



Australian Government
Anti-Dumping Review Panel

ADRP Report No. 126

Hollow Structural Sections from the Kingdom of
Thailand

October 2021

<https://www.adreviewpanel.gov.au>

Contents

| | |
|---------------------------------------|----|
| Contents | 2 |
| Abbreviations..... | 3 |
| Summary..... | 6 |
| Introduction | 6 |
| Background..... | 6 |
| Conduct of the Review | 8 |
| Grounds of Review..... | 10 |
| Consideration of Grounds..... | 11 |
| ATM..... | 11 |
| Orrcon..... | 78 |
| Recommendations and Conclusions | 78 |

Abbreviations

| Term | Meaning |
|-------------------|---|
| Act | <i>Customs Act 1901</i> |
| ADA | Anti-Dumping Agreement |
| ADC | Anti-Dumping Commission |
| AND | Anti-Dumping Notice |
| AUD | Australian Dollar |
| AB | Appellate Body of the World Trade Organisation |
| Atlantic | Atlantic Pipe Company Limited |
| ATM | Austube Mills Pty Ltd |
| ABF | Australian Border Force |
| First Conference | Conference held with ATM on 3 September 2020 |
| Second Conference | Conference held with the ADC on 6 November 2020 |
| Third Conference | Conference held with ADC on 1 October 2021 |
| CTMS | Cost to Make and Sell |
| Commissioner | The Commissioner of the Anti-Dumping Commission |
| Dumping Duty Act | Customs Tariff (Anti-Dumping) Act 1975 |
| FOB | Free on board |
| GAAP | Generally accepted accounting principles |
| Goods | The goods the subject of the application for review, being Hollow Structural Sections |

| | |
|---------------------|---|
| GOT | Government of Thailand |
| HRC | Hot rolled coil |
| HSS | Hollow structural sections |
| IDD | Interim dumping duty |
| Injury Direction | Ministerial Direction on Material Injury 2012 |
| inquiry period | 1 October 2018 to 30 September 2019 |
| INV 254 | ADC Investigation No. 254 |
| Manual | Dumping and Subsidy Manual November 2018 |
| Minister | The Minister for Industry, Energy and Emissions Reduction |
| MCCs | Model Control Codes |
| NIP | Non-injurious price |
| Orrcon | Orrcon Manufacturing Pty Ltd |
| Pacific Pipe | Pacific Pipe Public Company Limited |
| CIO Regulation | <i>Customs (International Obligations) Regulation 2015</i> |
| REP 254 | <i>Anti-Dumping Commission Report No. 254</i> |
| REP 445 | <i>Anti-Dumping Commission Report No. 445</i> |
| REP 532 | Anti-Dumping Commission Report No. 532 |
| Review Panel | Anti-Dumping Review Panel |
| Reviewable Decision | The decision by the then Minister for Industry, Science and Technology not to secure the continuation of the anti-dumping measures applying to Hollow Structural Sections exported from the Kingdom of Thailand |
| Saha Thai | Saha Thai Steel Pipe Public Company Limited |
| Samchai | Samchai Steel Industries Public Company Limited |
| SCM | Agreement on Subsidies and Countervailing Measures |

| | |
|---------------|--|
| SEAISI | Southeast Asian Iron and Steel Institute |
| SEF | statement of essential facts |
| SEF 532 | <i>Statement of Essential Facts No. 532</i> |
| Then Minister | The then Minister for Industry, Science and Technology |
| Thailand | the Kingdom of Thailand |
| TPP | Thai Premium Pipe Co Ltd |
| WTO | The World Trade Organization |

The Review Panel corrected minor typographical errors on pages 24, 70, 73, 76, 84, 86 and 87 prior to the Minister's decision.

Summary

1. This is a review of the decision by the then Minister for Industry, Science and Technology (“the then Minister”) not to secure the continuation of anti-dumping measures in respect of Hollow Structural Sections (“HSS”) exported from the Kingdom of Thailand (“Thailand”) (“the Reviewable Decision”). The applicants for the review are:
 - Austube Mills Pty Ltd (“ATM”); and
 - Orrcon Manufacturing Pty Ltd (“Orrcon”).
2. For the reasons set out in this report, I consider that the Reviewable Decision is the correct and preferable decision. I recommend that the Reviewable Decision be affirmed and that the then Minister’s Decision not to secure the continuation of anti-dumping measures relating to HSS from Thailand be confirmed.

Introduction

3. The applicants applied under s.269ZZC of the *Customs Act 1901* (the Act) for a review of the decision of the then Minister relating to the continuation of anti-dumping measures pursuant to s.269ZHG(1) of the Act in respect of HSS exported from Thailand.
4. The applications were accepted and notice of the proposed review, as required by s.269ZZI, was published on 11 September 2020.
5. The Senior Member of the Anti-Dumping Review Panel (“Review Panel”) directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

6. Anti-dumping measures were originally imposed on HSS exported to Australia from Thailand by public notice on 19 August 2015 following an investigation by the Anti-

Dumping Commission (“ADC”).¹ The investigation was initiated following an application by ATM.

7. A review of the measures applying to HSS exported to Australia from Thailand was initiated on 19 October 2017.² Following the review, there were changes to the variable factors effective from 27 June 2018 as set out in ADC Report No. 445 (“REP 445”).³ The following table summarises the anti-dumping measures applying to exports of HSS to Australia from Thailand as a result of the most recent review of measures, the subject of REP 445:

| Exporter | Form of measure | Fixed component of interim dumping duty |
|---|-------------------|---|
| Atlantic Pipe Company Limited | floor price | 0% |
| Pacific Pipe Public Co., Ltd | <i>ad valorem</i> | 5.6% |
| Saha Thai Steel Pipe Public Company Limited | floor price | 0% |
| Thai Premium Pipe Co., Ltd | <i>ad valorem</i> | 0.7% |
| Uncooperative and all other exporters | <i>ad valorem</i> | 8.7% |

Table 1: Australia anti-dumping measures applying to HSS from Thailand

8. On 25 October 2019, the Commissioner of the ADC (“Commissioner”) also initiated a review of the anti-dumping measures applying to HSS exported from the People’s Republic of China (China), the Republic of Korea (Korea), Malaysia, Taiwan and Thailand.⁴
9. The anti-dumping measures applicable to exports of HSS to Australia from Thailand were due to expire on 19 August 2020. The inquiry was initiated on 15 November 2019 following consideration by the ADC of applications lodged by ATM and Orrcon seeking the continuation of the anti-dumping measures.⁵ The inquiry period was from 1 October 2018 to 30 September 2019 (“inquiry period”).
10. A Statement of Essential Facts (“SEF 532”) was published by the ADC on 20 May 2020. The ADC subsequently made a report to the then Minister, Anti-Dumping

¹ ADC Report No. 254 (REP 254).

² ADN 2017/136.

³ ADN 2018/88.

⁴ ADN 2019/132 (Document #03, EPR 529).

⁵ ADN 2019/141

Commission Report No. 532 (“REP 532”). The ADC calculated the following dumping margins in Investigation No. 532:

| Exporter | Dumping Margin |
|---|----------------|
| Pacific Pipe Public Co., Ltd | Negative 4.3% |
| Saha Thai Steel Pipe Public Company Limited | Negative 13.1% |
| Thai Premium Pipe Co., Ltd | Negative 4.5% |
| Uncooperative and all other exporters | Negative 4.3% |

Table 2: Dumping margins calculated in Investigation 532

11. The then Minister accepted the recommendations of the Commissioner and declared that she had decided not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand.⁶ Notice of the then Minister’s decision was published on 27 July 2020.

Conduct of the Review

12. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision or revoke it and substitute a new specified decision. 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.
13. 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.
14. 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. A conference was held with representatives of

⁶ ADN 2020/70.

⁷ See s.269ZZK(4).

ATM for the purpose of obtaining further information and clarification in relation to the application of ATM on 3 September 2020 pursuant to s.269ZZHA of the Act (“the First Conference”). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act (“the First Conference Summary”). A further conference was held with the ADC for the purpose of obtaining further information and clarification in relation to the review on 6 November 2020 pursuant to s.269ZZHA of the Act (“the Second Conference”). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act (“the Second Conference Summary”).

15. The time for submissions by interested parties under s.269ZZJ of the Act is 30 days after the publication of the notice under s.269ZZI. As the Public Notice was given on 11 September 2020 the time for submissions expired on 12 October 2020. Submissions were received in this period from:

- the ADC; and
- ATM.

16. After reviewing the applications, submissions and other relevant information, on 11 November 2020, pursuant to s.269ZZL of the Act, I requested the ADC to reinvestigate various findings in REP 532 (“Reinvestigation Request”). I requested the ADC’s report in this regard to be completed by 29 January 2021. The ADC in a letter dated 21 January 2021, requested an extension to provide the reinvestigation report, which was granted by the Review Panel for a period of 130 days to 8 June 2021. The ADC in a letter dated 3 June 2021, requested a further extension to provide the reinvestigation report, which was granted by the Review Panel for a period of 51 days to 29 July 2021. The ADC in a letter dated 28 July 2021, requested a further extension to provide the reinvestigation report, which was granted by the Review Panel for a period of 35 days to 2 September 2021. The Review Panel in a letter dated 31 August 2021, further extended the period to provide the reinvestigation report for a period of 14 days to 16 September 2021. The Reinvestigation Request and correspondence relating to the extensions were made publicly available.

17. A copy of the report of the Reinvestigation of Certain Findings in REP 532 was received on 16 September 2021 (“Reinvestigation Report”), is attached as Attachment A.1 to this report. In the Reinvestigation Report there is reference to the ADC’s preliminary findings in the reinvestigation which were published on 30 June 2021 in the ADC’s Preliminary Report, Reinvestigation of Certain Findings in Report 532 (“Preliminary Reinvestigation Report”). Interested parties were invited to lodge submissions concerning the ADC’s preliminary findings, which the ADC took into consideration in the Reinvestigation Report.
18. A further conference was held pursuant to s.269ZZHA of the Act on 1 October 2021 with the ADC for the purpose of obtaining further information in relation to the reinvestigation by the Commissioner of the allocation of hot rolled coil (“HRC”) import duties in relation to HSS exported from Thailand in the Reinvestigation Report (“the Third Conference”). A non-confidential summary of the information obtained at the conference was made publicly available in accordance with s.269ZZX(1) of the Act (“the Third Conference Summary”).
19. In conducting this review, I have had regard to the applications (including documents submitted with the applications) and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 532 and documents and information relevant to the review which was referenced in REP 532, including SEF 532 and to documents referenced in SEF 532. I have also had regard to relevant information obtained at conferences and conclusions reached at the conferences based on relevant information. As required by s.269ZZK(4A), I also have had regard to the report by the Commissioner provided under s.269ZZL(2).

Grounds of Review

20. The grounds of review relied upon by the applicants, which the Review Panel accepted, are as follows:
21. ATM:
 - i. The Commissioner failed to provide the Minister with a sufficient and reasonable explanation of the reason why the degree of the negative

dumping margin found during the inquiry period was likely to continue beyond the expiry of the measures;

- ii. The Commissioner failed to provide the Minister with a sufficient and reasonable explanation of the reason why other exporters, not examined, are unlikely to recommence dumping if the measures are allowed to expire;
- iii. The Commissioner's analysis of price competition in the Australian market is flawed;
- iv. The Commissioner's recommendation to the Minister failed to apply the correct meaning to the prospective nature of the term "likely" using past or present evidence in relation to the assessment of the 'prevailing economic conditions in Thailand of the Thai domestic market' and the likelihood of dumped exports from Thailand recurring; and
- v. The Commissioner erred in his recommendation to the Minister with respect to the determination of normal values and dumping margins for all exporters from Thailand by failing to take into account the higher cost of HRC used for domestic sales.

22. Orrcon

- i. The Commissioner cannot be satisfied that future HSS exports from Thailand are likely to be at undumped prices;
- ii. The expiry of the anti-dumping measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the injury that the anti- dumping measure is intended to prevent.

Consideration of Grounds

ATM

23. In the discussion below I consider ATM's five grounds of review.

Ground 1: Failure to provide a sufficient and reasonable explanation why the degree of negative dumping is likely to continue beyond expiry date

ATM Arguments

24. ATM contends in its application for review that the Reviewable Decision is not the correct or preferable decision as the Commissioner failed to provide the Minister with a sufficient and reasonable explanation of the reason why the degree of the negative dumping margin found during the inquiry period was likely to continue beyond the expiry of the measures
25. ATM refers to the ADC's assessment of the likelihood of dumping and material injury continuing or recurring, in REP 532, which found that all HSS exported from Thailand to Australia had been at undumped prices during the inquiry period and therefore the dumping found in ADC Report No. 254 ("REP 254") had not continued, and further stated:

The Commission considers that, whilst the presence (or absence) of dumping during the inquiry period may be indicative of future behaviour, this factor alone is not determinative.

In this case, the Commission considers that the degree of the negative dumping margins of all the Thai exporters indicates that each could have reduced their export prices even further and still not have dumped during the inquiry period.⁸ [emphasis added by ATM]

26. ATM contends that the reliance on the degree of the negative dumping margins found in the inquiry period has significantly and disproportionately influenced the ADC's findings on whether dumping and material injury will continue or recur. ATM submitted that given Thailand has no global competitive advantage as a producer of HSS products, the ADC failed to investigate, (a) the factors that have led to the size of the negative dumping margin to determine if the result is an outlier, or (b) if it is sustainable and likely to continue beyond the expiry of the measures.

⁸ REP 532, page 62.

27. ATM submits that World Trade Organisation (“WTO”) jurisprudence supports its contention that the ADC has an obligation to actively investigate rather than simply report, and in this regard refers to Appellate Body (“AB”) Report, *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*⁹ (“US – Corrosion-Resistant Steel Sunset Review”).¹⁰
28. ATM contends that the degree of the negative dumping margin found in the inquiry period in relation to Saha Thai Steel Pipe Public Company Limited (“Saha Thai”) is highly unusual for a commodity product and unlikely to be sustainable.¹¹ In its s.269ZZJ submission ATM pointed out that positive dumping margins of double digits on the other hand are not unusual as exporters may significantly reduce their prices to increase sales volumes and gain market share.¹² According to ATM, if the ADC’s finding of a negative dumping margin of 13.1 per cent for Saha Thai was correct, it means that it is significantly more profitable (at least 13.1 per cent more) for Saha Thai to sell into the Australian market than the Thai domestic market. ATM submits that if this was a sustainable or predictable outcome, commercial behaviour would indicate that Saha Thai would have increased its sales to Australia, especially given Saha Thai’s excess capacity and its reported comparative price advantage against all other exporters. However, according to ATM, despite the reported higher profitability of exports sales of HSS to Australia and significant excess capacity, Thai exporters’ market share fell by nearly 50 per cent across the tenure of the measures compared to the (original investigation) period in which they were found to be dumping (i.e. when export sales to Australia were less profitable). In its s.269ZZJ submission, ATM submitted that if the ADC was unable to determine if the degree of negative margin is likely to be sustainable beyond the investigation period, the ADC should have performed an analysis of Thai exporters’ past behaviour in different economic circumstances to determine if it was more probable than not that the exporters would likely recommence dumping and that their dumping would cause material injury.¹³

⁹ WT/DS244/AB/R.

¹⁰ WT/DS244/AB/R, para. 111. Also see AB Report, DS268: *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (“US – Oil Country Tubular Goods Sunset Reviews”), WT/DS268/AB/R, para. 179.

¹¹ See ATM’s application for review, page 2.

¹² See ATM’s s.269ZZJ submission, page 2.

¹³ See ATM’s s.269ZZJ submission, page 2.

29. ATM set out in its s.269ZZJ submission what it considered to be the information and evidence that the ADC did not appear to have proper regard to in considering whether it was likely that dumping would continue or recur, comprising: past behaviour of the Thai exporters in the Australian market; the export focus of the Thai exporters; the effect of the measures on export behaviour; and expected commercial behaviour of exporters.
30. This information and data is set out in detail in ATM's s.269ZZJ submission, which ATM contended indicated a clear link between the threat and imposition of anti-dumping measures and the volume of Thai exports to Australia, and also demonstrated on past behaviour that Thai exporters have the ability to quickly increase volumes by substantial amounts.¹⁴ In its s.269ZZJ submission ATM also submitted that in contrast, in assessing the likely behaviour of Thai exporters in the Australian market if measures were not to be continued, the ADC in REP 532 appeared to have relied on the market share of Thai exporters during the period when measures were in place and a single seemingly unsupported statement by the main Thai exporter, Saha Thai, that it has, "exclusively supplied one Australian customer, with no evidence of a strategy to expand its export volumes to Australia". ATM noted that the ADC had considered, "Saha Thai's claim to be supported by the available evidence."¹⁵ ATM submitted in its s.269ZZJ submission that it is not clear what evidence the ADC is referring to as Saha Thai did not provide any evidence to support its claim.¹⁶
31. ATM submitted in its s.269ZZJ submission that whilst there was no evidence of a strategy to expand export volumes to Australia there was available evidence to show that it was likely that Saha Thai would expand its export volumes to Australia if the measures were not to be continued, such as, evidence demonstrating that the Thai manufacturers: were export-orientated; had spare export capacity; had continued to invest in export capability; had reduced access to their biggest export market, the United States of America.¹⁷

¹⁴ See details of this information and evidence set out ATM's s.269ZZJ submission, pages 2 -3, which also referred to ATM's submission to the ADC of 15 May 2020 (Document #022 of EPR 532).

¹⁵ Reference was made to REP 532, page 47.

¹⁶ See ATM's s.269ZZJ submission, pages 4 – 5.

¹⁷ See details and references of evidence in this regard in ATM's s.269ZZJ submission, page 5.

32. ATM also pointed out in its s.269ZZJ submission that the ADC's focus on the Thai exporters small portion of the market, low volumes and flat and stable shares and volumes appeared to be in contradiction to the Ministerial Direction on Material Injury 2012 ("Injury Direction") which states that:

I note that in cases where the dumped or subsidised imports hold a small share of the Australian market, it may be difficult to demonstrate material injury. I direct that no minimum standard should be used to determine whether dumped or subsidised imports have a sufficient share of the Australian market to cause material injury. [Emphasis added by ATM]

33. ATM submitted that it appeared that the ADC relied on the "low volume", "small share", "small portion" and "market share of less than 5 per cent" of Thai exporters to determine that material injury will not continue or recur. ATM submitted further that in addition, the ADC's use of the terms of "essentially flat" and "stable" is contradicted by the evidence which shows significant changes in absolute terms with changes in Thai export volumes since the imposition of the measures in August 2015 showing a [REDACTED] per cent decrease from 2015/16 to 2016/17, a [REDACTED] per cent increase from 2015/16 to 2017/18 and a [REDACTED] per cent increase from 2015/16 to 2018/19.¹⁸
34. ATM also pointed out in its s.269ZZJ submission that the fact that Saha Thai had only one Australian customer was not a significant factor or evidence of no strategy to expand export volumes. ATM had noted in its application for review that the sole importer of Saha Thai's exports, has alternative supply options, importing HSS from other exporters, who will most likely continue to be subject to anti-dumping measures after Review No. 529 is finalised. ATM submitted that should the measures not be continued for Saha Thai, there would be an incentive for this importer to move import volumes from the other exporters, that will continue to be subject to measures, to Saha Thai.¹⁹ ATM submits that the alternative supply options for the sole importer was the likely reason they did not buy from Saha Thai when the floor price was effective.

¹⁸ See ATM's s.269ZZJ submission, page 4.

¹⁹ See ATM's s.269ZZJ submission, page 5. Reference was made to Document #022 of EPR 532, page 3 (sic) [this should be a reference to page 6].

35. ATM also submitted that the effect of anti-dumping measures on Thai export volumes had also been noted, including a significant reduction in: the number of Thai HSS producers exporting to Australia; the tonnes of HSS exported from Thailand to Australia; and the market share of Thai HSS exported to Australia.²⁰
36. In its s.269ZZJ submission, ATM submitted that the Australian market for HSS is a price sensitive market as was found in the original investigation, ADC Investigation No. 254 (“INV 254”) and in Continuation Inquiry No. 379, which also found that:

*Previous investigations and reviews of measures by the Commission indicate that the HSS market is a commodity market and that price is the major factor in customers’ purchasing decisions.*²¹

37. ATM referred to the evidence it provided in its application to the ADC for the continuation of the measures and at verification that the Australian market for HSS continues to be a price sensitive market with price being the major factor in customers’ purchasing decision. It pointed out that the expected commercial behaviour of Thai exporters if the measures were not to be continued would be to increase export volumes to Australia. ATM submitted that given the price sensitivity of the Australian market the available evidence supported the view that Thai exporters would reduce export prices to gain increased export volumes to Australia if the measures were not to be continued.
38. ATM submitted further that, regardless of the margins found in REP 532, it was likely that those exports would be at dumped prices, and that this view was supported by the evidence and past behaviour of Thai exporters in export markets including that:
- Thai export volumes to Australia significantly increased between INV 177 when there were no measures to INV 254 when dumping was found;
 - Thai export volumes to Australia significantly decreased following the imposition of measures in INV 254;

²⁰ See details and references of evidence in this regard in ATM’s s.269ZZJ submission, pages 6 – 7.

²¹ Reference was made to REP 379, page 63.

- The Canadian expiry review into Thai exports of pipe, that includes products that are similar to HSS, found that “Thai exporters continued to export to Canada at dumped prices” and noted “The limited amount of imports may be attributed to exporters' inability to compete in the Canadian market at non-dumped prices.”; and
- The two most recently completed US Administrative Reviews on Thai exports of pipe that includes products that are similar to HSS found margins ranging from 28 per cent in 2016/17 and 5.32 per cent in 2017/18.²²

39. ATM also contends at Ground 5 (below) that those dumping margins have not been correctly determined and that the size of the margins may likely change with the appropriate corrections applied.²³
40. ATM submits that the Thai exporters' behaviour was influenced by the effectiveness of the measures. ATM contends that regardless of whether the dumping margins determined for the inquiry period remain negative, this is not a conclusive determinant in assessing the likelihood of recurrence of dumping, but rather evidence that the anti-dumping measures imposed following INV 254 have achieved their stated objective. ATM pointed out that the cessation of dumping following the imposition of measures is the intended function of the anti-dumping system and in this regard ATM referred to ADRP Report No. 70 where the ADC had recommended the continuation of the measures, whilst exports were found not to be dumped during the inquiry period by negative margins.”²⁴

²² See ATM's s.269ZZJ submission, page 6 which also made reference to ATM's original application to the ADC (Document #002 of EPR 532, pages 11 and 12). ATM pointed out that the measures, actions and findings by the US and Canada are relevant as the pipe products exported to the US and Canada by Thailand are made on the same mills by the same manufacturers using the same raw materials (HRC of varying grades) and using the same production process as the HSS exported to Australia.

²³ It should be noted that ATM's challenge of the normal value methodology in terms of its fifth ground of review resulted in the negative dumping margins of Saha Thai and TPP being reduced slightly (but still negative) as follows:

- Saha Thai negative 10.9 % (from negative 13.1 % in REP 532)
- TPP negative 2.3 % (from negative 4.5 per cent in REP 532)

There was no change to Pacific Pipe's dumping margin of negative 4.3 per cent.

²⁴ Reference was made by ATM to ADRP Report No. 70, “Hot Rolled Coil Exported from Japan, the Republic of Korea, Malaysia and Taiwan“, para. 19 on page 6.

41. ATM further referred to the AB report in *US – Corrosion-Resistant Steel Sunset Review* which noted that:

*In a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping.*²⁵

42. ATM submitted that there has been only one review of measures since INV 254, being Review 445 (REV 445) resulting in a floor price for Saha Thai, and that it is significant that the export data provided to the ADC shows that Thai export prices have not dropped below the floor price estimated for the Review period since the review of measures. ATM submits that it would appear that the floor price has acted as a buffer against export prices declining below a set value and this is a reasonable indication of the objectivity and effectiveness of the measures.
43. ATM submitted that the fall of the Australian market share of Thai exports since the imposition of the measures is a further indication of the effectiveness of the measures acting as a buffer against Thai exporters seeking to maintain or increase market share by lower export prices.
44. ATM submitted further that, as previously submitted to the ADC, available information on the public record shows that there were no duty assessments lodged for the two-year period applying from 19 August 2016 to 18 August 2018 in regard to HSS exported from Thailand when all exporters from Thailand were subject to ad valorem measures (Saha Thai's rate was 5.7 per cent). ATM estimated the value of the interim dumping duties payable on those exports at close to [REDACTED] dollars. According to ATM this is a substantial amount of duties for which no applications for duty assessments were made with the only reasonable explanation being that the exported goods were at dumped prices with no prospect of a refund of the interim dumping duties paid.²⁶

ADC position

45. The ADC in its s.269ZZJ submission referred to ATM's references to a number of past cases of the WTO which all note that the existence (or absence) of dumping is

²⁵ AB in *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

²⁶ EPR 532 Document #022, page 3.

not, by itself, determinative of the question of whether to continue anti-dumping measures. The ADC states that it agrees with this view, as noted in Section 7.4 of REP 532, which examined the evidence relevant to considering whether the measures in respect of HSS exported from Thailand ought to be continued.

46. The ADC submitted that the dumping margins found during the inquiry period are one factor that was considered in making the recommendations to the then Minister. It submitted that a range of other factors were examined. The ADC pointed out that it, however, did not examine whether Thai (or any other) exporters have a global competitive advantage, nor what that would mean for the Australian industry producing like goods and therefore the likelihood of injury continuing or recurring in the absence of the measures. The ADC points out that this question was not raised in submissions and the Commissioner did not consider that such an assessment, if undertaken, would have shed any additional light on the findings already made. The ADC also submitted that it did not consider that it is necessary to predict the likely degree of dumping (or its absence) if the measures were to expire and to do so would be entirely speculative.
47. The ADC referred to ATM's questioning whether the absence of dumping by Thai exporters was "sustainable" and therefore likely to continue beyond the expiry of the measures and submitted that it found that the undumped exports from Thailand were profitable, to essentially the same customers and in the same volumes as has occurred for the best part of the nine year period examined. The ADC submitted that it also found that there are few, if any, incentives for Thai exporters to alter their behaviour such that they would reduce their prices and commence dumping. The ADC submitted that it was unclear in what sense ATM considered this pattern of behaviour to be not "sustainable".
48. The ADC submitted that whilst ATM considered that the large negative dumping margin for Saha Thai was unusual for a commodity product, by the same reasoning a large positive dumping margin (such as those found in REP 254) would also be unusual and may not be "sustainable". The ADC did not accept ATM's thesis that, given the large negative dumping margin, "commercial behaviour" would result in Saha Thai's exports increasing to Australia. It submitted that as a general rule, the prices achieved in a market are a result (normally) of bargaining between an

importer (and the price it is willing to pay) and the exporter (and the price at which it is prepared to sell).

49. The ADC submitted that in any event, ATM's argument takes no account of any difference in prices offered by Saha Thai and those offered by other sources of supply (which are numerous), the relationships between the parties and whether the importer has any demand for additional volume. The ADC stated that it established that price is not the sole consideration of purchasers in the market and for completeness, if price was the sole consideration of purchasers, the Australian industry (which is able to command a price premium for shorter lead times and benefits from customers that prefer to support local production) would not have achieved the market share it did.
50. The ADC referred to ATM's claims that the absence of duty assessments for HSS exported from Thailand during the period from 19 August 2016 to 18 August 2018 indicates that HSS exported during that period was at dumped prices, and submits that it is not "the only reasonable explanation" and that importers may not apply for a duty assessment for a range of reasons. The ADC provided the example of an importer such as Thai Premium Pipe Co Ltd ("TPP") that may have not paid any interim dumping duty if the export prices had exceeded the floor price applicable at the time, and in other instances, an importer may not wish to devote resources to lodging an application, or may have been able to pass on the cost of the duties to its customers.
51. The ADC pointed out that it relied on verified data for the inquiry period and did not consider it appropriate to have regard to ATM's estimates for dumping which it alleges may have occurred in periods which the ADC did not examine. The ADC also did not consider that the absence of duty assessment applications, by itself, provides any probative evidence of patterns of behaviour which might indicate the likelihood of future dumping.

Consideration

52. ATM contends that the Commissioner failed to provide the Minister with a sufficient and reasonable explanation of the reason why the degree of the negative dumping margin found during the inquiry period was likely to continue beyond the expiry of the measures.

53. Subsection 269ZHF(2) of the Act explicitly requires that the Commissioner, “must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the Anti-Dumping measure is intended to prevent”. [emphasis added]
54. It is generally accepted that the “likely” test established under s.269ZHF(2) is interpreted to mean “more probable than not”.²⁷ WTO jurisprudence provides that the WTO Anti-Dumping Agreement (“ADA”) requires that a decision to continue measures must be based upon “a foundation of positive evidence”²⁸ and that such a decision should only be made, “if the evidence demonstrates the dumping would be probable if the duty were terminated-and not simply if the evidence suggests that such a result may be possible or plausible.”²⁹
55. Interpreting s.269ZHF(2) of the Act in accordance with the WTO jurisprudence referred to above would mean that the Commissioner must not recommend the continuation of the measure unless there is positive evidence to demonstrate that the recurrence of dumping is likely or probable. The way that this ground of review is formulated by ATM would appear to shift (and increase) the Commissioner’s burden (as articulated in s.269ZHF(2)) requiring him or her to provide sufficient and reasonable explanation of the reason why the degree of the negative dumping margin found during the inquiry period was likely to continue beyond the expiry of the measures. I disagree that this is what was required of the Commissioner. The question for consideration is clearly whether the Commissioner is satisfied, based on positive evidence, that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping.
56. It does not appear to be in dispute that in coming to a decision, the process envisaged combines, “both investigatory and adjudicatory aspects” and that this involves, “an active rather than a passive decision-making role to the authorities”, and that “authorities conducting a sunset review must act with an appropriate

²⁷ *Siam Polyethylene Co Ltd v Minister for Home Affairs (No.2)* [2009] FCA 838 at para. 48.

²⁸ *US – Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (“US – DRAMs”),* (WT/DS99/R), at para 6.42.

²⁹ *US – Sunset Review Carbon Steel from Japan*, WT/DS244/AB at para 111.

degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.” This was contended by ATM in its application for review with reference to WTO jurisprudence relating to Article 11.3 of the ADA³⁰ which s.269ZHF(2) appears to enact into Australian legislation. The ADC did not dispute this.

57. The ADC in its s.269ZZJ submission also agreed with ATM’s view (with reference to WTO jurisprudence) that the existence (or absence) of dumping is not, by itself, determinative of the question of whether to continue anti-dumping measures and submitted that the dumping margins found during the inquiry period was one factor that was considered in making the recommendations to the Minister, and that a range of other factors were examined.
58. Based on the discussion of s.269ZHF(2) above, I do not consider that the ADC was required to show that the pattern of negative dumping margins of the Thai exports was not “sustainable”. As mentioned above, the question for consideration for this ground of review is whether the Commissioner was satisfied, based on positive evidence, that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping. There is in fact absolutely no reference in the Act, the ADA or in WTO jurisprudence that it is necessary to show any particular degree of dumping or that a particular degree of negative dumping is sustainable.
59. ATM set out in its s.269ZZJ submission what it considered to be the information and evidence that the ADC did not appear to have proper regard to in considering whether it was likely that dumping would continue or recur, comprising: past behaviour of the Thai exporters in the Australian market; the export focus of the Thai exporters; the effect of the measures on export behaviour; and expected commercial behaviour of exporters. ATM also submitted that given Thailand has no global competitive advantage as a producer of HSS products, the ADC failed to investigate, (a) the factors that have led to the size of the negative dumping margin to determine if the result is an outlier, or (b) if it is sustainable and likely to continue beyond the expiry of the measures.

³⁰ See reference to *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, para. 111 above.

60. It appears to me from REP 532 and the various documentation that the ADC did in fact take into consideration a number of these issues referred to by ATM, but that when considered as a whole did not lead the Commissioner to conclude that dumping would probably re-occur if the measures were removed. The ADC pointed out that it, however, did not specifically examine whether Thai (or any other) exporters have a global competitive advantage, nor what that would mean for the Australian industry producing like goods and therefore the likelihood of injury continuing or recurring in the absence of the measures. In fact, the ADC pointed out that this question was not raised in submissions and the Commissioner did not consider that such an assessment, if undertaken, would have shed any additional light on the findings already made.³¹ It should be noted that there is no specific methodology or particular analysis required in the Act (or in WTO law) to be used for the purposes of s.269ZHF(2) of the Act (or Article 11.3 of the ADA) to make a likelihood determination in a continuation inquiry. That said, any such determination must be based on a sufficient factual basis with the ADC acting with an appropriate degree of diligence in reaching a reasoned conclusion. I do not consider that the ADC was in the particular circumstances required to specifically examine whether the Thai exporters had a global competitive advantage or the effect of that on the Australian HSS market, as suggested by ATM, in coming to its conclusion as to whether it was probable that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping.
61. ATM argued that, regardless of the margins found in REP 532, it was likely that the exports would be at dumped prices, and that this view was supported by:
- a. the evidence and past behaviour of Thai exporters in export markets including that Thai export volumes to Australia significantly increased between INV 177 when there were no measures to INV 254 when dumping was found and Thai export volumes to Australia significantly decreased following the imposition of measures in INV 254; and
 - b. US and Canadian expiry and administrative reviews into related Thai exports (made on the same mills) which resulted in positive dumping margins.

³¹ See Attachment A of ADC's s.269ZZJ submission, page 1.

I do not consider that either of these arguments support ATM's submission that Thai exports would increase and likely be at dumped prices if the measures were lifted, as discussed below.

62. During the Second Conference, I requested clarification from the ADC with regard to ATM's first point (referred to in the above paragraph) relating to the Thai exporters' market share falling by nearly 50 per cent compared to the original investigation period in which they were found to be dumping. ATM's explanation was that the Thai exporters' behaviour was influenced by the effectiveness of the measures and that there was a clear link between the threat and imposition of anti-dumping measures and the volume of Thai exports to Australia. The ADC stated that the reduction in market share of the Thai exports was not as straight forward as ATM seemed to indicate. According to the ADC, after INV 254, Thai exports dropped back to pre-INV 177 levels. The ADC stated that at that time, in 2012, it seemed that customers were seeking the lowest cost outcome, however, thereafter, once Thailand was in the same position as other exporters (with duties imposed), Thai volumes and market share remained flat, even though Thai exports were not subject to the highest duties and had a price advantage, which suggested that price was not the determining factor. It was pointed out that if price was the only determining factor then Saha Thai and TPP would have expanded their market, however, there were other relevant factors for the customers, such as existing relationships and preference for the local product. The ADC referred to Confidential Attachment 5 to REP 532 which showed the Thai importers and suppliers for the last six years and which indicated that Saha Thai's export volumes were not expanding even after other exporters exited the market and even though there was a price advantage in the market. The ADC pointed out that there was nothing to stop the importer from increasing Thai exports during the inquiry period and interpreted it as being that the market did not have the demand for more Thai products, notwithstanding the price advantage.³² I reviewed Confidential Attachment 5 to REP 532 which supported the ADC's analysis. I therefore do not consider that there was any positive evidence indicating that exports from Thailand would increase if the measures were discontinued or that prices would decrease to the extent of being dumped. Thai prices were already competitive and profitable during

³² See Discussion Item 4 of the Second Conference Summary.

the inquiry period, and there had not been a resulting reduction in prices (even to the extent of the negative dumping margins) nor increased volumes.

63. With regard to the ATM's second point relating to the US and Canadian dumping duties on similar products being evidence that dumping would occur, the ADC indicated that it could not comment on the fact that other countries had imposed dumping duties on Thai exports, as the conditions of competition in those markets were different, as were the anti-dumping laws and practices. It was also pointed out that where safeguard duties were involved, dumping was not relevant and it was more about the economic and political conditions in the importing country. The ADC stated further that while measures in other countries was one consideration it did not provide much guidance as to the likelihood of what was going to happen in Australia if the Australian measures were removed. The ADC pointed out that measures imposed in other countries did not result in a flood of exports to Australia, even with Thai exporters having a price advantage (without dumping). The ADC stated that therefore it could not be said that if the Australian measures were removed, there was likely to be a flood of exports, since the favourable conditions already existed and the opportunity was not taken up by Thai exporters.³³ I agree with the ADC's position that dumping measures imposed on similar products from Thailand by other anti-dumping authorities cannot demonstrate that dumping will occur in Australia if the existing measures are lifted, for the reasons articulated by the ADC. I consider it to be particularly relevant that the Thai exporters had a price advantage (without dumping) during the inquiry period, even with the measures in place, and did not take the opportunity to lower prices and increase volumes when they were in a position to do so without having to resort to dumping. It would seem that the facts point to the ADC being correct in its submission that price was not the only determining factor and that there did not appear to be appetite for more Thai exports, notwithstanding the price competitiveness. I agree with the ADC that there is no basis to say that if the Australian measures were removed, there was likely to be a flood of Thai exports at dumped prices. There would appear to be no positive evidence supporting ATM's contention in this regard.
64. ATM contended in its s.269ZZJ submission that whilst there was no evidence of a strategy to expand export volumes to Australia there was available evidence to

³³ See Discussion Item 6 of the Second Conference Summary.

show that it was likely that Saha Thai would expand its export volumes to Australia if the measures were not to be continued, such as, evidence demonstrating that the Thai manufacturers: were export-orientated; had spare export capacity; had continued to invest in export capability; had reduced access to their biggest export market, the United States of America. The ADC in examining these exports found that the undumped exports from Thailand were profitable, sold to essentially the same customers and in the same volumes as occurred for most of the nine-year period examined, and found few if any, incentives for Thai exporters to alter their behaviour such that they would reduce their prices and commence dumping.³⁴ I agree with the ADC's assessment in this regard and as stated above I do not consider that there is positive evidence demonstrating that Thai exports to Australia were likely to increase if the measures are discontinued.

65. ATM contended that regardless of whether the dumping margins determined for the inquiry period remained negative, this was not a conclusive determinant in assessing the likelihood of recurrence of dumping, but rather evidence that the anti-dumping measures imposed following INV 254 achieved their stated objective. ATM referred to ADRP Report No. 70 where the Review Panel had affirmed the ADC's recommendation that the measures be continued in ADC Continuation Inquiry No. 400 ("INV 400"), notwithstanding negative dumping margins during the inquiry period. I reviewed ADRP Report No. 70. ATM correctly articulates the finding in that report in which there were also negative dumping margins by the Taiwanese exporters during the inquiry period. However, the circumstances and market conditions of the various players in the two continuation inquiries were quite different. While excess capacity of the relevant exporters was a relevant factor in both continuation inquiries, in INV 400 the ADC found that the data suggested that there was close price competition throughout the region and particularly between Chinese and Taiwanese exports, which could be expected to be replicated in the Australian market, particularly given the reducing threat posed by Korean and Japanese exporters to the Australian market. Further, the ADC concluded in INV 400 that Taiwanese prices were held up by the operation of the measures rather than fluctuating in response to normal market forces and in the absence of measures Taiwanese and Chinese exporters would actively compete upon price, which would in turn inevitably lead to the reduction of market prices and the

³⁴ See Attachment A of ADC's s.269ZZJ submission, page 1.

resumption of dumping by the Taiwanese applicants. In ADRP Report No. 70 it was found that in INV 400, the various factors when considered together were capable of supporting a reasoned and adequate “likely determination”.³⁵ On the other hand in the current inquiry, as discussed above, the Thai exporters had a price advantage over other exporters (even with the measures in place), were profitable with large negative dumping margins and with no incentive to lower prices, and in any event there appeared to be no appetite for increased Thai exports notwithstanding their price advantage in the market. The ADC concluded that there was therefore no reason to say that if the measures were removed, the Thai exports’ market share would increase. The ADC also pointed out that there were other non-subject imports that had a larger (and increasing) share of the market, than Thai exports and reiterated that this indicated that there was no basis to say that the measures were “holding back the tide” of Thai exports and pointed out that while the Australian market share reduced it was mostly at the expense of an increase in non-subject imports and INV 529 country imports.³⁶ I agree with the ADC’s analysis.

66. At the same time, during the Second Conference, the ADC stated that it did not dispute that there were changes in volume (that were not *de minimis*) when viewed in absolute terms, however, when viewed in the context of the total Australian market, and in comparison with exports from non-subject countries, the Thai imports were not that significant. The ADC pointed out that the absolute changes were not ignored and were still part of the ADC’s consideration.³⁷
67. During the Second Conference I also requested clarification of the ADC’s response to Orrcon and ATM’s contentions that REP 532 indicated that the ADC had not taken adequate account of the price sensitive nature of the Australian HSS market, notwithstanding previous such findings in INV 254 and Continuation Inquiry 379. The ADC stated that while there was no doubt that ATM was under pressure from price, and that there were aspects of price sensitivity, it was also clear that price was not the only consideration. The ADC noted that if price was the only consideration [REDACTED]. The ADC also noted that while ATM certainly had regard to the prices of Thai imports, they

³⁵ See ADRP Report No.70, paras 47 – 56 and para 63.

³⁶ See Discussion Item 4 of the Second Conference Summary.

³⁷ See Discussion Item 7 of the Second Conference Summary.

did not appear to be especially influential with respect to the import parity pricing model.³⁸

68. In the light of the above discussion and clarifications made by the ADC during the Second Conference, I do not consider ATM's submissions relating to Thai market share or price sensitivity to be persuasive or that the evidence referred to amounts to positive evidence indicating that Thai exporters' behaviour was influenced by the effectiveness of the measures and that the removal of the measures would probably result in a flood of Thai imports at dumped prices.
69. I also do not agree with ATM's submission that the absence of duty assessments for HSS indicates that HSS exported during that period was at dumped prices, as being "the only reasonable explanation" that importers did not apply for a duty assessment. The ADC provided examples of instances where there were other quite reasonable explanations. In any event, the absence of duty assessments does not in my view amount to 'positive evidence' of dumping or the likely recurrence of dumping.
70. In conclusion and based on the above discussion I agree with the ADC's analysis and conclusions. I consider that the Commissioner's finding that he was not satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping, was factually-based, well-reasoned and I consider that it is the correct or preferable decision. ATM's first ground of review therefore fails.

Ground 2: Failure to provide a sufficient and reasonable explanation of the reason why other exporters, not examined, are unlikely to recommence dumping if the measures are allowed to expire

ATM's arguments

71. ATM contends that the Reviewable Decision is not the correct or preferable decision as the Commissioner failed to provide the Minister with a sufficient and reasonable

³⁸ See Discussion Item 10 of the Second Conference Summary.

explanation of the reason why other exporters not examined are unlikely to recommence dumping if the measures are allowed to expire.

72. According to ATM, the ADC summarised as the key reasons that the Commissioner was not satisfied that the expiration of measures on Thai exports of HSS would lead or likely lead to a continuation of, or recurrence of, the dumping and material injury that the anti-dumping measure is intended to prevent as being:
- a. the degree of negative dumping margin;
 - b. the market share of the Thai exporters as being stable;
 - c. the high degree of price competition in the market; and
 - d. significant existing price advantage enjoyed by Thai exporters in the Australian market that did not have any discernible impact on the economic condition of the Australian industry.

73. ATM points out that the ADC's observations were made on the basis of only two active Thai exporters during the inquiry period, Saha Thai and TPP, with no consideration given by the ADC to the prospective impact of Pacific Pipe Public Company Limited ("Pacific Pipe") and other Thai exporters re-entering the market as indicated by their co-operation in the continuation inquiry. According to ATM, whilst the continuation inquiry generated a negative dumping of 4.3 per cent for Pacific Pipe, this was a theoretical margin calculated on the basis of no export sales. ATM referred to previous investigations where the ADC determined positive dumping margins for Pacific Pipe (INV 254 and REV 445), Samchai Steel Industries Public Company Limited ("Samchai") (INV 254) and uncooperative exporters (INV 254 and REV 445).³⁹

74. In its s.269ZZJ submission, ATM submits that it is relevant that in REV 445 Pacific Pipe was found to be a low volume exporter, and that the ADC found in regard to Pacific Pipe's low volume of exports that:

It is the Commission's view that Pacific Pipe has not been able to provide sufficient evidence to demonstrate that factors outside its control affected its

³⁹ For details of the dumping margins, see ATM's application for review, page 4.

*trade volumes during the review period. The Commission considers that anti-dumping measures in place in relation to the Pacific Pipe's exports of HSS to Australia are not a result of factors outside their control. In fact the measures directly resulted from the behaviour of Pacific Pipe during the original investigation period, in the sense that the goods were priced and sold by the exporter willingly at that time, and were found to have been dumped.*⁴⁰

75. ATM submitted further in its s.269ZZJ submission that it is also relevant that the ADC found in REP 532 that the number of Thai exporters had decreased since the imposition of the measures. ATM submits that the reduction in Thai exporters appeared to show a linkage to the anti-dumping measures and the ability of Thai exporters to compete in the Australian market at undumped prices. ATM further submitted that the US Administrative Review in 2016/17 determined a dumping margin for Pacific Pipe of 30.61 per cent and that subsequent Administrative Reviews in 2016/17 and 2017/18 did not determine an individual margin for Pacific Pipe due to the low volume of exports indicating a further linkage between dumping margins and export volumes.⁴¹
76. In its s.269ZZJ submission, ATM submits that in considering the impact of other Thai exporters re-entering the Australian market if measures were to expire the ADC had also not had regard to the spare capacity of those exporters. ATM referred to its application to the ADC in which it provided information on the spare capacity of Samchai of approximately [REDACTED] tonnes and Pacific Pipe of approximately [REDACTED] tonnes.⁴² ATM contended that given the available capacity of other exporters, the restrictions of measures in other markets and the evidenced past linkages between dumping and export volumes it was likely that the other Thai exporters would export to Australia in significant volumes at dumped prices. ATM submitted that the ADC did not have regard to the available evidence in considering whether it was likely that the other Thai exporters would resume dumping if the measures were to expire.

⁴⁰ Reference was made to REP 445, page 16.

⁴¹ See ATM's s.269ZZJ submission, page 7.

⁴² In this regard, in ATM's s.269ZZJ submission reference was made to Confidential Attachment 4 to ATM's application to the ADC, pages 13 & 15.

77. ATM contends that the factors the Commissioner has based his decision on in relation to Saha Thai and Thai Premium Pipe are not correct, but even if they are, they do not apply to Pacific Pipe, Samchai and other Thai exporters. ATM submits that Pacific Pipe, Samchai and all other exporters have a proven record of dumping when they export HSS to Australia. According to ATM, future HSS exports from Pacific Pipe, Samchai and all other exporters to Australia will increase the market share of Thai exporters, noting that when Pacific Pipe was found to be dumping in REP 254 Thai market share was almost double the market share that was found in REP 532 and the high degree of price competition in the market that the ADC has already found will intensify.

ADC's position

78. The ADC in its s.269ZZJ submission referred to ATM's submission that the dumping margin for Pacific Pipe is a theoretical margin calculated on the basis of no export sales and noted that the margin was calculated using the available provisions under s.269TAB, having regard to the export prices achieved by other exporters, and considered it to be a reasonable basis for estimating the prices at which Pacific Pipe would have exported during the inquiry period. The ADC noted that the dumping margin established for uncooperative and all other exporters was also negative, and was also calculated in accordance with the relevant provisions of the Act.⁴³
79. The ADC submitted that whilst there may be other potential exporters of HSS from Thailand (such as Samchai), their absence from the market and lack of cooperation with the inquiry prevented the ADC from establishing their variable factors. However, the ADC noted again that the existence (or absence) of dumping is only one factor that was considered and that a range of other factors examined (set out in Section 7 of REP 532), particularly those concerning the prevailing economic conditions in Thailand, were equally applicable to those other potential exporters. The ADC also considered that, after closely examining the circumstances of the exporters that are active in the Australian market, it is reasonable to infer that those circumstances represent relevant, positive evidence that would be applicable to all other exporters and there was no evidence which would indicate that it was unreasonable to take that approach.

⁴³ Reference was made to Section 6.6 of REP 532, page 41.

80. The ADC referred to ATM's claims that some Thai exporters have a "proven record of dumping" and submitted that this is a selective interpretation of the facts, particularly given the absence of dumping by certain exporters (as set out in Anti-Dumping Commission Report No. 445 (REP 445)) and in the inquiry period for REP 532, as examined in Section 7.4.7. The ADC reiterated that the presence or absence of dumping was not the only relevant factor considered.

Consideration

81. In this ground of review ATM contends that there was a failure to provide a sufficient and reasonable explanation of the reason why other exporters, not examined, are unlikely to recommence dumping if the measures are allowed to expire.
82. As discussed under ATM's first ground of review, s.269ZHF(2) of the Act explicitly requires that the Commissioner, "must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the Anti-Dumping measure is intended to prevent". [emphasis added] As is also discussed under ATM's first ground of review, interpreting s.269ZHF(2) of the Act in accordance with the WTO jurisprudence means that the Commissioner must not recommend the continuation of the measure unless there is positive evidence to demonstrate that the recurrence of dumping is likely or probable.⁴⁴
83. There is no legal requirement for the ADC to provide a sufficient and reasonable explanation why other exporters, not examined, are unlikely to recommence dumping if the measures are allowed to expire. The question for consideration is clearly whether the Commissioner is satisfied, based on positive evidence, that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping. This standard equally applies to the exporters not examined / the uncooperative exporters.

⁴⁴ See *Siam Polyethylene Co Ltd v Minister for Home Affairs* (No.2) [2009] FCA 838 at para. 48 and *US – DRAMs* (WT/DS99), at para 6.42.

84. ATM takes issue with the fact that in the continuation inquiry the ADC found that the negative dumping margins for Pacific Pipe, Samchai and other uncooperative Thai exporters were theoretical margins calculated on the basis of no export sales. The ADC, however, relevantly pointed out that the margin was validly calculated using the available provisions under s.269TAB, having regard to the export prices achieved by other exporters. The ADC considered it to be a reasonable basis for estimating the prices at which Pacific Pipe would have exported during the inquiry period. The ADC noted that the dumping margin established for uncooperative and all other exporters (being negative) was also calculated in accordance with the relevant provisions of the Act. During the Second Conference I sought clarification of whether, in the ADC's consideration, less emphasis was placed on negative dumping margins of Pacific Pipe and "uncooperative and other exporters" as the calculations were based on export prices of the other Thai exporters, and not on actual export prices. The ADC stated that it was required to determine margins for all exporters and pointed out that it could not be said that any particular emphasis was placed on the afore-mentioned negative margins, as they were not based on actual export prices. It was stated that the ADC, however, had greater regard to the negative margins of TPP and Saha Thai, as they were actually exporting.⁴⁵
85. The ADC also noted in its s.269ZZJ submission that the existence (or absence) of dumping is only one factor that was considered, and that a range of other factors examined (set out in Section 7 of REP 532), were equally applicable to those other potential exporters. The ADC also considered that, after closely examining the circumstances of the exporters that are active in the Australian market, it was reasonable to infer that those circumstances represent relevant, positive evidence that would be applicable to all exporters and that there was no evidence which would indicate that it was unreasonable to take that approach. I would agree with the ADC in this regard, and would go further in that I consider that not only was there no evidence to indicate that it was unreasonable to take that approach, but that there was no positive evidence to indicate that those other exporters would probably resume exporting to Australia at dumped prices if the measures were discontinued. As discussed under ATM's first ground of review above, anti-dumping duties imposed on Thai exporters by other authorities cannot be considered to be evidence of probable dumping in Australia, as appears to be suggested by ATM.

⁴⁵ See Discussion Item 3 of the Second Conference Summary.

Similarly a subsequent reduction of export volumes to that particular country cannot be considered to be evidence of a linkage between dumping margins and export volumes in Australia, due to different market conditions, and different laws and practices in Australia.⁴⁶

86. As is also reiterated by the ADC in its s.269ZZJ submission, the presence or absence of dumping was not the only relevant factor considered by the ADC. The ADC in making its decision relating to the likelihood of dumping and injury if the measures were discontinued, took into account various issues,⁴⁷ including the presence (or absence) of dumping margins during the inquiry period. I consider the following to be of particular relevance: Thai exports were already price competitive in the Australian market (and profitable) and therefore there was no incentive to reduce prices if expansion was a consideration. As reiterated by the ADC during the Second Conference, there needed to be a demand for Thai products in Australia for an intended expansion, which did not appear to be the case. As the ADC pointed out, based on the substantial negative dumping margins that were established, prices could be reduced without dumping occurring, so there was no indication that dumping would occur as there would be no reason to seek to export unprofitably. The ADC also pointed out that measures imposed in other countries did not result in a flood of exports to Australia, even with a price advantage and therefore it could not be said that if the Australian measures were removed, there was likely to be a flood of exports, since the favourable conditions already exist and the opportunity was not taken up by Thai exporters.⁴⁸
87. For the reasons discussed above, I therefore consider that the Commissioner's finding that he was not satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping, of all the Thai exporters (including Pacific Pipe, Samchai and all other Thai exporters) was factually-based and well-reasoned and I consider it to be the correct or preferable decision. ATM's second ground of review therefore fails.

⁴⁶ See also Discussion Item 6 of the Second Conference Summary.

⁴⁷ See Section 7 of REP 532.

⁴⁸ See Discussion Item 6 of the Second Conference Summary.

Ground 3: The Commissioner's analysis of price competition in the Australian market is flawed

ATM's arguments

88. ATM contends that the Reviewable Decision is not the correct or preferable decision as the Commissioner's analysis of price competition in the Australian market is flawed. ATM submits that the flawed price analysis leads to the Commissioner's recommendation to the then Minister that she not be satisfied that it is likely that the expiry of the anti-dumping measures would lead, or would be likely to lead, to a continuation, or a recurrence of, the injury that the anti-dumping measure is intended to prevent.
89. According to ATM the ADC has relied on an analysis of export prices since October 2011 and an analysis of prices in the Australian market during the inquiry period in its assessment of price competition in the Australian market. ATM submits that both analyses are flawed and call into question the reasoning behind the recommendation to the then Minister.
90. The ADC stated in SEF 532 and REP 532 that:

The Commission observes that the FOB export price of HSS from Thailand is the lowest of all countries subject to measures and one of the lowest from all countries, which has consistently been the case since the year commencing 1 October 2011. The Commission also notes that, in the inquiry period, this has occurred in the absence of dumping.⁴⁹

91. ATM stated that it submitted in response to SEF 532 that the Model Control Codes ("MCCs") reported in the Thai exporter visit reports show that both Saha Thai and TPP only exported the lower price painted or non-oiled and painted HSS models ("black") during the inquiry period. Further it stated that both the Australian Industry and other non-Thai exporters sell a galvanised HSS as part of their product mix that typically sells for a price premium above that of non-galvanised black HSS and that

⁴⁹ SEF 532, page 51 and REP 532, page 56.

this was likely to be the contributing reason for the lower FOB prices of Thai HSS exports compared to non-Thai exports.⁵⁰

92. ATM submitted that it appeared that the ADC relied on FOB export prices from the import database sourced from import entries provided to Australian Border Force (“ABF”) upon entry of the HSS. According to ATM, galvanised and black HSS are both entered to the same tariff and statistical codes, and the quantities and values used to calculate a FOB price would therefore be an average FOB price of galvanised and black HSS. Further, according to ATM galvanised HSS sells at a premium to black HSS and that it would be expected that the premium in pricing in the Australian market would be reflected in the FOB export prices. ATM submitted that the ADC’s analysis did not take into account the known price differential, between galvanised and black HSS, in reaching its conclusion that FOB export prices of HSS from Thailand have consistently been the lowest from all countries.
93. ATM submitted that the ADC responded to its submission regarding galvanised and black HSS price differences in its analysis of pricing in the market in the inquiry period noting in REP 532 that:

The Commission observes that, in this analysis, the weighted average selling prices of HSS from Thailand are lower than the same HSS models offered by the Australian industry. This analysis indicates that, in a period where the goods were exported at undumped prices, HSS from Thailand had a significant price advantage over the Australian industry’s HSS in the market. For completeness, the Commission also notes that the weighted average selling prices of HSS from Thailand was also lower than the same HSS models offered in the Australian market by importers of HSS from China, Korea and Taiwan (noting there were no Malaysian imports in the inquiry period), based on the information gathered in the concurrent review of measures (case 529).

The Commission excluded P-G-N-R-350 from the price analysis for sales of HSS from China, Korea and Taiwan as the volume sold represented approximately 45 per cent of the total volume of the MCCs listed above and would unduly weight the calculation towards galvanised HSS. However, P-G-

⁵⁰ Reference was made to Document #029 of EPR 532, page 5.

*N-R-350 – is included in the sales of HSS exported from Thailand and in the domestic sales of the Australian industry, as the volumes were immaterial in both instances.*⁵¹

94. ATM contended that this analysis appeared to be fundamentally unsound because:

- a. In the first instance in respect to prices from Taiwan, information on the public record showed that the two cooperating exporters from Taiwan only exported galvanised HSS. It therefore appeared to ATM that the ADC compared the prices of black HSS from Thailand to prices of galvanised HSS from Taiwan.
- b. In the second instance, in respect of the calculation of prices of HSS from Thailand in the Australian market, according to ATM the analysis appeared to rely on unverified data with the ADC noting that prices were based on:

*...the verified Australian sales of importers of HSS from Thailand. Where this sales information was not provided, the FOB export price plus post exportation and selling expenses from the relevant importer;*⁵²

ATM set out the basis for its contention that the ADC appeared to rely on unverified data and incomplete information, and questioned the reliability of its calculations.⁵³

- c. In the third instance, ATM submitted that the calculation and comparison of prices makes no reference to any price premium that ATM and the Australian industry can achieve in the market, which ATM noted as such in its application for the continuation of the measures. ATM described in detailed how it priced its products based on an import parity pricing (IPP) model, that is, import price offers plus a local premium and set out the reasons why domestic customers are generally willing to pay a small premium for locally produced equivalent standard products.⁵⁴ ATM stated that while the ADC

⁵¹ REP 532, pages 57 – 58.

⁵² Reference was made to REP 532, page 84 (sic) [There is no page 84 of REP 532 - the quote appears on page 57].

⁵³ See ATM's application for review, page 7.

⁵⁴ Reference was made to Document #002 of EPR 532, pages 21-22.

noted that the Australian industry can achieve a price premium,⁵⁵ it contended that the product mix adds a high degree of complexity to pricing negotiations with customers. ATM stated that it provided the ADC with copies of its price books at verification and discussed the different prices in those books and the reasons for variations in pricing. ATM stated that it also provided the ADC with a copy of its IPP workbook detailing import offers in the market and that it also provided examples of the link between IPP, the effect on ATM pricing and the price premiums achieved. ATM contended that the price comparison by the ADC may be unsound where the price premium has not been taken into account, in that the amount of undercutting can be magnified.⁵⁶

- d. Fourthly, ATM contended that the ADC departed from the undercutting exercise of the original investigation, INV 254 in its price comparison. ATM referred to WTO Panel decision in *US – Oil Country Tubular Goods Sunset Reviews* which found that, to the extent that an investigating authority relies on a determination of injury when conducting a sunset review, the obligations of Article 3 would apply to that determination.⁵⁷ ATM submitted that it appeared that the ADC had not performed a price comparison as undertaken in INV 254. ATM submitted that the price comparison in INV 254 was based on verified FIS prices by importers compared to ATM's net prices for each product at a comparable level of trade for all 12 months of the investigation period.⁵⁸ In comparison, the ADC in REP 532 used FOB prices plus unverified expenses to calculate the majority of selling prices for the imported HSS and then "estimated an Ex Works (EXW) equivalent price for HSS in Australia"⁵⁹ [emphasis added by ATM]. According to ATM, as the ATM selling prices were presented on a FIS basis it appeared that the ADC deducted an "estimated" amount for freight for those prices, and these prices were then compared on a weighted average quarterly basis. ATM contended that the price comparison done in REP 532 represented a significant departure from

⁵⁵ Reference was made to REP 532, page 22.

⁵⁶ See ATM's detailed discussion on its price premium and its communications with the ADC relating thereto, in its application for review, pages 7 – 9.

⁵⁷ See Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/R, para. 7.274. See also Panel Report, *EU – Footwear (China)*, para. 7.337.

⁵⁸ Reference was made to REP 254, pages 57 – 58.

⁵⁹ Reference was made to REP 532, page 57.

the price comparison conducted in INV 254 and the use of unverified data and “estimated” prices called into question whether the calculation is consistent with the provisions of the ADA.

95. ATM also contended that the ADC appeared to not have had regard to information provided by ATM on price competition in the Australian market. ATM referred to the statement in REP 532 in regard to the ‘Commercial Likeness’ of HSS that:

The Commission found that the goods exported to Australia from Thailand are commercially similar to the HSS produced by the Australian industry. The Commission found that the goods are sold via the same channels, to the same or similar customers, and compete directly for sales to those customers. In addition, customers have regard to the pricing of the HSS from Thailand (and other countries) when assessing the relative competitiveness of HSS prices from the Australian industry.⁶⁰ (emphasis added by ATM)

96. ATM stated that it provided the ADC with evidence of this price competition from Thailand and [REDACTED] other countries, [REDACTED] detailing offers on a [REDACTED] basis between [REDACTED] from [REDACTED] from different sources including the [REDACTED] from Thailand.⁶¹ ATM submitted that the information submitted was in contradiction to the ADC’s statements and reasons for not continuing the measures that:

The high degree of price competition and the apparent price advantage that Thai exporters have consistently had in the Australian market.

...the Commission has observed that the significant existing price advantage enjoyed by Thai exporters in the Australian market.⁶²

97. In its confidential version of its application for review ATM also reproduced a chart tracking the average IPP to ATM selling price from [REDACTED]

⁶⁰ Reference was made to REP 532, page 15.

⁶¹ ATM stated that the information was provided as Confidential Attachment 6 IPP to the Application and included charts tracking the IPP offers from [REDACTED] exporters, including [REDACTED] from Thailand. ATM stated that the attachment also included examples of price pressure and lost volumes to exports from Thailand.

⁶² Reference was made to REP 532, page 62.

████ on a █████ basis. According to ATM the chart shows a generally consistent gap between ATM selling price and the average █████ import price that reflects the price premium that ATM can achieve in its sales of HSS. ATM submitted that the chart and associated data was discussed with the ADC during the verification visit as part of evidence of the effect of import prices on ATM pricing and evidence of the price premium.⁶³ ATM contends that the highly relevant information appears to have not been given due consideration by the ADC in deciding that measures against Thailand be discontinued. ATM stated that it also drew to the ADC's attention the materiality of injury that would likely be caused by likely dumped exports from Thailand if the measures were not to be continued in the application and during the verification visit as noted, as well as in its submission of 15 May 2020.⁶⁴

ADC position

98. The ADC in its s.269ZZJ submission refers to ATM's criticisms of the findings reported in Section 7.4.6 of REP 532, claiming that the analysis is flawed, and acknowledges that there are limitations in this analysis, as the ADC did not have detailed price and grade information for all sales in the market over the 9 year period which has been examined. However, the ADC submitted that the analysis does describe what is happening in the market generally over that period and provides useful context for the remainder of the chapter.
99. The ADC considered that ATM overstated the significance of this analysis and submits that the subsequent analyses (such as that indicated in chapter 7.4.7 of REP 532, which specifically compares relevant MCCs for HSS exported from Thailand with that sold by the Australian industry to demonstrate significant undercutting at undumped prices) provide a more detailed comparison of prices. The ADC submitted that this was clearly apparent from Confidential Attachment 5 to REP 532.
100. The ADC stated that ATM speculated that the analysis in Confidential Attachment 5 is incorrect and refers to ATM's various claims that:

⁶³ For more details on the chart and ATM's related submissions, see its application for review, pages 12 – 14.

⁶⁴ Reference was made to Document #022 of EPR, pages 8 - 9.

- a. the ADC relies on unverified (and therefore incorrect) information;
- b. the analysis has had insufficient regard to ATM's price premium achieved (and has therefore magnified the degree of undercutting found); and
- c. in any event, it is different to the approach taken in REP 254 and is therefore inconsistent with WTO jurisprudence.

The ADC contended that the information used in the analysis is reliable, for the reasons outlined in the verification reports and REP 532.

101. The ADC submitted that it is apparent from Confidential Attachment 5, that the price premium claimed to have been achieved by ATM may not reflect the prices which were achieved by the Australian industry as a whole, noting that Orrcon's data is also relevant to this analysis. It submitted that in any event, the degree of undercutting in all quarters (shown in Figure 20 in REP 532) exceeds the price premium claimed by ATM to exist. Further, the ADC submitted that Orrcon did not participate in the investigation set out in REP 254 and that as a result of Orrcon's participation in this inquiry, and as a result of its data being in a different format to the data provided by ATM, the price undercutting analysis methodology is necessarily different in REP 532.

102. The ADC referred to ATM's submission that the ADC had insufficient regard to its import pricing parity model and considers that there are some weaknesses in ATM's arguments on this point, such as the IPP is based on known price offers, so does not reflect all price offers in the market and the known price offers are based on what customers are prepared to share with ATM, which may not always be accurate. Further, the ADC submits that the IPP also does not demonstrate what prices were ultimately achieved and does not account for considerations other than price. The ADC considered that it was nevertheless, a useful guide for ATM as a price setting mechanism, and it demonstrates that the prices being achieved by ATM are influenced by price offers from export sources.

103. The ADC submitted further that the IPP shows that offers for HSS from Thai exporters - which were ultimately exported at undumped prices - have influenced ATM's prices during the inquiry period. The ADC submitted that the IPP does not (by itself) demonstrate the materiality of potential injury, and in any event the known

price offers from Thailand exporters were not consistently the lowest of those reported. The ADC pointed out that the IPP is moderated by reference to price offers from all sources, so the relative influence of Thai prices is diluted.

104. The ADC concluded that as noted in chapter 7.4.10 and chapter 7.5, it has found that it is not likely that dumping will recur if the measures are allowed to expire, and also found that even if dumping was to recur, the evidence suggests that the undumped price advantage enjoyed by Thai exporters and the low volume of exports had a negligible connection with the economic performance of the Australian industry and hence is unlikely to result in material injury.

Consideration

105. I noted that in its s.269ZZJ submission, in response to ATM's criticisms of the findings reported in Section 7.4.6 of REP 532, the ADC acknowledged that there were limitations in its analysis, as the ADC did not have detailed price and grade information for all sales in the market over the 9 year period examined. The ADC submitted that the analysis described what was happening in the market generally over that period, and provides useful context for the remainder of the chapter. I agree with the ADC in this regard and was more concerned about the analysis during the inquiry period which was more relevant for the ADC's likelihood of injury finding for the purpose of REP 532.

Conference held on 5 November 2020 ("the Second Conference") and Reinvestigation Request

106. During the Second Conference I sought clarification from the ADC (with particular reference to Confidential Attachment 5 to REP 532) of its response to contentions of Orrcon and ATM that the explanation of the ADC that weighted-average selling prices for Thai exports are below those of the Australian industry (and other exporters in China, Korea and Taiwan) is a misrepresentation due to the mix of exports (i.e. predominant exports of low-value black HSS by Thai exporters), in particular in relation to:

- ATM's submission that information on the public record shows that the two cooperating exporters from Taiwan only exported galvanised HSS;

- ATM's submission that the calculation of prices of HSS from Thailand appeared to rely on unverified data; and
- ATM's submission that the ADC's analysis has had insufficient regard to ATM's price premium achieved.

107. With regard to the first issue raised, the ADC was able to show, with reference to Confidential Attachment 5 to REP 532 (which I reviewed), that the undercutting comparisons with what was referred to as "INV 529 countries" excluded P-G-N-R-350 exports. The ADC clarified that while Taiwan was one of the countries in INV 529, the term "INV 529 countries" was used by the ADC for convenience and that Taiwanese exports were actually excluded from the comparison as all galvanised models were excluded.⁶⁵ I therefore consider that in its price comparison analysis the ADC appropriately compared exports of black HSS and excluded the higher-priced exports of galvanised HSS (including all exports from Taiwan) and that the analysis was not unsound as contended by ATM. I also noted that the ADC had stated in REP 532 that it specifically compared relevant MCCs for HSS exported from Thailand with that sold by the Australian industry.

108. With regard to the second issue raised, the ADC confirmed that while it received an incomplete importer response from one importer, the ADC was still able to verify the information submitted (in respect of post importation expenses). The ADC clarified that where information was missing it had regard to information previously submitted as well to the information of the other importer. The ADC reiterated that the information used in the analysis was reliable.⁶⁶ I was satisfied with the ADC's explanation and its methodology, and do not consider that there was a reasonable basis for ATM's contention that the ADC's analysis was unsound because it relied on unverifiable and unreliable information.

109. With regard to the third issue raised, of ATM's contentions relating to the price premium, I noted that in its s.269ZZJ submission the ADC referred to Confidential Attachment 5 and raised some issues with the price premium claimed to have been achieved by ATM and relating to the price premium of the Australian industry as a whole. Significantly, the ADC submitted that in any event, the degree of

⁶⁵ See Discussion Item 2 of Second Conference Summary.

⁶⁶ See Discussion Item 2 of Second Conference Summary.

undercutting in all quarters (shown in Figure 20 in REP 532) exceeded the price premium claimed by ATM to exist. During the Second Conference, in response to a clarification request, the ADC demonstrated (with reference to Confidential Attachment 5) that the degree of undercutting by the Thai exports exceeded the [REDACTED] price premium claimed by ATM to exist. The ADC stated that this comparison was done for the purpose of the ADC's s.269ZZJ submission and the percentage value of the undercutting (and ATM's claimed price premium [REDACTED] [REDACTED]) was not actually placed before the Commissioner for the purposes of REP 532 because the scale of those specific premium values was only included in ATM's application to the ADRP. The ADC also pointed out that it should also be borne in mind that there was [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁷

110. It was apparent that this comparison (referred to above) was made for the purpose of the ADC's s.269ZZJ submission and was not part of the analysis in REP 532. I therefore requested the ADC to reinvestigate the Commissioner's analysis of price competition in the Australian market, taking into consideration price premiums that ATM and Orrcon can achieve in the market and making the necessary comparisons with the Thai export prices as part of its analysis. I requested that in its reinvestigation the ADC should have regard to various interested parties' submissions on this issue both to the ADC and to the Review Panel, as well as other relevant documents and information.⁶⁸

Reinvestigation Report

111. In the Reinvestigation Report the ADC detailed its comprehensive review of the documents and information provided by ATM and Orrcon to the ADC during the inquiry, and to the Review Panel during the review, in relation to price-setting generally and the quantification of the price premium, including the verification of that information.⁶⁹

⁶⁷ See Discussion Item 2 of Second Conference Summary.

⁶⁸ See Reinvestigation Request.

⁶⁹ See details of this documentation review in Section 7.2 of the Reinvestigation Report, pages 31 – 32 as well as Confidential Attachment 11 to the Reinvestigation Report.

112. In outlining its assessment of price competition in the Australian market, the ADC, firstly, detailed its price competition analysis in REP 532, pointing out that its assessment of price competition in the Australian market in REP 532 was demonstrated via the price undercutting analysis. In this regard the ADC referred to the Manual which provides an explanation of the price undercutting analysis usually performed by the Commission and used in REP 532.⁷⁰ The ADC concluded with respect to its price competition analysis in REP 532:

*This analysis indicates that, in a period where the goods were exported at undumped prices, HSS from Thailand had a significant price advantage over the Australian industry's HSS in the market.*⁷¹

While noting that the ATM did not raise the quantum and impact of price premiums during the conduct of the inquiry, the ADC referred to its explanation during the review process that the analysis demonstrated a difference between prices, and that the difference was greater than the purported price premium claimed by ATM. The ADC acknowledged, however, that if ATM's price premium could be quantified, it would analyse and assess it in the broader context of the market as part of its undercutting analysis.⁷²

113. Secondly, the ADC set out its interpretation of the local price premium. The ADC referred to the Review Panel's previous consideration of the relevance of a local price premium in ADRP Report No. 31 and its acceptance in that Report of the ADC's reasoning that, having regard to the WTO Panel Report in *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*⁷³ ("EC Salmon – Norway"), the components of the higher price claimed needed to be clear and identifiable in order to be meaningful. The ADC stated that the significance of the Panel Report in *EC Salmon – Norway* was that, where a price premium can be

⁷⁰ The ADC's price analysis in REP 532 compared prices actually achieved for sales of comparable MCCs in the Australian market, between: (i) the Australian industry, using verified sales data, calculated as a weighted average of prices (transactions) from both ATM and Orrcon, which excluded the reported inland transport costs to calculate prices at Ex Works terms,⁴⁹ and (ii) the estimated weighted average selling prices achieved by importers of HSS from Thailand at the same terms.

⁷¹ See Section 7.3.1 of the Reinvestigation Report, page 33, and REP 532, page 57.

⁷² See Reinvestigation Report, page 34. Reference was made to the ADC's s.269ZZJ submission and to the Second Conference Summary.

⁷³ *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* (WT/DS337/R)

identified, an unbiased and objective investigating authority would take that premium into account when assessing the degree of price undercutting caused by dumping, as opposed to injury caused by other factors.⁷⁴ The ADC stated that while the factual circumstances in ADRP Report No. 31 differ from the present case⁷⁵ it, however, considered that some considerations in that report are relevant, particularly the understanding that a 'clear and identifiable' price premium is needed for consideration in the ADC's price analysis.⁷⁶

114. Thirdly, the ADC set out ATM's interpretation of the IPP and the local price premium in accordance with ATM's submissions to the ADC and the Review Panel. The ADC stated that ATM had submitted that the local price premium it aims to achieve and which customers are generally willing to pay is a small additional amount applied to the IPP calculated price, with the IPP plus price premium forming the base price of the HSS that ATM sells. The ADC noted that the amount of price premium applied was not a standard dollar value or percentage increase added to the IPP but was variable depending on ATM's strategic pricing considerations.⁷⁷ The ADC referred to ATM's reference to a confidential graph in its submission in response to the Preliminary Reinvestigation Report, that demonstrates a quarterly correlation between the IPP and the weighted average unit price of a HSS subset. ATM had stated that the Chart showed, "a generally consistent gap" between ATM's selling price and the average [Free Into Store] import price that, "reflects the price premium" that ATM can achieve in its sales of HSS.⁷⁸ [emphasis in original] According to the ADC, ATM therefore claims that the 'gap' between the IPP and the weighted average unit price is the price premium.⁷⁹ However, the ADC stated:

⁷⁴ See Reinvestigation Report, page 34.

⁷⁵ It was stated that ADRP Report No. 31 dealt with a reinvestigation of rod in coils and much of the focus of the analysis revolved around material injury and causation findings.

⁷⁶ See Section 7.3.2 of the Reinvestigation Report, page 34.

⁷⁷ The ADC stated that these considerations were discussed at verification and documented by the ADC in the work program. The ADC further stated that ATM reconfirmed this information in its submission to the ADC on the Preliminary Reinvestigation Report, which showed that the net prices it achieved for one HSS subset were variably higher than the corresponding IPP. Reference was also made to Confidential Attachment 11 to the Reinvestigation Report in which ATM's pricing considerations, as well as the ADC's assessment of the information provided in ATM's submission, were summarised.

⁷⁸ See confidential version of Document #35 of EPR 532.

⁷⁹ See Section 7.3.3 of the Reinvestigation Report, pages 34 – 35.

In the Commission's view, the existence of an analytical price gap is not the same as quantifying a clear and identifiable price premium when setting prices. The price gap merely shows that ATM considers import price offers when setting its prices and that the prices achieved (after negotiation) are higher, to varying degrees, than the IPP. In other words, ATM's achieved prices generally follow its intelligence on price offers in the Australian market for HSS.⁸⁰

The ADC stated further that, ATM also submitted that the price premium involves setting a price that is a function of the IPP plus a percentage uplift, and to demonstrate this, ATM provided an email which showed the base price calculation using a price premium to uplift the IPP.⁸¹

115. Fourthly, the ADC set out its assessment of ATM's local price premium. The ADC noted that the actual price achieved by ATM and which forms part of the Australian industry price calculations in the undercutting analysis was not the base price (IPP plus the price premium) but the base price was modified as a result of negotiation with customers and the application of ATM's strategic pricing considerations, such as discounts, which were summarised at Confidential Attachment 11. The ADC reviewed the data and evidence that formed the price analysis in REP 532, inviting evidence from ATM that would demonstrate the link between the base price and the final price which is recorded by ATM in its sales and accounting system. The ADC was unable to observe the necessary linkages. In addition, the ADC stated that the single email evidence from ATM that demonstrated a base price calculation (using a price premium to uplift the IPP), did not address the ADC's concerns from the Preliminary Reinvestigation Report and demonstrated an amount purported to be the IPP, but that number was not found in ATM's IPP model. The ADC had further issues relating to the email that were of concern.⁸²

116. The ADC considered that its approach in REP 532 was consistent with ADRP Report No. 31, which concluded that the higher price achieved by the Australian industry was a function of normal pricing behaviour, with the price premium not

⁸⁰ See Section 7.3.3 of the Reinvestigation Report, page 35.

⁸¹ See Section 7.3.3 of the Reinvestigation Report, page 35.

⁸² See Section 7.3.4 of the Reinvestigation Report, page 36.

being a specific margin and its impact already assessed in the price undercutting analysis.⁸³ The ADC concluded that in the absence of a clear and identifiable price premium in the *EC - Salmon (Norway)* sense, the ADC did not adjust its price undercutting analysis in the way contended by ATM. The Commissioner therefore affirmed the price undercutting analysis and the resulting conclusions and findings in REP 532.⁸⁴

Review Panel's assessment of reinvestigated finding relating to the local price premium

117. In the reinvestigation the ADC conducted a comprehensive review of all the relevant documentation, verified data and submissions made by ATM and Orrcon (to both the ADC and the Review Panel) relating to price-setting generally and the quantification of the price premium, with particular emphasis on ATM's detailed submissions as to how it sets its prices in the Australian market, including the IPP mechanism and the local price premium.⁸⁵ The ADC did not find that there was a clear, identifiable and quantifiable price premium that could be taken into consideration in the price analysis and concluded that the higher price achieved by the Australian industry was a function of normal pricing behaviour.

118. I consider the ADC's analysis to be comprehensive and thorough. I agree with the ADC's assessment that ATM's local price premium was not clearly identifiable or quantifiable, in the sense of being a specific amount or a percentage. Rather the price premium was variable, being a reflection of negotiation with customers and the application of ATM's strategic pricing considerations. I agree with the ADC's conclusion arising from this finding that the local price premium is therefore unable to be taken into consideration in the price analysis. This aligns with the Review Panel's finding in ADRP Report No. 31 in which the Panel Member accepted the ADC's reasoning that the higher price negotiated by the Australian industry was part of its normal market pricing, reflecting the benefits of local supply, and differing between customers. In particular, in ADRP Report No. 31 there was reference to the domestic price premium not being a specific amount or a percentage and not able

⁸³ See Paragraph 65 of ADRP Report No. 31.

⁸⁴ See Section 7.3.4 of the Reinvestigation Report, page 36.

⁸⁵ Confidential Attachment 11 to the Reinvestigation Report was particularly relevant to the analysis of both ATM's and Orrcon's price setting.

to be separately identified in the price undercutting analysis.⁸⁶ While it is acknowledged that the factual circumstances in ADRP Report No. 31 differed from the present case,⁸⁷ the understanding that a 'clear and identifiable' price premium is needed for consideration in the ADC's price analysis, is particularly relevant. The circumstances of both this continuation inquiry and that of ADRP Report No. 31 are distinguishable from the *EC - Salmon (Norway) Panel Report* as in that case the domestic product was known to obtain a clear and identifiable premium of 12 per cent.⁸⁸

119. I agree with the ADC's conclusion that in the absence of a clear and identifiable price premium (in the *EC – Salmon (Norway)* sense), the ADC did not need to adjust its price undercutting analysis in the way contended by ATM. I therefore accept the reinvestigated findings relating to the price premium and the ADC's affirmation of the price undercutting analysis and the resulting conclusions relating to the ADC's findings of price competition in REP 532.

120. For the reasons discussed above, I therefore reject ATM's third ground of review that the Commissioner's analysis of price competition in the Australian market is flawed. I consider the decision of the then Minister, in not being satisfied that it is likely that the expiry of the anti-dumping measures would lead, or would be likely to lead, to a continuation or a recurrence of the injury that the anti-dumping measures is intended to prevent, is the correct or preferable decision.

Summary of Findings Relating to Ground 3 - Claim of Flawed Price Analysis

121. I made the following findings regarding the various claims made by ATM in relation to its third ground of review, challenging the ADC's analysis of price competition in the Australian market, as discussed above:

- a. I considered that in its price comparison analysis the ADC appropriately compared exports of black HSS and excluded the higher-priced exports of

⁸⁶ See ADRP Report No. 31, paragraph 64 – 65.

⁸⁷ The circumstances differed in that in ADRP Report No. 31, in that it was an exporter (rather than the Australian industry) that claimed that the ADC price undercutting analysis was inadequate as it contained no specific consideration of the local price premium and much of the focus of the analysis revolved around material injury and causation findings.

⁸⁸ See *EC - Salmon (Norway)*, para 7.640 page 273.

galvanised HSS (including all exports from Taiwan) and that the analysis was not unsound, as contended by ATM.

- b. I was satisfied with the ADC's explanation and its methodology, and do not consider that there was a reasonable basis for ATM's contention that the ADC's analysis was unsound because it relied on unverifiable and unreliable information.
- c. I was also satisfied with ADC's explanation as to its deviation from its methodology in REP 254, in that Orrcon did not participate in INV 254 and that as a result of Orrcon's participation in this inquiry, and as a result of its data being in a different format to the data provided by ATM, the price undercutting analysis methodology was necessarily different in REP 532.
- d. I was satisfied that the ADC did not find that there was a clear, identifiable and quantifiable price premium that could be taken into consideration in the price analysis. I therefore affirmed the price undercutting analysis and the resulting conclusions, in far as it relates to the ADC's findings of price competition in REP 532.

122. I have not been persuaded by ATM's arguments and consider that the decision by the then Minister not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand by all exporters is the correct or preferable decision and that the Commissioner's analysis of price competition in the Australian market is not flawed. I consider that the decision of the then Minister in not being satisfied that it is likely that the expiry of the anti-dumping measures would lead, or would be likely to lead, to a continuation, or a recurrence of, the injury that the anti-dumping measure is intended to prevent, to be the correct or preferable decision.⁸⁹

⁸⁹ It should be noted that s.269ZHF(2) requires that the Commissioner be satisfied as to the probability of two future events if the measures are to be continued, namely, dumping and material injury. Therefore, irrespective of the status or effect of the Commissioner's determination of likelihood of material injury, the power conferred by that section will only be enlivened if the Commissioner also attained the requisite level of satisfaction with regard to the likelihood of the continuation of, or recurrence of, dumping. Absent such a finding, a finding with respect to the likely recurrence of injury would be insufficient to prevent the revocation of measures. Since it has been concluded that recurrence of dumping is not probable with respect to ADC's other grounds of review, a finding of the

Ground 4: Failure to apply correct meaning to the prospective nature of the term “likely” in relation to the assessment of the ‘prevailing economic conditions in Thailand of the Thai domestic market’ and the likelihood of dumped exports from Thailand recurring.

ATM’s Arguments

123. ATM contends that the Reviewable Decision is not the correct or preferable decision as the Commissioner’s recommendation to the Minister failed to apply the correct meaning to the prospective nature of the term “likely” using past or present evidence in relation to the assessment of the prevailing economic conditions in Thailand of the Thai domestic market and the likelihood of dumped exports from Thailand recurring.

124. ATM submits that the reasoning for the Commissioner’s finding that prevailing economic conditions in Thailand means that he is not satisfied that future exports of HSS from Thailand are likely to be at dumped prices, is not based on a prospective assessment of the Thai domestic market in relation to the impact of the COVID-19 pandemic.

125. ATM referred to the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* on the approach required in relation to the prospective likelihood determination on "positive evidence":

The requirements of 'positive evidence' must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a 'forward-looking analysis'. Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future

recurrence of material injury would not have been sufficient in any event, for a finding that the measures should stay in place.

does not necessarily suggest that such inferences are not based on 'positive evidence'.⁹⁰ [emphasis added by ATM]

126. ATM submitted that throughout the investigation the ADC fails to objectively assess past evidence to form a view on what was likely to occur based on forecast market conditions. ATM pointed out that Thailand's annual GDP growth (as a percentage) was at a low point (approx. 1 per cent) during the period that all Thai exporters were found to be dumping in INV 254.⁹¹ ATM submitted that despite publishing a projected graph for Thai GDP for 2020 that shows even lower GDP growth, that is, -0.3% the ADC stated that it, "is not satisfied that the evidence before it shows that conditions in the domestic market in Thailand provide an incentive to producers to export HSS unless it would be profitable to do so".⁹² [emphasis added by ATM] ATM submitted that was not clear what evidence the ADC based this statement on as the graph on page 52 of REP 532 shows that Thailand has had annual exports of between 100,000 to 200,000 tonnes of HSS from 2013 to 2019 during which period Canada, the USA and Australia have found dumping of HSS by Thai exporters.⁹³

127. Further, ATM submitted that Figure 17 of REP 532 showed that Australia has been a prime destination for Thai exports with volumes close to 50,000 tonnes before the initiation of INV 254 that substantially decreased to around 20,000 tonnes following the imposition of the measures. Further ATM pointed out that the ADC also observed that due to the COVID-19 pandemic Thailand was likely to experience negative growth in GDP and that it is likely that the Government of Thailand ("GOT") would use investment in infrastructure and development projects to stabilise and lift the Thai economy.⁹⁴ Whilst ATM agreed with this assessment it also noted that no assessment had been done of the impact of the reduction in private investment. ATM also noted the concerns of the Southeast Asian Iron and Steel Institute ("SEAIISI") that China's increase in steel inventories during the pandemic had the

⁹⁰ WT/DS268/AB/R, para. 341.

⁹¹ Reference was made to Figure 18: Thailand annual GDP growth(%) of REP 532, page 54 which was reproduced in ATM's application for review, page 13.

⁹² Reference was made to REP 532, page 54.

⁹³ Reference was made to Figure 16: Thailand's total imports and exports for HSS (MT) of REP 532, page 52.

⁹⁴ Reference was made to REP 532, pages 53 – 54.

potential to flood other Association of Southeast Asian Nation member countries (including Thailand) and other nations.⁹⁵

128. ATM pointed out that the ADC contradicted its earlier observation stating it was “not in a position to comment on the likely effectiveness of GOT market interventions to counter the impact of COVID-19, nor the GOT’s ability to fund stimulus measures as a result of impacts elsewhere in the Thailand economy”.⁹⁶ According to ATM the meaning of this statement is unclear, given that the prevailing economic conditions in Thailand was one of the prime findings stated as a reason not to continue the measures. ATM pointed out that the ADC also stated that it was not in a position to comment on the relative attractiveness of Thailand as a destination for Chinese HSS, nor the likely effectiveness of Thailand anti-dumping measures on Chinese exporters of HSS.⁹⁷ ATM also pointed out that the ADC had noted the concerns of SEAISI of a potential flood of imports of steel products, including HSS from China and ATM provided details of the dumping measures applied by Thailand to exports from China and other countries in its application.

129. ATM referred to its submissions to the ADC which provided further information on the effect that a slowdown in the Thai economy caused by COVID-19 would have on the domestic industry and the reduced VAT rates recently imposed on exports of HSS by the Chinese government to encourage exports further. ATM had submitted that, “Given the pressures in the Thai domestic market from imports of HSS and the loss of their largest single export market, ie the US market, and the impact that Covid-19 will have on the Thai domestic construction market, the facts support the Australian industry’s claim that it is highly likely that if the Australian measures were discontinued that Thai exporters would likely recommence dumping that would likely cause material injury.”⁹⁸

130. ATM further submitted that it had provided information and evidence in its application, at verification and in submissions that Thai manufacturers of HSS were export-orientated and were facing barriers to export markets due to the measures,

⁹⁵ Reference was made to REP 532, pages 55-56.

⁹⁶ Reference was made to REP 532, page 56.

⁹⁷ Reference was made to REP 532, page 56.

⁹⁸ Reference was made to Document #027 of EPR, pages 7 - 8.

including safeguards and anti-dumping actions, by other countries.⁹⁹ ATM pointed out that the ADC had observed that ATM's assessment of the challenges faced by Thai HSS manufacturers appeared to be an accurate summation of events.¹⁰⁰

131. ATM expressed concern that the ongoing challenges faced by Thai producers in their home market, being import competition and the US Section 232 measures, would result in a repeat of the dumping and material injury experienced in the original investigation period.¹⁰¹ ATM particularly challenged the ADC conclusion in REP 532 that ATM and Orrcon had provided no positive evidence which explains how the section 232 measures and the imports of HSS in the Thai domestic market would affect the volume of HSS exported to Australia from Thailand and why an increase in export volume is likely if the measures are discontinued.¹⁰²

132. ATM contended that the correct or preferable decision was to secure the continuation of the anti-dumping measures.

ADC Position

133. The ADC in its s.269ZZJ submission stated that in respect of this ground, ATM set out a range of facts which, in contrast to other facts, supported its assertion that the measures ought to have been continued. The ADC provided an example, that ATM contended that the ADC ought to have done more to assess the economic conditions in the Thai economy (such as the impact that the reduction in private investment and COVID-19 pandemic would have on Thai exporters), and that greater weight should have been placed on other facts (such as the apparent correlation between GDP growth and when dumping was found in REP 254).

134. The ADC stated that all the evidence was weighed during the inquiry and the Commissioner reached a different conclusion to the one contended by ATM. The ADC contended that it could not have done any more in the time available to conduct the inquiry, noting that, unless continued, the measures must expire on the relevant date.

⁹⁹ ATM referred to and repeated "evidence" previously submitted to the ADC. Reference was made to Document #27 of EPR 532, pages 4 – 7.

¹⁰⁰ Reference was made to REP 532, page 52.

¹⁰¹ Reference was made to REP 532, page 52.

¹⁰² Reference was made to REP 532, page 52.

135. The ADC submitted that the prevailing economic conditions in Thailand were relevant only insofar as they provided evidence which might indicate whether Thai exporters may have an incentive to dump HSS into markets like Australia, and it was one factor which the ADC considered might be relevant. It was submitted that the ADC explored this topic in the SEF 532, in ATM and Orrcon submissions in response to SEF 532 which were then addressed in REP 532.¹⁰³ The ADC contended that there was no evidence which would reliably demonstrate the likely effect of the GOT's interventions in its own market, nor what effect those interventions would have on future exports of HSS to Australia. The ADC submitted that REP 532 clearly indicated that the impact of these interventions on the likelihood that HSS would be exported from Thailand to Australia at dumped prices in the absence of the measures was not considered by the ADC.¹⁰⁴ The ADC pointed out that the ADC did touch on what was happening with the Thai economy generally and did, for example, examine movements in GDP over time and volumes of imports and exports for similar products. The ADC pointed out that much of this analysis was in response to claims that ATM had made relating to the US measures as an incentive for Thai exporters to dump and flood the Australia market with products diverted from the US, which the ADC did not find to be the case. The ADC stated that the purpose of these considerations was to assess the likelihood of dumping, and not to assess the Thai domestic market in detail, particularly when the impact of COVID and the GOT's interventions was difficult to assess, noting that there was a time limit relating to the continuation inquiry and that ADC resources were limited. The ADC contended that it could not have done any more in the time available to conduct the inquiry.¹⁰⁵

136. The ADC noted that a number of ATM's submissions during the inquiry sought to emphasise that the existing measures were effective, and that similar views were expressed by Orrcon in its grounds of review. The ADC submitted that ATM's application ignored the clear reasoning set out in section 7.4.10 of REP 532, which

¹⁰³ Reference was made to Section 7.4.4 of REP 532, pages 51 – 56.

¹⁰⁴ During the Second Conference, I requested clarification on this statement (made by the ADC in its s.269ZZJ submission). The ADC stated that the Commissioner was not in a position to comment on the likely effectiveness of the GOT's market interventions to counter the impact of COVID, nor its ability to fund stimulus measures, which were issues raised by ATM only in response to SEF 532. See Discussion Item 11 of the Second Conference Summary.

¹⁰⁵ See Discussion Item 11 of the Second Conference Summary and the further discussion relating thereto in the consideration section of this ground of review.

clearly set out what has happened in the market in the period prior to and following the imposition of the measures and sought to examine their effect. The ADC submitted that it could establish that Thai exports of HSS were not dumped during the inquiry period (and whether the economic condition of the Australian industry has improved or declined over the life of the measures) but could not definitively establish whether that is because of the measures (therefore “effective”), or in spite of the measures (and therefore “ineffective”). The ADC pointed out that it was not necessary to do so, but rather it was necessary for the ADC to consider all of the available evidence and make positive findings that are reasonably supported by that evidence to assess whether, in the absence of the measures, dumping is likely to recur. According to the ADC, the factors examined led to the conclusion that it is not likely, and in this instance, the conclusion differed from that contended by ATM.

137. The ADC agreed that the existence of dumping and injury in the inquiry period is not the relevant test as to whether measures ought to be continued, but submitted that the evidence in the inquiry period was the most contemporary information available to indicate market conditions and commercial behaviours and their apparent effect (if any) on the Australian industry, and from which reasonable inferences could be made about likely future outcomes. The ADC did not agree that evidence from several years prior (such as that relied on in REP 254) was a preferable evidentiary basis for assessing what would happen in the absence of the measures. The ADC submitted that all of that information should be considered as a whole, and reasonable conclusions drawn from all of the evidence, and considered that REP 532 does that.

Consideration

138. In this ground of review ATM contended that the Minister failed to apply the correct meaning to the prospective nature of the term “likely” using past or present evidence in relation to the assessment of the prevailing economic conditions in Thailand of the Thai domestic market and the likelihood of dumped exports from Thailand recurring. ATM was critical that the ADC had not done enough in assessing the impact of the reduction in private investment in Thailand, the impact of China’s increase in steel inventories during the pandemic and the potential to flood other Association of Southeast Asian Nation (ASEAN) member countries (including Thailand) and that greater weight should have been placed on other facts

(such as the apparent correlation between GDP growth and when dumping was found in REP 254).

139. The ADC in its s.269ZZJ submission and during the Second Conference provided what I considered to be valid reasons as to why it had not considered in depth, the prevailing economic conditions in Thailand and the impact of COVID and the GOT's interventions on the likelihood that HSS would be exported from Thailand to Australia at dumped prices, in the absence of the measures. These related to limitations of time and resources which I considered to be relevant, particularly in view of the fact that certain of the complex issues relating to the prevailing economic conditions in the Thai domestic market were only raised in response to SEF 532. I also agree with the ADC's submission that the prevailing economic conditions in Thailand were relevant only insofar as they provided evidence which might indicate whether Thai exporters may have an incentive to dump HSS into markets like Australia, and it was a factor which the ADC appropriately considered during the inquiry and addressed in REP 532.¹⁰⁶ I noted that, as stated by the ADC, that the Commissioner had weighed all the evidence during the inquiry but had reached a different conclusion to the one contended by ATM.

140. As has been noted above, undertaking a continuation inquiry requires a prospective examination of the likelihood of future dumping and material injury. At this point, it bears repeating what was noted above in the discussion under the consideration of ATM's first ground of review, that neither the Anti-Dumping Agreement nor the Act prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a continuation inquiry. That said, any determination in relation to the measures must rest on a sufficient factual basis allowing the ADC to reach a reasoned conclusion as to whether it is probable that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping. In this regard, I also note ATM's reference to WTO jurisprudence in support of its submissions that such a "forward-looking analysis", "may inevitably entail assumptions about or projections into the future", and the AB's conclusion that this does not necessarily suggest that such

¹⁰⁶ Reference was made to SEF 532, ATM and Orrcon submissions in response to SEF 532 which were then addressed in REP 532. See Section 7.4.4 of REP 532, pages 51 – 56.

inferences are not based on 'positive evidence'.¹⁰⁷ As has also been noted above, it is generally accepted that the “likely” test established under s.269ZHF(2) is interpreted to mean “more probable than not”.¹⁰⁸

141. I reviewed REP 532 and the relevant documents referred to by the ADC and ATM and consider that the ADC comprehensively addressed all the issues raised by ATM, to the extent of its available resources and time restrictions of the inquiry. I do not consider that the ADC could be expected (or that it had the time and resources available) to conduct a more complex and more comprehensive analysis of the economic conditions in the Thai domestic market or make reasoned projections of the GOT’s likely interventions as a result of the pandemic or the impact of any trade measures taken by Thai authorities on Chinese imports, and the impact of such interventions on future exports of HSS to Australia. I agree with the ADC’s assessment that there was no evidence which would reliably demonstrate the likely effect of the GOT’s interventions in its own market, nor what effect those interventions would have on future exports of HSS to Australia. ATM’s submissions and ‘evidence’ relating to the economic conditions in Thailand, the trade restrictive measures imposed on Thai exports or the pressure from imported products on the Thai domestic market, taken as a whole, in my view do not demonstrate the likelihood of dumped exports from Thailand recurring. I consider that the ADC’s analysis to be thorough, comprehensive and focussed (within the framework of its resources and time limitations) and I agree with its conclusions.

142. It also bears repeating (having been the subject of ATM’s first ground of review and discussed during the Second Conference) that the ADC has emphasised that the Thai exports were already price competitive in the Australian market (and profitable) and therefore there was no incentive to reduce prices if expansion was a consideration as a result of either the conditions in the Thai domestic market or as a result of trade restrictions in other markets.¹⁰⁹

143. In conclusion, I have not been persuaded by ATM’s arguments and do not consider that there was a failure to apply the correct meaning to the prospective nature of the term “likely” or “likelihood”, in relation to the assessment of the prevailing economic

¹⁰⁷ See *US – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, para. 341.

¹⁰⁸ *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838at [48].

¹⁰⁹ See Discussion Item 11 of the Second Conference Summary.

conditions in Thailand and the likelihood of dumped exports from Thailand recurring. I consider that the finding by the then Minister in not being satisfied that the expiration of the anti-dumping measures applying to HSS exported to Australia from Thailand would lead to or would be likely to lead to a continuation of, or a recurrence of, dumping that the anti-dumping measure is intended to prevent, is the correct or preferable decision.

Ground 5: Error with respect to normal values and dumping margins for all exporters from Thailand by failing to take into account the higher cost HRC used for domestic sales

144. ATM contended that the Commissioner erred in his recommendation to the Minister with respect to the determination of normal values and dumping margins for all exporters from Thailand by failing to take into account the higher cost of HRC used for domestic sales.

145. ATM submitted that normal values for the three cooperating exporters (Saha Thai, Pacific Pipe and TPP), were determined under s.269TAC(1), having regard to whether those domestic sales were in the ordinary course of trade (OCOT) pursuant to s.269TAAD.¹¹⁰ ATM submits that s.269TAAD(5) provides that the costs of manufacture of production of the goods for OCOT must be worked out in such manner, and taking account of such factors, as the regulations provide, with the relevant regulation being s.43(2) of Customs (International Obligations) Regulation 2015 (“CIO Regulation”).

146. ATM contended that the records of the exporters do not reasonably reflect competitive market costs with respect to HRC, being the major raw material associated with the production or manufacture of like goods. ATM submitted that this is materially significant, as the quantum of HRC costs will directly affect the outcome of the OCOT tests performed, and will likely result in an incorrect determination of the normal values and dumping margins determined (likely lower than they would otherwise be).

¹¹⁰ Reference was made to REP 532, page 63.

147. ATM submits that HRC is the major raw material input comprising 90 per cent of the cost to make (“CTM”) for Thai manufacturers of HSS.¹¹¹ According to ATM the Thai authorities have imposed both anti-dumping and safeguard duties to imported HRC, with the anti-dumping duties ranging from 14 per cent and safeguard duties from 20 per cent of the value of the imported coil.¹¹² The duties do not apply to HRC that is processed into the finished product (HSS) that is subsequently exported.

148. According to ATM, Thai exporters submitted in INV 254 that imports are a major part of the Thai HRC market, accounting for almost half of total Thai HRC supply and that the domestic Thai (HRC) producers can set their home market prices at a level that includes the duty costs that would be borne by HRC users if they chose to purchase imports. That is to say, that the market prices of HRC in Thailand are essentially import parity prices.¹¹³ In the review of variable factors for Continuation Inquiry No. 532 (“INV 532”), the Thai exporters presented, and the ADC accepted, their HRC costs as a single cost of coil for the CTM of HSS regardless of whether the HSS was destined for the domestic or export market. The ADC confirmed in REP 532 that the exporters’ costs were not unreasonable as being presented as a single CTM regardless of the destination market (export or domestic).¹¹⁴

149. ATM stated that it provided submissions throughout the continuation inquiry opposing the acceptance of a single cost of HRC for the CTM noting that the:

*single cost of coil for the export and domestic markets gives an erroneous cost as imported coil used to make domestic HSS is subject to import duties, including anti-dumping and safeguard duties, whilst imported coil used to make exported HSS is not subject to the same duties.*¹¹⁵

150. ATM contended that allocating a single cost of coil to the CTM for exported and domestic HSS overstates the CTM for exported HSS (by including duties that are not incurred), and understates the CTM for the like domestic HSS (by not including

¹¹¹ Reference was made to REP 254, page 59.

¹¹² Reference was made to Document #025 of EPR 532, page 3 as well as Document #016 of EPR 532 page 2 and Confidential Attachments 2 and 4 to ATM’s application for review.

¹¹³ Reference was made to Document #040 of EPR 254, pages 1-2 and Document #052 of EPR 254, page 38.

¹¹⁴ Reference was made to REP 532, page 35 and page 40.

¹¹⁵ Reference was made to Document #025 of EPR 532, page 1.

the full costs of duties incurred by the coil to produce that HSS). ATM submitted that the understatement of coil costs for the domestic CTM affects OCOT tests with flow on effects to domestic sales suitable for normal value determination under s.269TAC(1) and for a constructed normal value where required. According to ATM, the understatement of domestic coil costs can be significant.¹¹⁶

151. ATM stated that it submitted in response to SEF 532 that costs used for OCOT tests should as per s.43(2) of the CIO Regulation, “reasonably reflect competitive market costs associated with the production or manufacture of like goods”¹¹⁷

152. ATM had noted that the Dumping and Subsidy Manual November 2018 (“the Manual”) states for cost items that fall within the CTM under Australian and International standards:

Cost of purchase means the aggregate of:

- *Purchase price*
- *Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities).¹¹⁸ [emphasis added by ATM]*

153. ATM submitted that the Manual makes it clear that import duties should be included in the purchase cost of imported coil used to produce HSS for the domestic market and should not be included in the purchase cost of imported coil used to produce HSS for the export market. ATM submitted that it is quite clear that imported coil or steel used to make HSS for sale on the domestic market incurs anti-dumping and/or safeguard duties¹¹⁹ and such duties are part of the cost of production. ATM further submitted that it was also quite clear that imported coil or steel used to make HSS for sale on the export market does not incur anti-dumping and/or safeguard duties and such duties are not part of the cost of production. It was further submitted that the cost of coil used to manufacture HSS for the domestic market will not

¹¹⁶ Reference was made to Confidential Attachment 4 to ATM's application for review, pages 68 – 69.

¹¹⁷ Reference was made to Document #025 of EPR 532, page 2.

¹¹⁸ The Manual, page 43.

¹¹⁹ Reference was made to Document #025 of EPR 532, page 3.

“reasonably reflect competitive market costs associated with the production or manufacture of like goods” as required by the legislation and CIO Regulation.

154. ATM referred to the Manual which addresses the meaning of “reasonably reflects competitive market costs” and stated that the ADC had regard to the Manual in REP 532 noting:

Having regard to that approach, the Commission again notes that Saha Thai’s records were kept in accordance with the GAAP in Thailand, is inclusive of all relevant costs, and that the costs allocated in the CTM are reasonable.

155. ATM submitted that the ADC also compared the Thai exporter costs against each other and with exporters of HSS from other countries subject to Review 529 in reaching its conclusions that there was no evidence that the Thai exporters’ HRC costs did not reasonably reflect a competitive market cost.¹²⁰ ATM considered that the ADC’s approach, analysis and conclusion were incorrect for the following reasons:

- The ADC appeared to have only considered the weighted average costs of HRC, being inclusive of imported and domestic HRC.
- The accounting records support that average cost of imported and domestic HRC, and do not support the separate costs of imported and domestic HRC.
- The costs allocated in the CTM are not reasonable in that costs (the duties) incurred by imported HRC used in the domestic production of HSS are unreasonably allocated to the cost of production of exported HSS which does not incur such costs. [emphasis by ATM]

156. ATM submitted that s.43(2) of the CIO Regulation and the Manual, both refer to the costs of production in regard to the domestic like goods sold on the domestic market for the purposes of OCOT tests, determining whether there are suitable sales under s.269TAC(1) and for costs for constructed normal values under s.269TAC(2)(c)(i). ATM contends that neither s.43(2) of the CIO Regulation, nor the Manual, refer to and neither envisages the approach taken by the ADC in

¹²⁰ Reference was made to REP 532, page 36.

comparing the weighted average costs of production for imported and exported goods.

157. ATM referred to REP 532:

The Commission considers that the factual circumstances examined in REP 254 remain the same, such that Saha Thai's records do not permit the allocation of import duties and any associated duty drawback to its domestic or export production, as appropriate. The Commission notes that Saha Thai's records are audited and are in accordance with the generally accepted accounting principles (GAAP) applying in Thailand, and the manner in which those records have been kept are not in sufficient detail to enable the Commission to allocate the import costs in the manner that ATM requests.¹²¹
[emphasis added by ATM]

158. ATM considered that as the exporters' records do not permit the allocation of import duties and that those records are not in sufficient detail to enable the ADC to allocate the import costs then it must be concluded that the exporters' records do not reasonably reflect competitive market costs associated with the cost to make like goods as required by s.43(2) of the CIO Regulation. ATM noted that s.43(8) of the CIO Regulation states in regard to the determination of the cost of production or manufacture that:

For this section, the Minister may disregard any information that he or she considers to be unreliable.

159. ATM contended that as the exporters' records do not reasonably reflect the cost of manufacture for the purposes of OCOT tests, whether there are sufficient sales for a determination of normal values under s.269TAC(1) and for constructed normal values under s.269TAC(2)(c)(i) then the costs of production as it relates to the cost of HRC should be considered unreliable and the best available information used. ATM considered that the best available information would be to use the cost of the imported coil used to produce the domestic like goods plus the average import duties applicable.

¹²¹ Reference was made to REP 530, page 35.

160. ATM noted that it provided information in its application of import duties on HRC ranging from 14 per cent for imports from Korea, to 25 per cent from Taiwan, 30 per cent from China and up to 128 per cent from other countries.¹²² ATM submitted that safeguard duties of 20 per cent also apply to imports of HRC.¹²³ ATM therefore considered that a fair and reasonable method in light of the unreliable production costs of the exporters and in the absence of other information that import duties of at least 20 per cent (or a weighted average percentage based on imported coil volumes from the relevant countries for a given exporter) should be added to the cost of the imported coil used to produce the domestic like goods for the purposes of OCOT tests and any constructed normal values as required.

161. ATM submitted that the ADC also noted in reference to the reasonableness of the exporters' costs that:

In relation to ATM's claim that HRC import duties should be allocated to domestic production and not export production, the Commission notes that TPP did not claim a downwards adjustment to the normal value in relation to import duty differentials, such as a duty drawback, and the Commission can confirm that the CTM is complete and inclusive of all relevant import duties.¹²⁴ [emphasis added by ATM]; and

In any event, the Commission observes that Saha Thai did not claim in this inquiry that its domestic HSS production was more expensive because it was eligible for a duty drawback on HRC used in its exported HSS; such a claim, if able to be verified, would have resulted in a downwards adjustment to the normal value in order to achieve a fair comparison between the normal value and the export price.¹²⁵ [emphasis added by ATM]

162. ATM submitted that it appeared that the ADC was conflating different issues in its consideration of whether the costs of production are reasonable and whether the exporters would be eligible for a duty drawback. ATM submitted that the ADC appeared to have reached the conclusion that as the exporters would have likely been eligible for a duty drawback and a downwards adjustment to the normal values

¹²² Reference was made to Confidential Attachment 4 to ATM's application for review, pages 68-69.

¹²³ Reference was made to Document #016 of EPR 532, page 2.

¹²⁴ Reference made to REP 532, page 40.

¹²⁵ Reference made to REP 532, page 35.

then the end result would have been the same whether import duties applicable to HRC used in domestic production were taken into account or not. ATM considered that this approach is not correct and that consideration of whether an exporter may be eligible for a duty drawback is not a relevant consideration under s.43(2) of the CIO Regulation and for the purposes of OCOT tests. ATM noted that in INV 254 Saha Thai and Pacific Pipe both applied for duty drawback adjustments and that the ADC rejected both claims.¹²⁶

163. ATM pointed out that REP 254 also noted that:

To support its claim, Saha Thai relies on:

- *the cost difference between HRC produced in Thailand and imported HRC*
- *evidence showing that it paid duties for imported HRC that are used in the production of HSS sold in the domestic market; and*
- *a comparison of weighted average selling prices of like goods in its domestic market versus Australian exports prices.¹²⁷ [Emphasis by ATM]*

and,

“Pacific Pipe also submits that its domestic prices of HSS are modified by import duty payable on HRC used in the production of HSS as market prices of HRC in Thailand are essentially import parity prices.¹²⁸ [Emphasis by ATM]

164. ATM submitted that it appeared clear from REP 254 and submissions to INV 254 that the cost of imported HRC and domestic HRC used to produce the domestic HSS was higher than the cost of imported coil to produce the exported HSS and that the exporters could quantify that difference although they subsequently failed to meet the criteria required to support their claims for a duty drawback.

¹²⁶ Reference made to REP 254, pages 28 and 39.

¹²⁷ Reference was made to REP 254, page 27.

¹²⁸ Reference was made to REP 254, page 40. [It should be noted that this reference appears to be an error and that the actual quote is on page 38.]

165. ATM also noted that TPP, who was not an exporter investigated during INV 254, also made a claim for a duty drawback during the Review No. 445 (REV 445) of the measures, stating that:

The amount of the duties and taxes refunded upon exportation is equal to the amount of duties and taxes paid upon import.

Duty payable on imported materials is X% AND XXXXXXXX AND XXXX XXXXX (Duty on Imported HRC).¹²⁹

166. ATM contends that the correct or preferable decision would be for the Minister to determine new normal values that take into account the higher cost of HRC used for domestic sales for the purposes of OCOT, sufficiency of sales of like goods and constructed normal values (where required) and to determine dumping margins appropriately based on those corrected normal values.

ADC position

167. In its s.269ZZJ submission the ADC referred to ATM's assertion that the records of the exporters of HSS from Thailand must be incomplete, that accounting allocations were incorrect or that the ADC had otherwise failed to demonstrate that the recorded costs of Thai exporters represented competitive market costs. The ADC submitted that ATM offered no evidence to support these assertions but inferred from other information (such as the fact that there are import duties payable in Thailand) that this must be the case.

168. The ADC states that the method of calculating the dumping margins for exporters from Thailand is set out in chapter 6 of REP 532 and that the details of the verification steps undertaken in respect of each exporter have been set out in the relevant work programs, summarised in the verification reports and published on the electronic public record for the inquiry. According to the ADC those reports and work programs, along with REP 532, set out the basis for the ADC being satisfied that the records of the exporters were complete, accurate and relevant, and therefore formed the basis on which the margins were calculated.

¹²⁹ Reference was made to Document #009 of EPR 445, page 31.

169. The ADC submitted that as was set out in REP 532 and in the various verification reports, the records of the Thai exporters were kept in accordance with generally accepted accounting principles relevant to Thailand. The ADC further submitted that an absence of detail in those accounting records which enables the source of HRC to be traced through to the ultimate destination of the exported HSS did not, in the opinion of the ADC provide a reasonable basis on which to ascertain that those records did not represent competitive market costs. The ADC contended that there was no evidence indicating that the Thailand market was distorted such that it is not operating according to normal commercial principles, nor that HRC costs were understated generally.

170. The ADC submitted that if ATM's submission on this ground is taken to its furthest conclusion, and the HRC costs recorded by Thai exporters were not inclusive of all relevant costs or were not competitive market costs, the ADC would have replaced the recorded cost of HRC with a suitable benchmark. The ADC stated that this would have been derived from the recorded HRC costs of other exporters in the same period, based on information the ADC obtained in the course of the present review of measures concerning HSS exported from China, Korea, Malaysia, Taiwan and Thailand (Investigation No. 529). The ADC submitted that the analysis in that case indicated that the costs of HRC recorded by exporters in Korea, Malaysia, Taiwan and Thailand were comparable. According to the ADC in these circumstances, it is unlikely that such a finding would make any material difference to the dumping margins calculated.

171. The ADC referred to ATM's contention that the ADC erroneously considered the availability of a duty drawback to be relevant for the purposes of s.43(2) of CIO Regulation and the OCOT tests. The ADC submitted that whilst REP 532 touches on the possibility of a duty drawback, it was discussed in the context of submissions made by ATM and comparing the present circumstances to those found in REP 254. The ADC stated that, as outlined in REP 532, the evidence of HRC import duties in REP 254 and in the present inquiry was similar, as was their accounting treatment,¹³⁰ and it was therefore unclear why the approach applied in REP 254 (and as advocated at the time by ATM) was now not appropriate in REP 532 (as contended by ATM) when there is no material factual difference beyond the

¹³⁰ Reference was made to REP 532, page 35.

dumping margins that have been established. The ADC reiterated that the presence (or absence) of dumping during the inquiry period was only one factor that was considered when recommending not to continue the measures.

Consideration

The Second Conference and the Reinvestigation Request

172. I considered that ATM's submissions relating to the single CTM of HRC import costs by the Thai manufacturers of HSS to have substance.

173. Therefore, during the Second Conference I requested clarification of the ADC's position with regard to ATM's contentions of not taking into account the higher cost of HRC used for domestic sales, in determining normal value, in the light of s.43(2) of the CIO Regulation and in light of the definition of cost of production and itemised cost items relating to s.43 in the Manual. The ADC stated that the records of the Thai exporters were kept in accordance with generally accepted accounting principles relevant to Thailand. It was pointed out that while the relevant accounting system did not track the source of HRC used in production, with no differentiation made between the costs of domestic and exported HSS, the ADC did not consider it to be a reasonable basis on which to ascertain that those records did not represent competitive market costs, for the purpose of s.43(2) of the CIO Regulation. The ADC stated that, in its opinion, a single cost for HRC in the circumstances seemed reasonable. The ADC further stated that if the cost of HRC could have been separated for exported and domestic HSS, adjustments could subsequently have been claimed in order to ensure a fair comparison, and therefore the effect on the dumping margin would have been neutral. I pointed out that this did not address ATM's claim relating to determining the CTM for the purpose of the OCOT test and that the Manual makes it clear that the full cost of import duties should have been included in the purchase cost of imported HRC used to produce HSS for the domestic market. I requested clarification as to whether separating the costs of import duties could have affected whether any MCC's were in the OCOT, for the purpose of determining normal value and possibly affecting the dumping margin. The ADC acknowledged that it was possible to perform "a sensitivity analysis" to determine if an increase in costs could affect the OCOT test for relevant models

identified as being exported to Australia, which might lead to an increase in the normal value and subsequently affect the dumping margin.¹³¹

174. Notwithstanding the ADC's position that the resulting drawback adjustment to normal value would have a neutralising effect on the dumping margin, if the cost of HRC could be separated for exported and domestic HSS production, I still considered that ATM's contentions relating to effect of the allocation on normal value OCOT tests, had some merit. The single CTM also appeared to be contrary to the ADC's practice as set out in the Manual, indicating that cost items that fall within the CTM include, "Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities)". I therefore decided to request a reinvestigation of the ADC's finding in this regard.

175. As part of the reinvestigation of this issue, I requested the ADC to undertake such "a sensitivity analysis" (as referred to during the Second Conference) to determine if an increase in costs would impact relevant OCOT tests and therefore the normal value and dumping margins. I requested that if there was an indication that the normal values might be affected, the ADC should undertake appropriate calculations to determine the actual effect on dumping margins. Further, I requested that should the dumping margins change as a result of the above reinvestigation request, consideration should be given as to whether this impacted the ADC's assessment of the likelihood of dumping and material injury continuing or recurring.¹³²

Reinvestigation Report

176. In the Reinvestigation Report the ADC explained in detail the methodology used for its sensitivity analysis to examine the impact of the non-refundable duties on the cost of imported HRC used in domestic HSS production. The ADC stated that the scenario being examined was, "the subsequent impact of these relatively higher HRC costs on the OCOT test, normal value and dumping margin calculations". The ADC stated that by considering certain boundaries, data limitations and assumptions (which were described in detail in the Reinvestigation Report), it manipulated the single CTM to calculate what it stated to be, "the Maximum Cost

¹³¹ See Discussion Item 1 of the Second Conference Summary.

¹³² See the Reinvestigation Request for further details.

Model” which assumes the maximum HRC cost differential possible between HSS markets. The ADC explained that the Maximum Cost Model was the basis of its sensitivity analysis, which assessed the potential impact of non-refundable safeguard duties on the CTM and subsequent dumping margins as if the Thai exporters had accounted for that difference.¹³³

177. The ADC pointed out that the “Maximum Cost Model” and the sensitivity analysis is merely a counterfactual scenario which seeks to test the claims submitted by ATM, relying on certain assumptions, limitations and boundaries which the ADC derived from the verified data. The ADC pointed out that it was not a replacement of the verified data, which in the ADC’s view showed that the Thai exporters accurately and reasonably accounted for all of their HRC costs.¹³⁴

178. In the Reinvestigation Report the ADC also explained the “duty drawback consequence of the Maximum Cost Model” in that the modelled differences in HRC costs are a result of non- refundable duties paid on HRC used in domestic production, and duties which are either not paid (via a bonded warehouse) or refunded (via duty drawback) for HRC used in export production. The ADC stated that the premise of the Maximum Cost Model is that the single CTM is manipulated to calculate a domestic CTM and an export CTM because of the non-refundable import duties allocated only to domestic production. The ADC also stated that if the verified single CTM was discarded in favour of a separate domestic CTM and an export CTM based on the Maximum Cost Model, it would also be appropriate to account for the duty drawback mechanism that the Thai exporters use.¹³⁵

179. In this regard the ADC stated that having used the Maximum Cost Model to establish a theoretical difference in the domestic CTM and the export CTM, there were now theoretical differences which affected domestic and export sales comparability, and that a downwards adjustment must therefore be made in accordance with s.269TAC(8) when calculating the theoretical normal value under the Maximum Cost Model. This was said to be because the domestic sales in OCOT, using the Maximum Cost Model, are modified by the import duty allocation

¹³³ For a full discussion of the ADC’s sensitivity analysis and methodology used, including the “Maximum Cost Model”, see Section 2.3 of the Reinvestigation Report, pages 12 – 18.

¹³⁴ See Section 2.3.2 of the Reinvestigation Report, page 18.

¹³⁵ See Section 2.3.3 of the Reinvestigation Report, page 18.

in the domestic CTM, and this does not exist for export sales. Reference was made to the Manual in this regard.¹³⁶

180. The ADC then applied this methodology to each exporter and found that the dumping margins would be as follows:

- a. Pacific Pipe would not change and would continue to be negative 4.3 per cent.¹³⁷

Given the small volume of HRC imported by Pacific Pipe, the ADC considered that the impact of any non-refundable duties on imported HRC used for domestic production of HSS was immaterial. As the impact was immaterial to the verified single CTM, the ADC did not reinvestigate the impact of non-refundable import duties on Pacific Pipe's normal value. Accordingly, the Maximum Cost Model was not applied to Pacific Pipe's data and no changes were made to Pacific Pipe's dumping margin calculation in REP 532.

- b. Saha Thai would change from negative 13.1 per cent to negative 26.8 per cent.¹³⁸

The ADC found that the information submitted by Saha Thai in response to the reinvestigation questionnaire was not sufficient for the purposes of allocating actual HRC costs incurred for domestic and export production of HSS. The ADC therefore relied on Saha Thai's verified data and information in REP 532 to undertake the modelling and sensitivity analysis. Overall, the application of the Maximum Cost Model resulted in approximately 5 per cent less domestic sales volume being in the OCOT. While there were sufficient domestic sales volumes of comparable domestic MCCs made in the OCOT for the three MCCs exported to Australia, the Maximum Cost Model caused all identical models to fall out of the OCOT.¹³⁹ The ADC then made the following adjustments to the normal value under s.269TAC(8) to ensure that

¹³⁶ See Section 2.3.3 of the Reinvestigation Report, pages 18 – 19 and page 68 of the Manual which is referenced in that section.

¹³⁷ See Chapter 3 of the Reinvestigation Report, pages 20 – 21.

¹³⁸ See Chapter 4 of the Reinvestigation Report, pages 22 – 25.

¹³⁹ See Table 3 of the Reinvestigation Report, page 24.

the normal value in the Maximum Cost Model was a fair comparison to the export price of the goods exported to Australia:

- Deduction of an amount for non-refundable duties payable on imported HRC for domestic production, calculated on a weighted average basis using the Maximum Cost Model HRC cost differences. The downwards adjustment was then applied to the MCCs that incurred the cost difference between markets.
- Addition or deduction of amount for specification differences in CTM between the export model and surrogate domestic model.¹⁴⁰

c. TPP would change from negative 4.5 per cent to negative 9.8 per cent.¹⁴¹

In reviewing the data for the application of the Maximum Cost Model to TPP, the ADC corrected a “minor error in TPP’s dumping margin calculation”, which changed the dumping margin from negative 4.5 per cent to negative 3.4 per cent. The ADC found that the information submitted by TPP in response to the reinvestigation questionnaire was not sufficient for the purposes of allocating actual HRC costs incurred for domestic and export production of HSS. The ADC therefore relied on TPP’s verified data and information in REP 532 to undertake the modelling and sensitivity analysis. Overall, the application of the Maximum Cost Model resulted in approximately 7% less domestic sales volume being in the OCOT. However, the results did not change for the MCCs that were also exported to Australia.¹⁴² The ADC then made the following adjustments to the normal value under s.269TAC(8) to ensure that the normal value in the Maximum Cost Model was a fair comparison to the export price of the goods exported to Australia:

- Deduction of an amount for non-refundable duties payable on imported HRC for domestic production, calculated on a weighted average basis using the Maximum Cost Model HRC cost differences.

¹⁴⁰ See Table 3 of the Reinvestigation Report, page 24.

¹⁴¹ See Chapter 5 of the Reinvestigation Report, pages 26 – 29.

¹⁴² See Table 7 of the Reinvestigation Report, page 28.

The downwards adjustment was then applied to the MCCs that incurred the cost difference between markets.

181. In the Reinvestigation Request I had requested that should the finding in relation to the normal values and dumping margins of exporters be changed as a result of the reinvestigation, consideration should be given as to whether this impacted the ADC's assessment of the likelihood of dumping and material injury continuing or recurring. In the Reinvestigation Report it was stated that the dumping margins are one factor that the ADC considered in assessing whether dumping and material injury was likely to recur if the measures were discontinued. It was further stated that the the sensitivity analysis (through the application of the Maximum Cost Model) would still result in a finding that the Thai exporters were not dumping in the inquiry period. As a result, the ADC considered that there was no basis to depart from the findings in REP 532 relating to the likelihood of dumping and injury.

Review Panel's consideration of the reinvestigated finding relating to the allocation of HRC import duties

182. I reviewed the reinvestigated findings relating to the Maximum Cost Model and its application to the allocation of HRC costs in respect of domestic production of HSS, together with the supporting confidential spreadsheets. I could not find fault with any of the assumptions made nor with any of the calculations (putting aside for the moment, the question of whether it was appropriate to make the adjustment for the duty drawback). I considered that the Maximum Cost Model appropriately addressed ATM's concerns relating the understatement of HRC costs with regard to domestic production of HSS and the overstatement with regard to export production, due to the single CTM. The impact of the reallocation of HRC import duty costs was that it affected the pool of products in OCOT, eliminating certain lower priced products and thereby increasing the normal value. This was not unexpected.

183. However, I had concerns relating to the adjustment to the normal value for the duty drawback, which resulted in substantially higher negative dumping margins than in REP 532.¹⁴³ During the Third Conference the ADC stated that since the Maximum

¹⁴³ The ADC had stated in the Reinvestigation Report that if the verified single CTM was discarded in favour of a separate domestic CTM and an export CTM based on the Maximum Cost Model, it would

Cost Model “artificially” increased the normal value and introduced a difference in taxation between the domestic sales and export sales, the adjustment for the duty drawback was considered to be a logical consequence of this “artificial” change to the CTM, to reflect circumstances of export sales where there was no tax payment.¹⁴⁴

184. My major concern was that the impact of the adjustment was a more than doubling of the negative dumping margins for both exporters (from negative 13.1 per cent (in REP 532) to negative 26.8 per cent for Saha Thai and from negative 4.5 per cent (in REP 532) to negative 9.8 per cent for TPP). This was unexpected and did not seem to accord with what the ADC previously stated during the Second Conference, that the likely effect on the dumping margin would be neutral in the event of the allocation of HSC import costs to domestic HSS, coupled with the duty drawback adjustment¹⁴⁵ ATM in its application for review also made reference to the ADC appearing to have reached the conclusion that as the exporters would have likely been eligible for a duty drawback and a downwards adjustment to the normal values, the end result would have been the same whether import duties applicable to HRC used in domestic production were taken into account or not.¹⁴⁶ There did not appear to me to be a logical explanation for the substantial increase in the negative dumping margins of the exporters. The ADC merely pointed out during the Third Conference that it did not have a view on what the margin should be, having proposed a methodology based on the assumptions described in the Reinvestigation Report, and that the outcome was just a result of the calculation.¹⁴⁷

185. I was also not convinced by the ADC’s reasons for automatically making the adjustment simply because it considered it to be a logical consequence of the “artificial” change to the CTM. While I can understand the ADC’s reference to the allocation of HRC costs in accordance with the Maximum Cost Model being considered “theoretical” or “artificial” relative to the exporters’ accounting practices, which are considered to be in accordance with generally accepted accounting

also be appropriate to account for the duty drawback mechanism that the Thai exporters use. See Section 2.3.3 of the Reinvestigation Report, page 18.

¹⁴⁴ See Discussion Item 2 of the Third Conference Summary.

¹⁴⁵ See Discussion Item 1 of the Second Conference Summary.

¹⁴⁶ See ATM’s application for review, page 24, where reference made to the ADC’s rejection of claims by both Saha Thai and Pacific Pipe for duty drawback adjustments in INV 254. Further reference was made to REP 254, pages 28 and 39.

¹⁴⁷ See Discussion Item 2 of the Third Conference Summary.

principles (GAAP), I do not fully agree with this designation when considered in practical terms. It is not disputed that HRC import duty costs were indeed higher for the production of domestic HSS because of the GOT drawback / non-payment of duties on imports of HRC, when used as an input into HSS destined for export. It also appeared not to be disputed that the Thai exporters actually benefitted from this drawback / non-payment of duties on imports of HRC. ATM in its application for review made references to the various instances in INV 254 where the Thai exporters (Saha Thai and Pacific Pipe) had unsuccessfully applied for duty drawback adjustments, providing substantiating evidence to the ADC of the higher costs of HRC for domestic production of HSS.¹⁴⁸

186. I therefore do not consider the allocation to be “artificial” in the true sense of that word and would have expected the ADC to provide some justification for making the adjustment, in accordance with its usual policy and practice, such as a demonstration that the difference in taxation affected price comparability.¹⁴⁹ The lack of specific documentary evidence of the actual drawback / non-payment of duties, and the fact that the exporters’ accounts did not reflect a difference in HRC costs for exported and domestic production of HSS, would appear to indicate that the difference in taxation did not impact the setting of prices for export and domestic sales. In other words, there is no indication that price comparability was affected.

187. Notwithstanding the reference in REP 532 to a passage in the Manual that stated that adjustments may be allowed, “if the claimant produces evidence” and that an adjustment for differences in taxation may be made “where price comparability is affected”, the ADC provided no further basis for the adjustment in the reinvestigated finding other than the above reference to the allocation of HRC costs to domestic production by the application of the Maximum Cost Model being “artificial” or “theoretical”.¹⁵⁰ I therefore reject the adjustment of the duty drawback on the basis that the difference in taxation has not been shown to have impacted the setting of

¹⁴⁸ See ATM’s application for review, pages 24 – 26.

¹⁴⁹ It is clearly stated in the Manual that the policy of the ADC is that adjustments will be made, “if there is evidence that a particular difference affects price comparability”. See Section 15.2 of the Manual, page 64. It is also stated in the Manual that the practice of the ADC is to seek, “relevant data and make adjustments where evidence exists that a particular difference has affected price comparability”. See Section 15.3 of the Manual, page 65.

¹⁵⁰ See Section 2.3.3 of the Reinvestigation Report, page 19. Also see Discussion Items 4 of the Third Conference Summary.

prices. My rejection of the adjustment was also affected by the unexpected and rather severe impact of the adjustment on the calculation, which seemed to detract from its reasonableness.

188. I noted that the Reinvestigation Report did not address ATM's concerns relating to the adjustment of duty drawback, as articulated in Section 1 of ATM's submission dated 21 July 2021 in response to the Preliminary Reinvestigation Report.¹⁵¹ During the Third Conference I requested clarification from the ADC on this issue. The ADC pointed out that ATM's submission did not address the actual methodology of the Maximum Cost Model, only raising concerns with the duty drawback adjustment. The ADC stated that it took the approach not to tackle ATM directly on this issue as it considered that it was self-evident that there would be no evidence in existence to support a duty drawback because the reallocation of the HRC costs, in accordance with the Maximum Cost Model, was in the ADC's view "theoretical".¹⁵² It should be pointed out that whatever the ADC's view was on the merits of ATM's submissions, it should have at least acknowledged and addressed ATM's arguments and comments, in the Reinvestigation Report, to ensure that it was clear that ATM's submissions were taken into consideration in making the relevant finding.

189. During the Third Conference I had requested the ADC to provide recalculations for the Thai exporters using the Maximum Cost Model to determine normal values in accordance with the methodology in the Reinvestigation Report, but without making the adjustment for the duty drawback in each case.¹⁵³ This resulted in slightly reduced negative dumping margins for Saha Thai and TPP, as follows:

- Saha Thai from negative 13.1 per cent (REP 532) to negative 10.9 per cent;
- TPP from negative 4.5 per cent (in REP 532) to negative 2.3 per cent.

190. For the reasons set out above, I accept the ADC's reinvestigated findings with regard to the application of the Maximum Cost Model for determining normal values and the reallocation of HRC import duty costs to domestic CTM in respect of Saha

¹⁵¹ See Document #35 of EPR 532, pages 2 – 8.

¹⁵² See Discussion Item 4 of the Third Conference Summary

¹⁵³ See Discussion Items 5 and 10 of the Third Conference Summary. The ADC provided the Review Panel with the relevant spreadsheets showing these calculations.

Thai and TPP, but I reject the adjustment of the duty drawback in respect of both exporters. The adjusted dumping margins that I consider to be correct or preferable are as follows:

| | |
|---------------|------------------------|
| Saha Thai: | negative 10.9 per cent |
| TPP: | negative 2.3 per cent |
| Pacific Pipe: | negative 4.3 per cent |

191. ATM's fifth ground of review is therefore successful in its challenge of the single cost methodology for determining normal values and failing to take into account the higher cost of HRC used for domestic sales, resulting in different dumping margins.

192. As reiterated by the ADC, dumping margins are one factor to be considered in assessing whether dumping and material injury was likely to recur if the measures were discontinued. It follows on to determine whether the changes in the dumping margins would alter the assessment of the likelihood of dumping and material injury continuing, if the anti-dumping measures were to be removed.

193. During the Third Conference I requested clarification as to whether the ADC's findings relating to the likelihood of dumping and injury, would have been affected if the Maximum Cost Model methodology for determining normal value was accepted but the duty drawback adjustments rejected, resulting in final dumping margins (referred to above) that were negative 10.9% (for Saha Thai) and negative 2.3% (for TPP). The ADC stated that the dumping margins barely shift (from REP 532) and the result would be that the Thai exporters were still not dumping in the inquiry period, and the change would make no difference to the ADC's other findings in REP 532, including the Commissioner not being satisfied that future exports of HSS from Thailand are likely to be dumped. The ADC reiterated that it always maintained that the margins are not the only factor to be considered and that there was other information that was covered in REP 532 that affected the ADC's decision.¹⁵⁴

194. I therefore affirm the decision of the then Minister in not being satisfied that the expiration of the anti-dumping measure applying to HSS exported to Australia from

¹⁵⁴ See Discussion Item 11 of the Third Conference Summary.

Thailand would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and material injury.

Summary of Findings Relating to Ground 5

195. For the reasons discussed above, I made the following findings regarding ATM's fifth ground of review:

- a. I accept the ADC's reinvestigated findings regarding the application of the Maximum Cost Model and the reallocation of HRC import duty costs to domestic CTM, for the determination of normal values.
- b. I reject the s.269TAC(8) adjustment of the duty drawback to the reinvestigated normal value calculation.
- c. The resulting adjusted dumping margins that I consider to be correct or preferable, are as follows:
 - Saha Thai: negative 10.9 per cent (from negative 13.1 per cent in REP 532)
 - TPP: negative 2.3 per cent (from negative 4.5 per cent in REP 532)
 - Pacific Pipe: negative 4.3 per cent (same as REP 532)
- d. I consider that the change in dumping margins referred to above does not affect the finding in REP 532 regarding the likelihood of the recurrence of dumping and material injury.
- e. I affirm the decision of the Minister in not being satisfied that the expiration of the anti-dumping measure applying to HSS exported to Australia from Thailand would lead, or would be likely to lead, to a continuation of, or a recurrence of, dumping and material injury.

Orrcon

196. In the discussion below I consider Orrcon's two grounds of review. It should be noted that there is some overlap with arguments and submissions made by ATM in

respect of certain of its grounds of review (particularly, ATM's first, second and fourth grounds of review). To avoid repetition, in my consideration of Orrcon's grounds of review, I therefore refer back to my considerations of ATM's grounds of review, where relevant.

Ground 1: The Commissioner cannot be satisfied that future HSS exports from Thailand are likely to be at undumped prices

Orrcon's arguments

197. Orrcon submitted that it did not seek to dispute the ADC's assessment of dumping margins as detailed in REP 532 and that its grounds of review extended beyond the mere determination of the variable factors and dumping margins to the assessment and conclusions as to the likelihood of dumping and material injury in the absence of the measures.

198. Orrcon stated that the ADC determined that Pacific Pipe did not export HSS to Australia during the investigation period, and whilst the ADC determined a normal value for Pacific Pipe, the export price for Pacific Pipe was determined by reference to the export prices of all other Thai exporters of the goods to Australia during the investigation period. On this basis, Orrcon disputed that the ADC could be satisfied that future exports of HSS to Australia by Pacific Pipe would not be at dumped prices (as the export prices relied upon are for other Thai exporters).

199. Orrcon noted that Saha Thai and Atlantic Pipe Company Limited ("Atlantic"), were the subject of a floor price duty. All remaining exporters were the subject of ad valorem duties. Orrcon submitted that the floor price duty method ensured that the exporter's price is at a non-dumped level and thereby constrained the dumping behaviour of Atlantic and Saha Thai. Orrcon further observed that Saha Thai had been a regular supplier to the Australian market and was one of the two largest Thai exporters to Australia in REP 254.

200. Orrcon submitted that the ADC acknowledged representations by the Australian industry concerning export volumes of HSS to Australia by Thai producers, including that:

- a. the negative dumping margins demonstrated the effectiveness of the measures;¹⁵⁵
- b. the reduction in the number of Thai exporters following the imposition of the measures is indicative of the effectiveness of the measures;¹⁵⁶
- c. the measures have constrained the dumping behaviour of Thailand exporters and therefore the volume of Thai exports to Australia has reduced;¹⁵⁷ and
- d. the Section 232 measures imposed on steel imports into the United States (“U.S.”) would impact the export intentions of Thai exporters.¹⁵⁸

201. Orrcon stated that the ADC considered in response to the above that:

- the cooperating exporters remained the dominant exporters since the measures were imposed;
- the Thai exporters that exited the market were less than 10 per cent of total Thai exports since 2013;
- there is no evidence that the Thai exporters that exited the market would recommence exporting at dumped prices; and
- there was not an influx of imports following the U.S. Section 232 actions.

202. Orrcon submitted that the comments of the ADC, however, did not address the issue of whether the measures have been effective in limiting the dumping from Thailand, having established that the U.S. and Australia are the two largest export markets for Thai exporters. Orrcon submitted that it was further established that the three cooperative exporters possess spare capacity to supply “approximately 20 per cent of the overall Australian market”. Orrcon submitted that the ADC further established that the Thai exporters had maintained distribution channels into the

¹⁵⁵ Reference was made to paragraph 7.4.1 of REP 532, page 46.

¹⁵⁶ Reference was made to paragraph 7.4.2 of REP 532, pages 46 - 48.

¹⁵⁷ Reference was made to paragraph 7.4.2 of REP 532, pages 46 - 48.

¹⁵⁸ Reference was made to paragraph 7.4.3 of REP 532, pages 48 - 50.

Australian market and continued to supply into the market at levels that had remained relatively stable since the imposition of the measures.

203. Further, Orrcon submitted that the ADC established that the weighted-average export prices for the Thailand exporters were “lower” than the same HSS models offered by the Australian industry, and that the weighted-average export prices for the Thai HSS exporters “was also lower than the same HSS models offered in the Australian market by importers of HSS from China, Korea and Taiwan”. Orrcon submitted that on this point it was not clear as to how the weighted-average Thai export prices could be lower than the same HSS models weighted average Chinese export prices, given the particular market situation finding for the latter. Orrcon referred to ATM's submission that any price advantage that Thai exporters have in the Australian market is the result of their predominant exports of black HSS, whereas the Australian industry and other exporters sell a mix of both black and galvanised.¹⁵⁹ In this regard Orrcon stated that ATM referred to the impact of including galvanised pricing in the ADC's analysis and Orrcon highlighted that a significant proportion of sales by the Australian industry involved pre- galvanised HSS, resulting in substantially higher selling prices when contrasted with black HSS. Orrcon concurred with ATM that the explanation of the ADC that weighted-average selling prices for Thailand exports are below those of the Australian industry (and other exporters in China, Korea and Taiwan) is a misrepresentation due to the mix of exports (i.e. predominant exports of black HSS by Thai exporters).

204. Orrcon submitted that the anti-dumping measures on exports of HSS from Thailand have been effective and provided a constraint on exporters to not export at dumped prices. Orrcon submitted further that where the measures are allowed to expire, this constraint is removed and the Thai exporters will likely lower export prices to capture additional sales in a market that ranks in the top two traditional export markets for Thai exporters, and the absence of dumping measures will permit Thai exporters to fill under-utilised production capacity and grow exports to Australia.

205. Orrcon submitted that the ADC acknowledged Orrcon's representations that anti-dumping measures apply to Thai pipe and tube exports in other jurisdictions (namely the U.S. and Canada), and that the ADC again referenced the impact of the

¹⁵⁹ Reference was made to REP 532, page 57.

Section 232 tariffs by the U.S. and there being no subsequent increase in exports to Australia. Orrcon, however, contended that the anti-dumping measures acted as a clear deterrent to Thai exporters from increasing exports to Australia (particularly following the imposition of the tariffs in the U.S.).

206. Orrcon noted that the ADC had stated that it was, “not satisfied that the evidence before it shows that conditions in the domestic market in Thailand provide an incentive to producers to export HSS unless it would be profitable to do so.”¹⁶⁰ According to Orrcon this comment reflected the ADC’s interpretation that the Thai exporters did not respond with an increase in exports to Australia following the Section 232 impost of tariffs in the U.S. Orrcon submitted that this interpretation could be refuted as the anti-dumping measures applicable in Australia operate as a disincentive to Thai exporters to increase exports to Australia, irrespective of another jurisdiction’s trade-related actions.
207. Further Orrcon submitted that it did not consider that the ADC’s analysis concerning the conditions in the Thailand domestic market offer any creditable insight as to whether it is likely that in the absence of measures, future exports of HSS to Australia would be at dumped prices.
208. Orrcon contended that the ADC’s examination as to whether exporters in Thailand are likely to re-commence dumping following the expiration of the measures failed to adequately consider:
- that two of the Thai exporters were the subject of measures with a floor price mechanism, operating to prevent a decline in export prices;
 - the weighted-average analysis does not adequately disclose that the low-priced Thai export prices are for predominantly low-value black HSS which has the lowest price of all HSS grades;
 - the measures have operated as an effective constraint on exporters not to lower export prices for fear of being assessed as dumping in a review of measures inquiry; and

¹⁶⁰ Reference was made to REP 532, page 57.

- the measures that operate in other jurisdictions (Canada and the U.S.) demonstrate a propensity for Thai exporters to export at dumped prices more broadly, thereby elevating the likelihood of dumping.

209. Orrcon submitted that the anti-dumping measures that have applied to HSS exported from Thailand have had the desired and intended impact. Further, it submitted that past performance is indicative of future performance, and the ADC concluded recently in REP 445 that Pacific Pipe and TPP continued to export at dumped prices two years after the imposition of measures. Orrcon contended that although exports of HSS from Thailand had declined post the imposition of measures, the measures had been successful in limiting export volumes of HSS at dumped prices (predominantly for the lower valued black HSS goods).

ADC position

210. The ADC in its s.269ZZJ submission disagreed with Orrcon's submission that the floor price duty method ensures that the exporter's price is at a non-dumped level and thereby constrains the dumping behaviour of Atlantic and Saha Thai. The ADC submitted that the floor price duty method simply has regard to the last established ascertained normal value and does not have any bearing on whether a subsequent consignment is dumped or not, particularly if prices are generally higher in the market, just whether it will attract interim dumping duty. The ADC submitted further that it may also be the case that goods exported at prices which are below the floor price are not dumped, and that any interim dumping duty paid may be subject to a refund arising from a duty assessment.

211. The ADC referred to Orrcon's expressed concerns regarding the price analysis contained in Confidential Attachment 5 to REP 532 and in particular, Orrcon's doubts as to whether the analysis has taken appropriate account of the market situation in China and the mix of black and galvanised HSS. The ADC stated that these concerns largely echo those by ATM, which it had addressed.

212. The ADC referred to Orrcon's submissions that the measures act as a clear deterrent to Thai exporters from increasing exports to Australia (particularly following the imposition of other trade remedies by the United States), and referred to the analysis in Sections 7.4.3 and 7.4.4 of REP 532 that it submitted addressed these issues. The ADC further submitted that Section 7.4.10 highlighted that:

- Thailand exporters enjoy comparatively advantageous anti-dumping measures, and yet no increase in market share has occurred;
- Thailand exporters enjoy a significant price advantage over the Australian industry (Figure 20), and over HSS from exporters from other subject countries, and yet no increase in market share has occurred;
- the same importers have continued to purchase HSS from Thailand from largely the same exporters since REP 254 (Figure 13); and
- this all occurred in periods in which HSS from Thailand was exported at prices which were not dumped (the inquiry period) or were mostly not dumped or at de minimis margins (the period examined in REP 445).

213. The ADC referred to Orrcon's contentions that the measures have had their desired effect and that past performance (in terms of previous dumping behaviour by exporters) is indicative of future performance and therefore the measures ought to be maintained. The ADC submitted that by this reasoning, measures would never expire. The ADC further noted that the argument that Thai exporters have a "propensity to dump" is weakened when there has been no dumping in the current inquiry period, and no dumping or negligible dumping in REP 445. The ADC considered that greater weight should be given to more recent behaviour in the context of all the historical information available, and pointed out that dumping in the inquiry period is only one factor that was considered.

Consideration

214. Orrcon's first ground of review is stated to be:

The Commissioner cannot be satisfied that future HSS exports from Thailand are likely to be at undumped prices.

215. At the outset it should be stated that this articulation of the ground of review would appear to misconstrue the decision-making burden of the Commissioner in taking a decision to recommend to the Minister to secure the continuation of the anti-dumping measures pursuant to s.269ZHF of the Act. Section 269ZHF(2) states that the Commissioner "must not recommend" that the Minister take steps to secure the continuation of the anti-dumping measures "unless" the Commissioner is satisfied

the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of dumping. [emphasis added]

216. A proper reading of this sub-section of the Act cannot lead to an interpretation that the Commissioner must recommend the continuation of the measures unless satisfied that that there will be no dumping if the measures expire. Orrcon's ground of review can only be successful pursuant to s.269ZHF(2) if it can be shown that the Commissioner should have been satisfied that dumping would likely continue or recur if the measures expired, which is a rather different test.

217. Therefore, for example, Orrcon's concern about Pacific Pipe's export price not being based on its own data and on this basis disputing that the ADC could be satisfied that future exports by Pacific Pipe would not be at dumped prices, is in my view misguided. While Orrcon might indeed be correct that the Commissioner could not be satisfied that future HSS Pacific Pipe exports from Thailand would likely be undumped, that was not the required test. Pursuant to s.269ZHF(2) the Commissioner was required to be satisfied that there would likely be dumping, if the measures were removed, in order to recommend to the Minister that the anti-dumping measures would be continued. The Commissioner calculated a negative dumping margin for Pacific Pipe and on that basis (together with various other factors) appropriately could not be satisfied that dumping would recur. In its second ground of review ATM also took issue with the fact that the ADC found that negative dumping margins for Pacific Pipe (and other uncooperative Thai exporters) based on what ATM considered to be "theoretical margins" calculated on the basis of no export sales. The ADC, however, relevantly pointed out that the margin was validly calculated using the available provisions under s.269TAB, having regard to the export prices achieved by other exporters, and considered it to be a reasonable basis for estimating the prices at which Pacific Pipe would have exported during the inquiry period. The ADC also noted that the dumping margins established for uncooperative and all other exporters (being negative) were also calculated in accordance with the relevant provisions of the Act.

218. Orrcon's submission that the floor price duty method ensures that the exporter's price is at a non-dumped level and thereby constrains the dumping behaviour of Atlantic and Saha Thai, does not in my view take this ground of review any further to show that Commissioner should have been satisfied that dumping would continue

or recur if the measures expired. The ADC relevantly responded to this argument in its s.269ZZJ submission, discussed above.¹⁶¹

219. Orrcon's concerns as to whether the price analysis took appropriate account of the mix of black and galvanised have been appropriately addressed in ATM's third ground of review with particular reference to the Second Conference Summary.¹⁶² Under that ground of review I found that in its price comparison analysis, the ADC appropriately compared exports of black HSS and excluded the higher-priced exports of galvanised HSS and that the analysis was not unsound as contended by ATM.
220. Orrcon made submissions relating to the failure of the ADC to address the representations by the Australian industry on the effectiveness of the measures in limiting the dumping from Thailand. These issues have been discussed under ATM's first and second grounds of review and the concerns appropriately addressed by the ADC in its s.269ZZJ submission and through clarifications during the Second Conference. I agree with the ADC's analyses and conclusions in this regard and do not consider ATM's or Orrcon's arguments to be persuasive or that there was positive evidence indicating that exports from Thailand would increase if the measures were discontinued, or that prices would decrease to the extent of being dumped. The ADC repeatedly pointed out that Thai prices were already competitive and profitable during the inquiry period (being undumped with significant negative dumping margins), and that there was no incentive to reduce prices, if expansion was a consideration (even to the extent of the negative dumping margin).¹⁶³
221. Orrcon's contentions regarding the ADC's analysis concerning the conditions in the Thai domestic market have been addressed under ATM's fourth ground of review. ATM had similar concerns relating to the inadequacies of the ADC's analysis of the prevailing economic conditions in Thailand. Under that ground of review of ATM, I considered that the ADC comprehensively addressed all the issues raised by ATM, to the extent of its available resources and time restrictions of a continuation inquiry. I do not consider that the ADC could have been expected to conduct a more

¹⁶¹ See ninth page of the ADC's s.269ZZJ submission (unpaginated).

¹⁶² See Discussion Item 2 of the Second Conference Summary.

¹⁶³ See also Discussion Items 4 and 6 of the Second Conference Summary.

complex and comprehensive analysis of the prevailing economic conditions in the Thai domestic market or make reasoned projections of the effect of such conditions on future exports of HSS to Australia. I agree with the ADC's assessment that there was no evidence which would reliably demonstrate the likely effect of the prevailing economic conditions in Thailand (and possible GOT interventions in the market), on future exports of HSS to Australia. I agree with the ADC's conclusion that, taken as a whole the 'evidence' did not positively demonstrate the likelihood of dumped exports from Thailand recurring.

222. Similarly, Orrcon's contentions of the inadequacy of the ADC's examination as to whether dumping would recur, having regard to the measures operating in other jurisdictions (Canada and the U.S.) have been addressed under ATM's first and second grounds of review. I agreed with the ADC's submission that anti-dumping duties imposed on Thai exporters by other authorities cannot be considered to be positive evidence of probable dumping in Australia, due to different market conditions, and different trade remedy laws and practices in Australia. The ADC has also pointed out that measures imposed in other countries did not result in a flood of Thai exports to Australia, even with the Thai exports' price advantage (without dumping). Therefore, I agree with the ADC in that it cannot be said that if the Australian measures were removed, there was likely to be a flood of exports, since the favourable conditions already existed and the opportunity was not taken up by Thai exporters. The ADC relevantly pointed out during the Second Conference that while measures in other countries was one consideration it did not provide much guidance as to the likelihood of what was going to happen in Australia if the Australian measures were removed.¹⁶⁴

223. Orrcon contended that that past performance (in terms of previous dumping behaviour by exporters) is indicative of future performance and therefore the measures ought to be maintained. The ADC relevantly submitted that by this reasoning, measures would never expire. The ADC further noted that the argument that Thai exporters have a "propensity to dump" is weakened when there has been no dumping in the current inquiry period, and no dumping or negligible dumping in REP 445. The ADC pointed out, however, that dumping in the inquiry period is only one factor and considered that greater weight should be given to more recent

¹⁶⁴ See also, Discussion Item 6 of the Second Conference.

behaviour in the context of all the historical information available. In response to a similar issue raised in ATM's second ground of review, the ADC stated that if past behaviour is indicative of future behaviour, it is unclear why older past behaviour is more reasonably preferred to more recent behaviour. I agree with the ADC in this regard and do not consider that previous anti-dumping behaviour, considered in isolation, can demonstrate that dumping is likely to recur if the measures are removed and be the basis for maintaining anti-dumping measures. I also agree with the ADC that past behavior is a relevant issue to be taken into consideration, together with various other factors, including more recent behavior which perhaps warrants more weighty consideration.

224. For all the above reasons, I agree with the ADC's analyses and conclusions relating to the issues raised by Orrcon under this ground of review and do not consider that the Commissioner should have been satisfied that that the expiration of the measures would lead or would be likely to lead to the continuation or recurrence of dumping. I consider that the decision of the Minister in accepting the Commissioner's recommendation in this regard is the correct or preferable decision. Orrcon's ground of review (as re-articulated to accord with relevant statutory provision) therefore fails.

Ground 2: The expiry of the anti-dumping measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the injury that the anti-dumping measure is intended to prevent.

Orrcon's arguments

225. Orrcon contended that the expiry of the anti-dumping measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the injury that the anti-dumping measure is likely to prevent.

226. Orrcon referred to the determination of the Commissioner in REP 532:

Due to the apparent low level of influence of HSS exported from Thailand in the Australian market and its negligible impact on the Australian industry, the Commissioner is not satisfied that it is likely that the expiry of the anti-dumping measures would lead, or would be likely to lead, to a continuation

*of, or a recurrence of, the injury that the anti-dumping measure is intended to prevent.*¹⁶⁵

227. Orrcon submitted that in making this determination, the Commissioner relied upon the negative dumping margins determined for HSS exported to Australia during the investigation period, and the alleged negligible impact of the exports from Thailand on the Australian industry during the investigation period.

228. Orrcon recalled from REP 254 that the margins of dumping determined in the original investigation period for exporters of HSS from Thailand, ranged from 5.7 per cent to 29.7 percent. Orrcon also pointed out that it was further noted in REP [532]¹⁶⁶ that:

*The information collected from the Australian industry and importers support ATM's claim that the Australian HSS market shows significant price sensitivity and price is the major criteria in customers' purchasing decisions.....The Commission therefore considers that price undercutting has had significant injury effects on Australian industry.*¹⁶⁷

229. Orrcon also points out that in its causal link analysis, it was reported by the ADC:

The Commission has established a connection between imports of HSS from Thailand at dumped prices and the fact that prices of HSS at dumped prices sold in Australia undercut the Australian industry prices of HSS throughout the investigation period.

The price undercutting and associated price pressures have contributed to price suppression for the Australian industry, which has resulted in negative profitability.

¹⁶⁵ REP 532, page 7.

¹⁶⁶ The reference should probably be to REP 254.

¹⁶⁷ Reference was made to REP 532, page 57. However, this quote actually appears in REP 254, page 60.

*The Commission considers that other possible causes of injury do not detract from the assessment that dumping has caused material injury to the Australian industry.*¹⁶⁸

230. Orrcon submitted that the Australian HSS market continued to be a price-sensitive market and any degree of price undercutting from imported HSS provided a supplier with a competitive advantage that resulted in reduced profit and profitability to the Australian industry. Orrcon contended that REP 532 indicated that the ADC had not taken adequate account of the price sensitive nature of the Australian HSS market, or the impact that a small price decline can have on the profit and profitability of an industry that is susceptible to injury. According to Orrcon, the ADC identified this level of susceptibility in its analysis of the economic condition of the Australian industry over the injury period, highlighting the following trends:

- since the imposition of measures against exports from Thailand in August 2015, the Australian industry's sales volume has marginally increased;
- the Australian industry's market share has generally declined over the same period;
- the Australian industry's selling prices for black and galvanised HSS was marginally higher than the CTMS following the imposition of measures, except in the current investigation period;
- the Australian industry's profit and profitability improved following the imposition of measures, with a noticeable decline evident in the investigation period; and
- the Australian industry's revenue has tracked pricing, with a deterioration evident in the investigation period.

Orrcon submitted that the foregoing established that the Australian industry is susceptible to further injury from dumping, and any small change in pricing by Thai

¹⁶⁸ Reference was made to REP 532, page 64. However, these quotes actually appear in REP 254, page 64.

exporters from undumped levels to dumped levels will result in a recurrence of injury to the Australian industry that the measures are intended to prevent.

231. Orrcon submitted that for the purposes of a continuation of measures review, the Minister is not required to be satisfied that the exported goods were at dumped prices during the investigation period. Rather, the requirement is whether it is likely that the dumping and material injury may recommence should the measures be allowed to expire.

232. Orrcon referred the ADC's formulated view that it was not satisfied that future exports of HSS from Thailand, in the absence of measures, would be at dumped prices. Orrcon stated that it was "puzzled" that the ADC had cast aside the findings in recent REP 445 which concluded the following dumping margins for HSS exported from Thailand in the 1 October 2016 to 30 September 2017 investigation period:

| EXPORTER | DUMPING MARGIN |
|---|-----------------------|
| Pacific Pipe Public Company Limited | 5.6% |
| Saha Thai Steel Pipe Public Company Limited | -3.6% |
| Thai Premium Pipe Co Ltd | 0.7% |
| Atlantic Pipe Company Limited | 0 % |
| Uncooperative and all other exporters | 8.7% |

Orrcon stated that the ADC determined that dumping occurred in the review period by Pacific Pipe and TPP and that historical performance provides an indication of likely future activity. Orrcon pointed out that even following the imposition of measures in August 2015, some Thai exporters continued to export at dumped prices. Orrcon argued further that INV 445 highlighted that the existence of dumping prompted the Thai exporters of HSS to ensure they did not export at dumped and injurious prices into the future.

233. Orrcon contended that it was premature to rely solely upon the absence of dumping in the recent investigation period of Continuation inquiry 532 when following the imposition of measures in INV 445 the ADC continued to evidence dumping by Thai exporters of HSS. Orrcon contended that the ADC failed to adequately consider the performance of the HSS exporters in Thailand post the imposition of the measures in August 2015 when considering its recommendation for the continuation of the measures.

234. Orrcon submitted that the past behaviour of exporters of HSS in Thailand to continue to export at dumped prices post the imposition of measures in August 2015 is indicative that, in the absence of the measures, a resumption of dumping and therefore a recurrence of material injury (to which the measures are intended to prevent) is likely.

235. Orrcon contended that the available evidence, contrary to the subjective interpretation of the ADC that is not based upon actual evidence, supports a viewpoint that there exists a strong likelihood of a resumption of dumping in the absence of measures that will result in a recurrence of material injury that the measures are intended to prevent, particularly given the price sensitive nature of HSS sold into the Australian market.

ADC position

236. The ADC in its s.269ZZJ submission responded to Orrcon's submission that it has not taken adequate account of the price sensitive nature of the Australian HSS market and the risks of further injury arising in the absence of the measures. The ADC submitted that taken as a whole, it is apparent from REP 532 that the Commissioner examined the relationship between the measures, prices in the market and the economic condition of the Australian industry.

237. The ADC states that REP 532 specifically notes that:

The Australian industry has regard to import price offers when setting prices. Its customers have ready access to both locally produced and imported products which are essentially interchangeable, and are therefore in a

*position to seek the most favourable terms, including price and anticipated delivery timeframes, and frequently negotiate on this basis.*¹⁶⁹

238. In this regard the ADC stated that it accepts that small changes in price could result in injury, and that the Australian industry as a whole may be susceptible to injury. However, it submitted that the measures do not exist to prevent all injury, merely injury caused by dumping, and having found that future dumping is not likely, the Commissioner did not agree that it is nevertheless appropriate to continue the measures to prevent a continuation or recurrence of any injury.

239. The ADC refers to Orrcon's submission that REP 532 "cast aside" findings in REP 445 which showed dumping in the period 1 October 2016 to 30 September 2017, and again argues that historical performance provides an indication of likely future activity. The ADC states that REP 532 did not ignore those findings, noting that:

*the picture is a little more complicated than Orrcon submits. For example, Atlantic became subject to a floor price and exited the Australian market after REP 445; Saha Thai also had a floor price and continued to export to Australia; TPP had an ad valorem dumping margin of less than one per cent; and Pacific Pipe's export volumes had already declined. There was no change to volumes, and no apparent change to pricing behaviours in the Australian market (apart from the elimination of dumping) that arose from the findings set out in REP 445, as was shown in chapter 7.4.2 of REP 532.*¹⁷⁰

240. The ADC contended that although past dumping behaviour has some relevance, it did not consider that evidence necessarily has greater weight than findings in the most recently examined inquiry period, and that if past behaviour is indicative of future behaviour, it is unclear why older past behaviour is more reasonably preferred to more recent behaviour.

241. The ADC referred to Orrcon's argument that INV 445 highlighting the existence of dumping prompted the Thai exporters of HSS to ensure they did not export at dumped and injurious prices into the future. The ADC submitted that by that reasoning, measures would never expire. The ADC points out that the imposition of

¹⁶⁹ Reference is made to Section 4.2.5 of REP 532, page 22

¹⁷⁰ See ninth page of Attachment A of ADC's s.269ZZJ (unpaginated).

measures is intended to remove the injurious effects of dumping, and if that prompts a change in pricing behaviour by an exporter such that they do not dump in the future, Orrcon's position appears to be that the measures are required to guarantee that outcome. The ADC submitted that this is not a relevant consideration under the Act, and that the analysis in REP 532 has applied the appropriate tests in considering whether the measures ought to be continued or not.

Consideration

242. I consider that the ADC's response in its s.269ZZJ submission to Orrcon's contention that the expiry of the anti-dumping measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the injury that the anti-dumping measure is likely to prevent, to be relevant and comprehensive. The ADC systematically addressed each of Orrcon's contentions with reference to its factual findings and analyses in REP 532.
243. I consider that the ADC's relevant analyses in REP 532¹⁷¹ to be thorough and comprehensive and I agree with its conclusions. I therefore consider that the ADC's assessment that the Commissioner was not satisfied that the expiration of the anti-dumping measure would lead, or would likely to lead, to a continuation of or a recurrence of the material injury that the anti-dumping measure is intended to prevent, is the correct or preferable decision.
244. It should be noted that s.269ZHF(2) of the Act requires that the Commissioner be satisfied as to the probability of two future events if the measures are to be continued, namely, dumping and material injury. Therefore, irrespective of the status or effect of the Commissioner's determination of likelihood of material injury, the power conferred by that section will only be enlivened if the Commissioner also attained the requisite level of satisfaction with regard to the likelihood of the continuation of, or recurrence of, dumping. Absent such a finding, a finding with respect to the likely recurrence of injury would be insufficient to prevent the revocation of measures. Since it has been concluded that recurrence of dumping is not probable, a finding of the likelihood of the recurrence of material injury, in terms

¹⁷¹ In particular, see Chapter 7 of REP 532.

of Orrcon's second ground of review, would not have been sufficient, in any event, for a finding that the measures should stay in place.

Recommendations and Conclusions

245. Pursuant to s.269ZZK(1)(a) of the Act and for the reasons given above, I consider that the Reviewable Decision is the correct and preferable decision.

246. I therefore recommend that the Minister affirm the Reviewable Decision and that the decision not to secure the continuation of anti-dumping measures relating to HSS from Thailand be confirmed with effect from 19 August 2020.



Leora Blumberg
Panel Member
Anti-Dumping Review Panel
22 October 2021