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PUBLIC RECORD

Submission on behalf of Austube Mills Pty Ltd (ATM) to the Anti-Dumping Review Panel concerning applications by Pacific Pipe Public Company Limited (Pacific Pipe) and Sahathai Steel Pipe Public Company Limited (Sahathai) for a Review of a Ministerial Decision to publish a Dumping Duty Notice applying to Certain Hollow Structural Sections (HSS) exported from the Kingdom Of Thailand.

Introduction

1. We act for ATM which, as the applicant in relation to the application that led to the making of the above reviewable decision, is an interested party as defined in s269ZX of the *Customs Act 1901 (Cth)* (**Act**). We make this submission pursuant to section 269ZZJ of the Act.

2. The applications to the Panel in this matter from Pacific Pipe Public Company Limited (**Pacific Pipe**) and Sahathai Steel Pipe Public Company Limited (**Sahathai**) set out a range of reasons why it is alleged that the reviewable decision is not the correct or preferable decision. This submission addresses the following:

   - the alleged failure of the Parliamentary Secretary to make an adjustment to normal value for duty drawback in respect of materials imported into Thailand and used in that country in manufacturing HSS for export to Australia;
   - the Parliamentary Secretary's alleged lack of authority to publish a retrospective dumping duty notice under s269TG(1) of the Act;
   - the alleged incorrect identification by the Parliamentary Secretary of the place of export;
   - the alleged inclusion of ineligible sales in the calculation of normal value.
   - the alleged failure of the Parliamentary Secretary to make an adjustment to normal value to reflect the differing amounts of commission paid on domestic and export sales; and

3. Some of those reasons have already been the subject of submissions to the Anti-Dumping Commission (**Commission**) by our client and can be found in files 046, 043, 042, 041 and 037 of EPR 254. We request that the Panel has regard to those representations as well as this current submission. We also note the Response of 9 November 2015 by the

Commission to the Review Panel's Invitation to Comment and express our agreement with all the comments in that document.

Duty Drawback

4. Section 269TAC(8)(c) requires that the ascertainment of a normal value based on the selling price of goods destined for consumption in the country of export, in cases where that price and the export price of the goods … *are modified in different ways by taxes or the terms or circumstances of the sales* … shall include an adjustment that eliminates those differences to the extent that they affect the comparison of the two prices. That requirement reflects the terms of Article 2.4 of the WTO Anti-Dumping Agreement which calls for a *fair comparison* between export and domestic selling prices by making due allowance for all differences that can be demonstrated to affect price comparability.

5. It is important to note that both provisions are concerned with differential impacts on prices, not costs. Thus, while evidence of a cost difference may cause an administering authority to assess whether that difference is reflected in prices, it is not of itself evidence of a price difference and justification for an adjustment to normal value. In the present matter, even on the issue of cost alone, there is no apparent evidence of a quantifiable difference between domestic and export production of HSS. It appears that, based on the existence of a duty drawback scheme in Thailand, there is a theoretical proposition that there may be a cost difference because there may be a drawback of duty on any imported hot rolled coil steel (HRC) used in the production of HSS for export. But it cannot be assumed that the measure of any such cost difference is equivalent to the amount of the drawback of duty, let alone that any difference is reflected in domestic and export prices of HSS.

6. There is no evidence of the existence or amount of a price premium paid to domestic producers of HRC by HSS producers when compared with the price, net of customs duty, paid by them for imported HRC. Furthermore, there is no evidence from Thai HRC producers as to how they construct their prices for domestic and export markets and again it cannot simply be assumed that they apply an antiquated cost plus pricing model in a market and an industry in which there are a multitude of factors influencing supply, demand and price.

7. Claims for adjustment of normal value must be supported by evidence of quantifiable differences that affect the comparability of domestic and export prices. No such demonstration has been produced by the applicants for review and we submit that the rejection by the Commission of such an adjustment was clearly the correct and preferable decision.

Section 269TG(1) Notice

8. The application for review by Sahathai claims that the Parliamentary Secretary's decision to publish a dumping duty notice under s269TG(1) was incorrect. It appears that the ground for this claim is that the publication of the notice dated 19 August 2015 was more than four months after the publication by the Commissioner of a Preliminary Affirmative Determination (**PAD**)on 16 March 2015. That is not a sufficient ground on which to base a finding that the Parliamentary Secretary's decision was incorrect.

9. Section 269TG(1) authorises the Minister to publish a notice applying dumping duties to goods already exported to Australia but the subsection is expressed to be subject to s.269TN of the Act. Subject to certain exceptions specified in subsections (2) and (3) that section prohibits the publication of a notice in respect of goods that have already been entered for home consumption. The relevant exception in this matter is as follows:

> (2) Subsection (1) does not prevent the publication of a notice under subsection 269TG(1), 269TH(1), 269TJ(1) or 269TK(1) in respect of goods that have been entered for home consumption in relation to which security has been taken under section 42 in respect of any interim duty that might become payable under section 8, 9, 10 or 11 of the Dumping Duty Act, as the case may be (not being security that has been cancelled), by reason of the publication of such a notice or in relation to which the Commonwealth had the right to require and take such security (not being security that would have been cancelled under this Act if it had been taken).

10. The Commonwealth's right to require and take security in respect of any interim dumping duty is set out in s.42(1B) of the Act. Collectively s.45(2),(3) and (3A) provide that in the circumstances of the present matter a security shall be cancelled within a period of 4 months from the date on which it was taken. There is no evidence on the public record concerning the detail of any securities that have been taken or whether they have been, or should have been cancelled or whether cancellation is a self executing process and consequently we are unable to comment on whether there are grounds for the return of any interim dumping duty that may have been paid as a result of the enforcement of the terms of any security that had lapsed.

11. However, such issues are matters to be taken up with the Comptroller- General of Customs. They are not part of the reviewable decision by the Parliamentary Secretary to publish a notice under s.269TG(1) and do not form part of the Review Panel's jurisdiction. The only question that can be before the Panel on this issue is whether the decision of the Parliamentary Secretary to publish a dumping duty notice under s269TG(1) was the correct or preferable decision.

12. The only argument advanced by Sahathai that attacks that decision is that because, in its view, securities should have been cancelled within four months of the PAD of 16 March 2015, there were no goods to which the published notice could apply. However, there is no evidence that 16 March 2016 is the only relevant date by which the continuing application of any securities taken in this matter should be measured. The period of operation of an individual security commences from the date that security was taken and, in view of the fact that there were a number of importers involved, there may be a number of dates on which security was taken and consequently the operation of those securities may not have exceeded four months when the dumping duty notice was published on 13 August 2015. There is also no evidence that there were no goods entered for home consumption in the period of four months ending on the date of publication in relation to which the Commonwealth had the right to require and take a security but failed to do so.

13. In the light of these evidentiary deficiencies there are no grounds to sustain a claim that the terms of s.269TN prevented the Parliamentary Secretary from publishing a notice under s.269TG(1).

Place of Export

14. Sahathai maintains that because there is a definition of place of export for consignments placed in a container for the purposes of Division 2 of Part VIII of the Act, the comparison of normal value with export price for the purposes of Part XV of the Act should be undertaken at the ex works level in the case of FCL shipments. In our view the proposition is without merit. Definitions set out in s.154 have no application in Part XV where s.269TAB definitions of price establish the export price at the fob level as the benchmark for undertaking adjustments to normal value.

15. In particular, we note that the Commission has found that the export price of HSS sold to Australia by Sahathai can be established under s.269TAB(1)(a) and that the applicant does not dispute that finding. That paragraph sets the following price benchmark:

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

Clearly that provision requires the comparison of export prices and normal values for the purpose of assessing dumping margins to be undertaken at the fob level.

Ineligible Sales

16. The contention by Pacific Pipe that sales for other than home consumption of a particular grade of HSS have been included in the calculation of normal value was raised by the applicant in its submission of 15 June 2015[1]. That submission concedes that it had made sales of the grade to Thai domestic customers but that 'generally' those customers were exporting the product. The terms of the concession admit the possibility that not all customers were exporting the product and furthermore the applicant presents no evidence in support of its assertion. Similarly the applicant presented no evidence at the time of the verification visit or thereafter to support its assertion that the domestic customers were not further processing the HSS prior to export.

17. By contrast the Commission has carefully analysed the available evidence and reached the considered conclusion that the purchasers in the sales in question had fabricated the HSS supplied by the applicant prior to export to Australia of a different product[2]. We support the Commission's conclusion that in circumstances where the HSS had entered the commerce of Thailand the relevant sales by the applicant were sales for home consumption.

Sales Commissions

18. Pacific Pipe claims that an adjustment to normal value should have been made to account for the difference in sales commissions paid to an associated entity in respect of domestic and export sales. A detailed analysis of this issue[3] has been undertaken by the Commission and we support its considered conclusion that an adjustment is unwarranted.

[1] EPR 254: file 036, p.2
[2] REP 254: pp 33-34
[3] ibid., pp.36-37

Conclusion

19. In relation to each of the above reasons for review we consider that the applicants have failed to establish that the Parliamentary Secretary's decision was not the correct or preferable decision. Consequently we submit that the report by the Review Panel should recommend that the Parliamentary Secretary affirm the reviewable decision.

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