

Canberra

6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia
+61 2 6163 1000

Brisbane

Level 4, Kings Row Two
235 Coronation Drive
Milton, Brisbane
QLD 4064 Australia
+61 7 3367 6900

Melbourne

Level 39
385 Bourke Street
Melbourne
VIC 3000 Australia
+61 3 8459 2276



commercial + international

16 June 2022

The Director
Investigations 1
Anti-Dumping Commission
GPO Box 2013
Canberra
Australian Capital Territory 2600

By email

Dear Director

Investigation 584 – Merchant bar from Taiwan thyssenkrupp response to SEF

Our client thyssenkrupp Materials Australia Pty Ltd (“**thyssenkrupp**”) wholeheartedly concurs with the preliminary findings of the Commission published in the Statement of Essential Facts (“SEF”) dated 20 May 2022.¹ **thyssenkrupp** agrees that the injury caused to an Australian industry, whether or not caused by dumping, is negligible. Consequently, **thyssenkrupp** urges the Commission to terminate the investigation in accordance with Section 269TDA(13) of the *Customs Act 1901* (“the Act”) as soon as possible.

The Commission’s methodical consideration of the Australian industry’s claims regarding the materiality of injury, causation and threat of material injury is realistic and logical. Importantly, due regard has been paid to the *Ministerial Direction on Material Injury* (“the Direction”) given by the Minister to the Commissioner under Section 269TA(1) of the Act.² The key principle cited in the SEF, in relation to the question of whether the Australian industry suffered material injury, is that injury caused by dumping must be “*greater than that likely to occur in the normal ebb and flow of business*”.³

¹ EPR 584, Document Number 41, (“SEF 584”).

² Minister for Home Affairs. 17 April 2012. *Ministerial Direction on Material Injury 2012*. Published as Australian Customs Dumping Notice No. 2012/24 (“Direction”).

³ Direction, page 2.

NON - CONFIDENTIAL

A No “material injury”

The facts of this investigation are peculiarly suited to the threshold question of whether fluctuations in the Australian industry’s economic indicia were “*greater than that likely to occur in the normal ebb and flow of business*”. Firstly, the Commission assessed the economic condition of the Australian industry and observed “fluctuation” in a range of economic indicators.⁴ Secondly, since this investigation is an original investigation, the Commission was able to conduct a “coincidence analysis”. This method involved a comparison of the Australian industry’s performance over a range of indicia during the injury analysis period (from 1 April 2017) with its performance in the investigation period (1 April 2020 to 31 March 2021). The Commission’s finding is that the Australian industry’s decline in certain economic indicators during the investigation period were within the “*normal ebb and flow of business*”, since the fluctuations in the economic indicators were “*within a range or upper and lower limits during the broader injury analysis period*”.⁵ In this regard, we note that our letter to the Commission dated 1 October 2021 pointed out that material injury requires consideration of the “whole period”,⁶ and not only a selection of one or other period, such as only specific months in a period. Both the sharp increase in steel costs and the diminishing of the dumping margins, as the exporters adjusted their prices, are properly noted by the Commission.

The picture presented by the evidence exemplifies a flow, and an ebb, and a return to a flow, over the investigation period. Further, the ebb and flow was no different (“*within a range*”) to that experienced in previous years of the injury analysis period.

As stated by the Commission:

*The commission has analysed the Australian industry’s economic indicators throughout the investigation period and observed a decline in certain economic indicators in the last two quarters of this period, namely in relation to market share, profits and profitability. The commission then considered these two quarters in the context of the longer injury analysis period in order to determine whether they were evidence of material injury or whether these changes were not greater than the normal ebb and flow of business. The commission observed that the Australian industry’s economic indicators fluctuated during the injury analysis period. It also observed that the lowest levels of market share, profits and profitability recorded during the investigation period were within a range of upper and lower limits achieved by the Australian industry throughout the broader injury analysis period. The commission is therefore preliminarily satisfied that there was ebb and flow of business in the injury analysis period, including during the investigation period, which account for the variations in economic indicators.*⁷

The perception that any dumping was unrelated to the financial condition of the Australian industry – ie, that it was “business as normal” – is further exemplified by this passage from the SEF:

The commission also notes that the point at which the Australian industry’s profit margins were at their lowest coincides with the point at which prices of imported goods were higher such that

⁴ SEF 584, page 38.

⁵ SEF 584, page 7.

⁶ EPR 584, Document 17, page 5.

⁷ SEF 584, page 7.

*the margins of price undercutting and dumping were also at their lowest during the investigation period. These observations further demonstrate that the decline in profits and profitability are likely attributable to factors other than dumping.*⁸

B No dumping “causation”

Having established on a preliminary basis that the Australian industry had not *suffered* material injury, the Commission went on to find that dumping had not *caused* material injury:

*The Commissioner has weighed up the available evidence and is preliminarily satisfied that material injury has not been caused or threatened to the Australian industry as a result of dumped goods exported to Australia from Taiwan.*⁹

thyssenkrupp agrees with the Commission’s finding that too-low prices cannot be assumed to be as a result of dumping, nor automatically attributed to dumping. The Commission’s finding echoes **thyssenkrupp’s** concern that any declines in the Australian industry’s profit or profitability were a result of forgone price increases:

The commission acknowledges that InfraBuild has presented evidence of continued price undercutting following the investigation period. However, the commission also notes price undercutting is not an emerging characteristic of the Australian market for merchant bar. Rather, price undercutting was present throughout the investigation period, and as discussed in section 8.6, imports entered the Australian market at higher prices in the final quarter of the investigation period such that the level of price undercutting narrowed and the dumping margin decreased to its lowest point. At the same time, the Australian industry’s profits and profitability were at their lowest recorded level during the investigation period (albeit remaining profitable). The commission therefore considers that any foregone price increases by the Australian industry cannot be sufficiently attributed to price undercutting.¹⁰ [underlining supplied]

thyssenkrupp views this as a correct application of the principle in the Direction that injury caused by factors other than dumping, such as factors within the Australian industry’s control, “*must not be attributed to dumping*”.¹¹

C No “threat” of material injury

The Commission has found that there is nothing to suggest that material injury to the Australian industry is threatened, because there was no evidence, and is no evidence (also considering a period after the investigation period), of “*foreseeable and imminent*” injury. To do so, the Commission considered these factors:

⁸ SEF 584, page 9.

⁹ SEF 584, page 55.

¹⁰ SEF 584, page 63.

¹¹ Direction, page 3.

- volume – “the commission has examined import volumes of the goods following the investigation period and the capacity utilisation of exporters”;¹² and
- price – “by the final quarter of the investigation period, imports were entering the Australian market at higher prices”.¹³

To date, the Australian industry has based its claim of a threat of material injury on the prospect of higher volumes of dumped imports from Taiwan in the future. As we said in **thyssenkrupp’s** submission, the allegation is itself insufficient because:

*Postulation of a future situation where a threat might emerge bears no resemblance to the legislative test for a “threat” argument to succeed, so far as we understand it.*¹⁴

This has been a long investigation – over 13 months have lapsed since the initiation of the investigation in May 2021. The Commission has undertaken a thorough analysis of the relevant issues. It is in the interests of business, including that of the Australian industry, for this matter to be disposed of as soon as possible, so that certainty and fair competition can be restored to the Australian market.

For all of these reasons, **thyssenkrupp** supports the termination of the investigation at the earliest possible opportunity.

Yours sincerely



Daniel Moulis
Partner Director

¹² SEF 584, page 9.

¹³ SEF 584, page 9.

¹⁴ EPR 584, Document Number 17, page 10.