to the review of anti-dumping measures – Hollow structural sections exported by Ursine Steel Co., Ltd

Dear ADRP member,

Please accept this submission on behalf of Ursine Steel Co., Ltd (Ursine), to the current review into the decision by the Minister in relation to the review of anti-dumping measures applying to imports of hollow structural sections exported from Taiwan by Ursine. The purpose of this submission is to provide further supporting evidence of its proposed correct and preferable decisions relating to finding 1 and 2 of its application.

Finding 1: The Minister erred in determining normal values using domestic sales which were not the most comparable like goods to the exported goods.

In model matching domestic sales of like goods with the relevant exported goods, the Commission's decision to rely on domestic grade [redacted], instead of grade [redacted], to compare to exports of [redacted], appears based on a view that the most important physical characteristic affecting the functional and commercial value of HSS is the minimum yield strength.

Ursine considers the Commission's findings in its investigation of hot-rolled structural steel (Report 223) to be directly relevant to the particular circumstances of the current HSS review (Review 419). In Report 223[1], the Commission states:

> **6.4.3 Models used for normal value**
>
> The Commission determined a comparable subset for calculating normal values should be derived on an exporter -by-exporter basis. It became evident to the Commission during exporter verifications that the circumstances of each exporter

[1] Report 223, para 6.4.3, page 30-32.

are varied in terms of the HRS in each exporter's domestic market. This is highlighted by findings of the Commission that:

- not all steel grades are manufactured and sold across all domestic markets (for example SM490 grades);
- not all products have the same actual physical characteristics across different markets, nor are all the relevant standards universally identical;
- **whilst goods satisfy the minimum requirements prescribed in the relevant standards, verified evidence demonstrates actual physical characteristics to which the products are produced can be materially higher**; and
- **exporters commonly produce versatile HRS capable of satisfying multiple standards at the semi-finished product level (for example, blooms suitable for rolling HRS to several standards)15 and finished product level (for example, dual grade SS/SM400 in the Thai market)16 across markets**.

These findings support the Commission's decision to assess the comparable subset of goods for normal values on an exporter -by-exporter basis.

…

The Commission examined a selection of test certificates, from several exporters. It was identified that when comparing the actual export sales of G300 to SM490 standards in the domestic market, that the export sales did not consistently comply with all of the prescribed requirements of the standards, including mechanical properties and chemical composition. On this basis, the Commission finds that SM490 grades may not be the most comparable goods to the goods under consideration.

…

Additionally, in circumstances where the exported goods and a subset of domestic goods are produced and sold from the same semi-finished products (for example, blooms), it would be unreasonable for the Commission to conclude that there would be a more appropriate subset of like goods in the domestic market for normal value than those produced from the same semi-finished products as the exported goods. This finding considers the physical similarities, the interchangeable nature of the goods, and the production likeness (including production costs), and in the Commission's view is a much stronger indicator than a mere comparison of minimum production standards.

[Emphasis added]

Consistent with the Commission's findings and reasoning outlined above, Ursine contends that HSS export grade [redacted] is most similar to domestic grade [redacted]. This position is supported by the manufacturing process utilised by Ursine and submitted evidence in the form of mill test certificates, which demonstrates that [redacted] and [redacted] are produced from the same coil feed material, resulting in the most closely resembling physical characteristics.

Finding 2: The Minister erred in determining the incorrect date of sale of the exported goods.

Ursine contends that the Commission erred by determining that the invoice date of its export sales was the date of sale when in fact, the material terms of sale were established and confirmed at the date of order/contract acceptance. This is supported by the submitted evidence which confirms:

- Ursine's domestic and export prices are based on [redacted];
- upon execution of the sale contract by Ursine and the Australian customer, the price and other material terms of sale become fixed and binding, which may not change, and did not change in the actual course of business during the whole of the review period;
- following execution of the export sales contracts, Ursine will enter into contracts for the purchase of galvanised coil to commence production of the exported goods;
- the material terms of all export contracts during the review period were unchanged between execution of the order and the subsequent invoice.

Therefore, where a domestic and export order are executed in the same month, there will be little difference in the price considerations for comparable products. As such, the material terms of sale are fixed upon execution of the export sales contract.

It is noted that in its conference meeting with the ADRP Member on 1 August 2018, the Commission '*indicated evidence needed to have been provided to confirm that at the contract date the price was fixed in stone and that it was not to be varied in any way or given any opportunity for the contract to be cancelled.*' Whilst all of the material terms of Ursine's export sales were indeed fixed upon execution of the sales contract and therefore met the extremely high standard set by the Commission, Ursine considers that the Commission's approach to determining the true date of sale to be fundamentally flawed.

Of relevance to this point is the similar practice of the US dumping administration in determining the date of sale, which essentially mirrors that of the Commission's current practice and was the subject of the review by the US Court of International Trade (CIT). In *Nucor Corporation v United States*[2] (refer to **Non-confidential Attachment A**), CIT noted that:

> …under Commerce's approach in the Remand Results here, even a single change to a material term in a single transaction - without regard to the nature of the change or the circumstances surrounding it – may require and across-the-board use of invoice date as the date of sale for all sales to all customers during the period of review. As ICDAS observes, such an approach is fundamentally at odds with the antidumping statute and regulations, as well as Commerce's past practice, because it involves nothing more than a superficial, black-and-white, all-or-nothing determination whether there has been any change in any material term in any contract at issue, rather than a reasoned, case-specific, fact-intensive analysis

[2] *Nucor Corp. v. United States*, No. 05-00616 (Ct. Int'l Trade 2009), page 66.

> as to when the parties had a meeting of the minds on the material terms of sale, which is what the law requires.

Further, the CIT[3] noted that:

> Commerce itself has labelled as "untenable" the "blanket use [of invoice date] as the date of sale in an antidumping analysis" where "the invoice date does not reasonably approximate the date on which the material terms of the sale were [established]." And Commerce itself has recognised that its regulations do not tie the agency's hands, but instead afford Commerce the "flexibility" needed to determine, and to use in its analysis as the date of sale, that date which best reflects the date on which the parties reached a meeting of the minds on the material terms of sale.

The CIT[4] added that '*[f]lexibility in Commerce's date of sale analyses is more than a mere regulatory preference; it rises to the level of a statutory mandate.*'

The first relevant aspect of the CIT's finding is that the date of sale requires establishing the date on which the parties reached a meeting of the minds on the material terms of sale. Applied to Ursine's exports, the evidence on the record clearly shows that agreement and meeting of the minds occurred upon execution of the sales contracts which was the trigger for Ursine to purchase the raw materials, commence production and prepare to deliver the goods to the customer's nominated port and by the customer's nominated date.

Further, whilst the investigating authority has discretion for presuming that the invoice date is the date of sale, this is merely the starting point for the Commission's analysis. However, it is clear from the Commission's comments to the ADRP, that its analysis is limited to a superficial and rigid examination and comparison of relevant documents to determine whether even a single term has been altered on all of the sales between the execution of the sales contracts and the subsequent invoice. This exact point was further addressed by CIT which noted[5]:

> … if the date of sale analysis conducted by Commerce in this case actually were the rule – the nature of the information provided to Commerce in questionnaire responses and the information confirmed by the agency through its verification process would be radically different. Rather than analyzing the nature of a respondent's *sales process*, Commerce would simply survey a respondent's documentation to determine whether there had been *any* change in *any* material term of sale in *any* contract at issue. But the latter was not Congress' intent; nor is it reflected in Commerce's own date of sale regulation.
>
> [Original emphasis]

Yet this cursory check of documentation and the Commission's apparent expectation that exporters will submit all documents for all contracts during the whole of the review period, is the extent of the Commission's analysis. In Ursine's view, the Commission fell well short of displaying the '*affirmative information-gathering burden on the investigating authority*'. Instead, the Commission was passive throughout the process as it made no attempt to

[3] Ibid, page 74.

[4] Ibid, page 75.

[5] Ibid, page 66-67 (footnote 34).

request any further documentary evidence of Ursine, after the evidence already submitted supported its statements that the material terms of sales did not change following the execution of the contract.

In response to the Commission's comments about the sufficiency of evidence submitted during the review, it should firstly be noted that the Commission has incorrectly advised the ADRP Member that '*[i]n the course of the desk top verification, a further five Australian sales contracts were examined.*' Ursine provided the requested documentation for six selected export sales.

Second, Ursine clearly explained and highlighted in its written exporter questionnaire response and Australian sales listing at Exhibit B-4 lodged on 28 August 2017, that '*the date of sale for the purpose of comparison with normal value should be the date of the sales contract*.' On 18 October 2017, the Commission commenced verification of Ursine's submitted information by requesting sales and cost reconciliation templates to be completed and returned.

On 23rd October 2017, the Commission then informed Ursine:

> We are requesting you to provide a complete set of all relevant documentation including;
>
> - the purchase order, order confirmation, and contract of sale;
> - commercial invoice;
> - bill of lading, export permit for exports;
> - freight invoices in relation to movement of the goods from factory to domestic purchaser/Australia, including inland freight contract;
> - marine insurance expenses;
> - letter of credit, and bank documentation, proving payment; and
> - costs for Hot Rolled coil (HRC)

On 1 November 2017, Ursine provided the Commission with all requested source sales documentation. On 13 December 2017, the Commission provided Ursine with excel spreadsheets containing its preliminary dumping margin calculations, but no verification report accompanied the calculations which would explain and set out the Commission's reasoning as is their normal practice.

Ursine submitted its comments to the Commission on 3 January 2018 in which it queried the Commission's decision on date of sale as '*[i]t is unclear whether the Commission has examined the submitted export sales documentation for the selected sales and determined that the evidence did not support the order date being the date of sales, or what other information it had regard to disregard this claim.*' On 14 February 2018, the Commission responded to Ursine's comments repeating the various items and issues outlined in its Dumping & Subsidy Manual which are required to be addressed.

In its submission in response to SEF 419, Ursine responded to each of these items and provided a detailed explanation of the negotiation, ordering, raw material procurement, finished goods inventory, sales and delivery processes that take place. It is disingenuous for the Commission to suggest that Ursine was not proactive in demonstrating that order date was the date of sale.

All submitted evidence demonstrated and supported this view. Notwithstanding Ursine's view that a simple check of documents across all exports contracts during the review period

is a flawed approach to determining whether a meeting of minds has been reached between parties, if the Commission's preference is to adopt this limited analysis, then it should clearly inform parties in its exporter questionnaire of this evidentiary standard, or at the very least, notify them as part of the verification process. This requirement to inform parties of the information necessary to ensure a fair comparison is reflected in Article 2.4 of the Anti-Dumping Agreement.

On the related issue of the distortion in dumping margin caused by the reliance on a date of sale based on invoice date, whilst the production costs of the goods reflect the order date when raw materials are purchased, Ursine again reiterates its view that if the date of sale remains unchanged, then an adjustment is required to be made to ensure export and domestic sales are properly compared.

The proposed adjustment is consistent with the US practice of 'temporal matching of costs and prices'. The US investigating authority will aim to match sales during a discrete period to actual costs incurred over the same period. This is reasonable as long as the period between manufacture and sale is not overly long, and costs do not vary significantly over the period.

However, temporal matching of prices to costs becomes an issue where either prices or costs are exhibiting significant and erratic variations. The US authority addresses erratic variations in prices or costs by lagging the manufacturing date behind the date of sale. The decision to lag manufacturing costs behind the domestic date of sale is consistent with the adjustment proposed by Ursine in its application.

Where the manufacturing date of the domestic and export sales lag behind each other due to the long lead time between export order confirmation and export sale, the domestic sales should be adjusted to reflect the variation in costs over the lagging period between manufacturing and sale.

Yours sincerely

John Bracic