Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 28

Hollow Structural Sections

11 December 2015

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Review of a Decision of the Parliamentary Secretary to Publish a Dumping Duty Notice in relation to Hollow Structural Sections exported from the Kingdom of Thailand.

Contents

Summary

1 This report relates to the decision (Decision) of the Parliamentary Secretary to the former Minister for Industry and Science made on 12 August 2015 under s 269TG(1) of the *Customs Act, 1901* (Act) to declare that s 8 of the *Customs Tariff (Anti-Dumping) Act, 1975* (Dumping Duty Act) applies in respect of certain hollow structural sections (HSS) exported to Australia from the Kingdom of Thailand.

2 In making the Decision, the Parliamentary Secretary accepted the recommendations made in the Report no. 254 dated July 2015 ("Report") of the Commissioner of the Anti-dumping Commission ("Commission").

3 The Report recommended the imposition of dumping duties and calculated dumping margins as follows:

(a) Saha Thai Steel Pipe Public Company Limited (Saha Thai) – 5.7%;

(b) Pacific Pipe Public Company Limited (Pacific) – 15.1%;

(c) Samchai Steel Industries Public Company Limited – 19.8%; and

(d) Uncooperative and all other exporters – 29.7%.

4 Applications for review of the Decision were made under s 269ZZA(1) of the Act by the following entities:

(a) Commercial Metals Pty Ltd (CMC) dated 17 September 2015;

(b) Saha Thai dated 15 September 2015; and

(c) Pacific dated 14 September 2015

5 The grounds advanced for the decision not being the correct and preferable decision may be summarized as follows:

(a) the Commission erred in failing to instruct the Australian Customs and Border Security Force (ACBSF) to cancel securities provided under on and from 16 March 2015;

(b) as there appeared to be no request by any Thai exporter for an extension of time beyond the 4 months' notice period, the decision to publish the Dumping Duty Notice the Secretary was precluded from publishing a notice

with retrospective effect because securities provided under s 45 of the Act[1] had lapsed;

(c) where Saha Thai sold goods for export in full container loads, the Commission erred by not determining the export price having regard to the place of containerization;

(d) the Commission did not make appropriate adjustment to domestic prices in accordance with s 269TAC(8) of the Act on account of drawback of import duty paid on imported hot rolled coil (HRC) used by both Pacific and Saha Thai;

(e) the Commission did not make an adjustment under s 269TAC(8) on account of selling commission paid by Pacific to Tamose Trading Co Ltd ("Tamose");

(f) the Commission used ineligible or unsuitable sales in the assessment of normal value of goods sold by Pacific; and

(g) the conclusion that the dumped goods cause material injury was wrong.

6 Having considered the grounds for the applications, I consider that the Decision could have had the effect of imposing dumping duties on goods in circumstances not contemplated by s 269TN(2) of the Act and was not the correct or preferable decision for that reason. The Decision should be revoked and a notice published under s 269TG(1) of the Act limiting the goods to which the Decision applies so that its operation is consistent with s 269TN(2) of the Act. The other grounds for the applications should not be accepted.

7 After setting out the background, I will deal with the grounds in the order identified above.

[1] Sections 42 and 45 of the Act were amended by the *Customs and Other Legislation Amendment (Australian Border Force) Act, 2015* with effect from 1 July 2015. That legislation did not alter the substantive effect of those provisions.

Background

8 On 10 June 2014, AusTube Mills Pty Ltd (ATM) lodged an application pursuant to s 269TB of the Act seeking the imposition of dumping duties in respect of certain HSS imported from the Kingdom of Thailand (Thailand).

9 An investigation was initiated by the Commission by notice dated 21 July 2014.

10 The goods to which ATM's application and the investigation related were certain electric resistance welded pipe and tube made of steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes, whether or not including alloys. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as hollow structural sections. Finish types for the goods include pre-galvanised, hot-dipped galvanised (HDG), and non-galvanised HSS. Sizes of the goods are, for circular products, those exceeding 21 mm up to and including 165.1 mm in outside diameter and, for oval, square and rectangular products those with a perimeter up to and including 950.0 mm. CHS with other than plain ends (such as threaded, swaged and shouldered) are also included within the goods coverage.

11 The following goods were excluded from the investigation:

(a) conveyor tube made for high speed idler rolls on conveyor systems, with inner and outer fin protrusions removed by scarfing (not exceeding 0.1mm on outer surface and 0.25mm on inner surface), and out of round standards (i.e. ovality) which do not exceed 0.6mm in order to maintain vibration free rotation and minimum wind noise during operation);

(b) precision RHS with a nominal thickness of less than 1.6 mm (i.e. not used in structural applications); and

(c) stainless steel CHS and RHS sections.

12 Pacific and Saha Thai were Thai exporters of the goods. CMC was an importer. Each was entitled to apply for review of the Decision pursuant to s 269ZZC of the Act.

13 After the Decision was published the applications for review identified above were made.

14 The Senior Member of the Panel determined that the panel was to be constituted by me in relation to each of the applications.

15 I accepted the applications.

16 Two separate notices were published in relation to the applications. One on 12 October 2015 was in respect of the applications by Saha Thai and Pacific. The notice in relation to the application by CMC was published on 16 October 2015.I wrote to the Commission inviting comments on the applications on 21 October 2015. The Commission responded by letter dated 9 November 2015.

17 The following submissions were made within the 30 day time limit prescribed by s 269ZZI:

(a) Saha Thai dated 11 November 2015;

(b) ATM on 11 November 2015;

(c) ATM (again) on 11 November 2015;and

(d) CMC dated 15 November 2015.

18 The grounds advanced by the applicants are identified at paragraph 5 above and dealt with in turn below.

Failure to instruct cancellation of securities.

19 The first ground of CMC's application is that the Decision was not the correct and preferable decision because:

(a) securities taken under s 42 of the Act as contemplated by Anti-Dumping Notice no 2015/36 should have been cancelled in accordance with s 45(2) of the Act; and

(b) the Commission failed to instruct the Australian Border Force to cancel the securities after their expiry date of 15 July 2015.

20 Section 42(1) of the Act permits the Commonwealth to take securities in accordance with the Act. Section 45(2) of the Act provides that a security taken in respect of an interim duty that may become payable under ss 8, 9, 10 or 11 of the *Dumping Duties Act* before the publication of a notice declaring those sections to apply, shall be cancelled before the expiration of the prescribed period. The prescribed period is defined by s 45(3) and (3A) to be 4 months, or such extended period as the Commission may determine on the request of an exporter, not exceeding 6 months.

21 On 16 March 2015, the Commission published Anti-dumping Notice No. 2015/36 which set out the Commission's preliminary affirmative determination and stated that the Commission was satisfied that securities were necessary to prevent material injury occurring to the Australian industry while the investigation continued. The Notice indicated that the ACBPS would require securities in respect of interim dumping duty that becomes payable in respect of goods entered for home consumption on or after 16 March 2015. The Commission subsequently published a further notice[2] varying the amount of the securities required in light of Statement of Essential Facts 254 (SEF 254).

22 It may be that some securities taken as a result of Anti-dumping Notice No. 2015/36 have not been cancelled as alleged by CMC. However, the decision by the Parliamentary Secretary to issue a notice under ss 269TG of the Act and the administration of the securities obtained under s 45 of the Act are two separate matters. A decision by the Parliamentary Secretary to issue a notice under

[2] Anti-dumping Notice No. 2015/66.

ss 269TG is not vitiated by non-cancellation of securities within the time limits contemplated by s 45 of the Act.

Retrospectivity

23 The second ground set out in CMC's application is somewhat difficult to understand. It appears, however, to reflect the second of the grounds advanced by Saha Thai. Both those entities engaged the same agent to represent them in these review proceedings. I will treat them as the same.

24 The argument about retrospectivity appears to be that the Decision was not the correct and preferable decision because the Decision applied retrospectively to entries for home consumption which had occurred in the past but in respect of which there was no security under s 45 of the Act.

25 Section 269TN(1) of the Act provides that the Minister must not cause a notice to be published under s 269TG(1) in respect of goods that have (already) been entered for home consumption;

26 Section 269TN(2) creates a limited exception to this rule. It provides:

> (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).

The principal elements of this subsection is that a retrospective notice under s 269TG is permitted where there is security taken under the s 42 of the Act in respect of interim duty that might become payable.

27 The Decision was that the dumping duty notice applied to the goods and like goods entered for home consumption on and after 16 March 2015, which was the

date of the Commission's preliminary affirmative determination (Anti-dumping notice no 2015/36). The notice was published on 19 August 2015, which is more than 4 months after 16 March 2015.

28 The Decision purported to apply to goods that were entered for home consumption longer ago than the ordinary 4 month term of a security given under s 42 of the Act. The notice would *not* be consistent with s 269TN(1) and (2) *unless*:

(a) securities had been taken in respect of entries of the goods for home consumption in the period since 16 March 2015; and

(b) in respect of goods entered for home consumption during the period from 16 March 2015 until 19 April 2015, any such securities had been extended pursuant to s 45(3A) of the Act.

29 ATM submitted that there was no information that I could take into account in accordance with s 269ZZK dealing with particular entries or securities. Section 269ZZK limits the information which can be taken into account on a review to information which the Commission must or may have taken into account in making the findings set out in its report and conclusions found in applications, or timely submissions, based on that relevant information. It may be accepted that there is no relevant information identifying the specific goods entered for home consumption after 16 March 2015 or the particular securities taken in respect of such goods or whether any applications had been made extending their term beyond the standard 4 month period. However, it is unrealistic to proceed on the basis that no goods were entered for home consumption after 16 March 2015. Ongoing importation of the goods in significant quantities is an assumption on which the existence of a threat of injury is based. It may also be assumed the ACBPS would take securities in accordance with the Notice. However, it would, in my opinion, be unlikely that an application for an extension of securities given during the period 16 March 2015 to 19 April 2015 was made. Consequently, there

is no basis for assuming that securities which were given more than 4 months prior to 19 August 2015 were valid on 19 August 2015.

30 In the circumstances, I consider that the Decision was not the correct and preferable decision. The Decision ought to have specified the goods to which the Decision applies so that the Decision was consistent with the requirements of s 269TN(2) of the Act. This could be effected by stipulating that the Decision only applies to goods entered for home consumption after 16 March 2015 in respect of which a valid security subsisted as at 19 August 2015.

Place of Export

31 The third ground of review advanced by Saha Thai was that:

(a) Saha Thai exports some of its goods in full container loads; and

(b) the Commission should have treated the place where those full container loads were packed as the place of export for the purposes of determining the export price of those goods.

32 Saha Thai referred to s 154 of the Act which, it contended, relevantly defines the place of export for full container load cargo as being at the ex-works level.

33 Section 154 of the Act is found in Part VIII, Division 2 of the Act. That Division deals with Valuation of Imported Goods. Section 154 provides:

> **154 Interpretation**
> (1) In this Division, unless the contrary intention appears:
> …
> ***place of export***, in relation to imported goods, means:
> (a) where, while in the country from which they were exported the goods were posted to Australia—the place where they were so posted;
> (b) where, while in the country from which they were exported, the goods, not being goods referred to in paragraph (a), were packed in a container—the place where they were so packed

34 The imposition of anti-dumping duties is not dealt with in Part VIII, Division 2 of the Act. Consequently, s 154(1) of the Act does not, in its terms, apply to the imposition of dumping duties. Although one might expect that terms would have the same meaning throughout a piece of legislation, this expectation must give way to specific provision dealing with the circumstances in which the definitions apply, such as the introductory words to the definitison in s 154(1) of the Act.

35 Section 269TAB of the Act deals with the determination of the "export price" for the purposes of Part XVB. Section 269TAB must be applied to the determination of the export price for dumping duty purposes, rather than s 154. Section 269TAB contemplates that the price will ordinarily be determined on a basis which excludes any part of the price which relates to transport after exportation. This compels a factual inquiry as to the actual place of exportation from the exporting country and will generally involve resort to the Free on Board ("FOB") price of the goods. Goods have not been exported when they have been packed into a container at an exporter's works.

36 This ground of review must be rejected.

Duty Drawback

37 Both Saha Thai and Pacific argued that the Decision was not the correct and preferable decision because the Commission had not correctly taken into account drawbacks of import duty imposed by Thailand on imports into Thailand of hot rolled coil (HRC). HRC is a major component of HSS.

38 This issue is governed by s 269TAC(8) of the Act, which provides:

> Where the normal value of goods exported to Australia is the price paid or payable for like goods and that price and the export price of the goods exported:
> (a) relate to sales occurring at different times; or
> (b) are not in respect of identical goods; or
> (c) are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;

> that price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price.

39 Both Saha Thai and Pacific received drawbacks of duty on imported HRC. The Commission did not make an adjustment for the drawback under s 269TAC(8) of the Act. They contend that the Commission was wrong in failing to do so.

40 The circumstances of Pacific and Saha Thai were different.

Pacific

41 The Report dealt with Pacific's claims in relation to drawback of duty at section 6.5.1.5 and 6.5.1.6 by reference to the findings of the Commission in Investigation 177.[3] The Commission accepted that Pacific received a drawback of duty in relation to imported HRC used in the manufacture of HSS. However, the Commission also indicated that the volume of HRC imported was almost identical to the volume of HSS exported. The Commission concluded that the imported HRC was used in the production of HSS for export and that the domestically produced HRC was used to make HSS for the domestic Thai market. Import duty was not imposed on HRC manufactured in Thailand. The Commission concluded that, as a result, Pacific did not pay any import duty on HRC used by it in the manufacture of HSS. In the case of domestic HSS, this was because import duty was not payable on (domestic) HRC, which was a component of domestically sold HSS. In the case of export HSS, this was because Pacific received a drawback of duty on HRC used in the manufacture of export HSS.

42 Pacific did not seriously dispute the factual assertions made in the Report about the use of domestic and imported HRC or the incidence of import duty. Rather it contended,[4] that Pacific's domestic prices of HSS are "modified" by duty because

[3] At page 38.
[4] At page 10 of its application.

the price which it pays for domestically produced HRC is an import parity price which matches the price of imported HRC.[5]

43 I do not consider that Pacific's position is correct. The price of domestically produced HRC cannot be said to be "modified" by the import duty when the import duty is not levied on domestically produced HRC. In order for the normal price of the HSS to be "modified" by import duty, the import duty must have a more direct impact on the normal price.

44 Further, the domestic market price for HRC will be the result of a number of factors, not just the price of the imported HRC. One would anticipate that there would be non-price advantages associated with the use of locally produced HRC, such as improved reliability and delivery times, which domestic producers of HRC may take into account in charging prices which do not precisely equal the domestic market price of imported product.

Saha Thai

45 Two questions arise in connection with Saha Thai's claim in relation to the drawback on import duty:

(a) Is the inquiry under s 269TN(8)(e) of the Act whether differential application of taxes has in fact modified the normal value for the goods or the export price or is the inquiry whether the circumstances of the application of the tax make it appropriate for an adjustment to be made to the normal price of the goods?

(b) If the answer to the previous question is that an actual modification is required, what impact was there on the normal value or the export price?

I will deal with each of these questions in turn.

46 At page 27 of the Report, the Commission said:

[5] At page 10 of its application.

> …in order to decide whether an adjustment is warranted, the Commission is required to establish whether the duties paid for the imported HRC that is used in manufacturing of domestically sold HSS has modified Saha Thai's pricing of like goods sold on the domestic market in contrast to the goods exported.

The Commission went on to conclude that the domestic and export prices of Saha Thai's goods appeared to be driven by market forces instead of marginal cost differences due to duties paid on imported HRC.

47 Saha Thai, in its submissions posited a more objective test, by reference to Article 2.4 of the WTO Anti-dumping Agreement ("ADA"), which provides:

> 2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

Saha Thai stressed the reference to a "fair comparison" and the word "comparability" suggest an objective standard. It argued that Art. 2.4 requires an allowance to be made to the price, irrespective of conscious decisions by the particular exporter.[6] It argued that the Commission was wrong to focus on whether Saha Thai, in making its pricing decisions, actually took into account differences in the incidence of import duty on HRC used in the manufacture of domestic and export HSS.

[6] At 4.9 and 4.10.

48 Although the Act is to be interpreted in light of the provisions of the WTO Agreements by which Australia is bound, Parliament may choose the manner in which to legislatively implement those obligations. I consider that s 269TAC(8) of the Act calls for a factual inquiry into the actual effect of the particular differential incidence of taxation on either the price paid or payable for like goods or the export price. This follows from the use of the expression "modified" and the focus in the sub-section on sales, rather than costs. Section 269TAC(8) does not apply where the normal value is based on costs in accordance with s 269TAC(1)(c).

49 I do not, however, regard this approach as substantially different from the inquiry contemplated by Art 2.4 of the ADA. The third sentence of Art. 2.4 refers to an allowance being made on its merits and, after referring to a number of specific differences, to "any other differences which are also demonstrated to affect price comparability". If a difference does not have a demonstrated effect, no allowance should be made in respect of it. By way of example, the Commission referred to the preference of Thai consumers for unpainted structural grade HSS and the premium they were prepared to pay for that product, compared to equivalent painted HSS, notwithstanding that the painted product costs more to produce. There would be no warrant for adjusting the price of this product to take into account the costs of painting it. That said, there will be some differences in costs which would ordinarily have an effect on pricing. Substantial differences in major components of the costs to manufacture goods for domestic and export markets would usually have an effect on pricing.

50 The second issue identified above is whether, as a matter of fact, the imposition of import duty on HRC used in the production of HSS for domestic sale, modified in different ways the price paid or payable for domestic sales and the export price.

51 The Commission[7] indicated that it had "concerns" that the selling price on the domestic market was modified because of the payment of duty on imported HRC for two reasons:

(a) there was an absence of financial records that allocated the cost of duty paid on imported HRC to HSS sold on the domestic market; and

(b) it considered that domestic prices were determined by market forces, as opposed to the cost of production.

52 The Commission noted that:

(a) Saha Thai's accounting records did not identify a cost differential between identical products sold locally and exported; and

(b) in its exporter response, Saha Thai allocated import duty expenses on HRC across all its products, regardless of whether the HSS it produced was sold locally, or exported.

53 Saha Thai pointed out that its accounting records reflected the Thai accounting standards under which it operated, which required the determination of a uniform value for inventory, regardless of the eventual destination of the product. While the Thai accounting standards justify the approach taken by Saha Thai in its formal accounts, it does not entirely explain the lack of other, less formal records attributing more specifically the burden of import duties between domestic and export sales. One would ordinarily anticipate that cost differences associated with the differential imposition of import duty would be a matter to which management was alive and which would constrain the domestic pricing options available to management. However, if the incidence of import duty was relevant to the market price for HSS, one might have expected information on that point to be available and identified in Saha Thai's exporter response. It is noted that Saha Thai employed an Anti-Dumping Measures Director and an external adviser. Saha

[7] At Report, p27.

Thai had been the subject of an earlier investigation by the ACBPS.[8] The suggestion that a claim for drawback would be made only after a request from the Commission to allocate import duty to the cost to make and sell domestically sold HSS suggests that the incidence of duty on HRC was not, in reality, a factor that was relevant to Saha Thai. There is no reason in principle why Saha Thai could not operate on the basis of a uniform cost of HRC and price its domestic HSS sales to meet the market, rather than by reference to its costs. The Commission conducted an analysis of Saha Thai's domestic sales and noted that [redacted]. There was also evidence that domestic prices of painted and unpainted versions of some domestic HSS products were priced without apparent regard to the comparative cost of manufacture of those products.,

54 The Commission was also concerned that Saha Thai's records did not enable it to identify the actual amounts of duty paid per tonne on HRC used in the manufacture of domestic HSS. The duty on imports varied depending on the country of origin. There were also discrepancies between the amount initially identified by Saha Thai as imported HRC for domestic use and the total production volumes. Although the calculation of duty paid was based on payments of duty through the bonded warehouse system, it appears that not all HRC used by Saha Thai for domestically sold HSS was processed through the bonded warehouse system and, more significantly, some HRC processed through the bonded warehouse system was not used for HSS production, but was on sold.

55 In the circumstances, I am satisfied that the existence and the amount of any modification, to the normal value and the export price associated with drawback of duty on imported HRC used in domestic production was not sufficiently established. Consequently, it was not appropriate to make an allowance in respect of drawback in this case.

[8] Investigation 177

Tamose Commission

56 Pacific also claimed that the decision was not the correct and preferable decision because the Commission failed to make any or any appropriate allowance in respect of payments recorded in Pacific's books of account as "intercompany commissions" paid by Pacific to Tamose. Pacific's asserted that it paid [redacted] of the net export invoice amounts to Tamose for "assistance in export document processing" and [redacted] of the net domestic invoice amounts for sales services in relation to standard pipe sales in the domestic market. These amounts were shown in Pacific's records. It contended that the arrangements should be given effect in accordance with their terms.

57 In the Final Report, the Commission proceeded on the basis that Tamose was a subsidiary of Pacific.[9] This view was based on Investigation 177 and articulated in the SEF 254. Although Pacific described Tamose as "related" and a "separate corporate entity" in its application, subsidiaries may be said to be related companies.

58 The Commission found that the intercompany charges involving Tamose did not reflect actual selling costs for the following reasons:

(a) the nature of the relationship between the parties;

(b) Pacific had:

(i) claimed a level of trade adjustment in its exporter questionnaire, stating that Pacific asserted that it incurred marketing costs in the domestic market that it did not incur in its export sales to Australia; and

[9] At page 37.

(ii) then sought to withdraw its level of trade adjustment in favour of its adjustment for the Tamrose commissions;[10] and

(c) the nature of the charges made, which were fixed and did not, apparently vary depending on the nature of the sale allegedly facilitated.

59 While I accept that parties may well fix a rate for services on a simple percentage basis, I consider that it was open to the Commission to conclude that an adjustment to the normal value and export price was not appropriate. I would not reach any other conclusion on the matter.

60 In any event, the question is whether the Decision to publish a notice under s 8 of the Dumping Duty Act was the correct or preferable one. The argument goes primarily to the amount of the dumping margin, rather than whether Pacific did not dump goods (at all). Even if the allowances claimed by Pacific should have been made by the Commission, that outcome would not have meant that a notice should not have been published under s 8 of the Dumping Duty Act. The Decision to publish a notice would still have been the correct and preferable decision.

Unsuitable Sales

61 Pacific argued that the Decision was not the correct and preferable decision because the Commission took into account sales of approximately [redacted] metric tonnes of HSS fabricated to an Australian Standard, AS1163 – C350 in determining the normal price of its goods.

62 Pacific argued first that of the [redacted] of domestic sales of AS1163- C350 standard goods, sales of [redacted] could not be taken into account at all in determining the normal value under s 269TAC(1). It said that:

(a) s 269TAC(1) refers to the sale of goods in the ordinary course of trade for home consumption in the country of export; and

[10] The Report, at 6.5.1.4

(b) these sales were not sales in the ordinary course of trade to domestic consumers. It referred to its "understanding"[11] that these goods were exported to Australia without fabrication that changed the essential character of the goods.

63 Pacific suggested that the Commission had no real evidence to refute Pacific's "understanding". However, there was no real evidence that the goods were exported without being consumed. The role of the Commission is investigative, so questions of onus do not arise. However, the fact that the sale was to a Thai customer suggests that the goods were for domestic consumption. Further, the Commission found the purchaser's website, which stated that the entity to which the goods were sold made pre-fabricated houses for export, with factories in Thailand. It also obtained information that the Australian entity associated with the Thai purchaser was not trading. In these circumstances, the inference that the sales were sales for home consumption was the correct one, in my opinion.

64 Pacific also argued that the sales of the AS1163 – C350 did not provide a fair and proper comparison with Pacific's export sales.

65 Pacific complained that the sales of the [redacted] of AS1163 – C350 grade HSS amounted to only a very small percentage of Pacific's domestic sales of "like goods", which totalled [redacted] Pacific also pointed out that the sales of AS1163-C350 were less than [redacted] of the total amount of Pacific's export sales. However, the approach taken by the Commission was based on matching as nearly as practical the characteristics of goods sold on the domestic market, in terms of shape, finish, grade, impact test requirements and diameter, with their corresponding export counterparts. Thus, the sales of the AS 1163-C350 were compared with sales of [redacted] of AS1163-C350 product to Australia. The domestic sales of AS1163-C350 were more than [redacted] of the sales of that grade of HSS to Australia. Other domestic sales of HSS were compared to export sales of

[11] At page 4 of its application.

other models of HSS, so that the total volume of domestic sales that were compared with the total volume of export sales was more than 5% of the total volume of export sales. I consider that the approach of model matching was a reasonable one, and minimized the number of adjustments necessary to take into account differences in grade and finish between domestic sales and export sales. I accept that the exporters were informed that this approach would be taken at an early stage of the investigation.

66 The Commission took steps to check that Pacific's domestic sales of AS1163-350 were not higher priced than normal. It checked prices against domestic sales by the other responsive exporters, Saha Thai and Samchai. Pacific's prices were within [redacted] of their prices. Saha Thai sold AS1163-350 domestically in significant volumes. The Commission also allowed for the limited time periods over which Pacific's AS1163-350 domestic sales were made by adjusting for changes in prevailing HRC prices during the investigation period.

67 In the circumstances, I consider that Pacific's domestic sales of AS1163-350 were a legitimate comparator with Pacific's export sales of AS1163-350.

68 This ground of review is not made out.

Material injury

69 CMC's third ground was that the Commission's conclusion that there was material injury to the Australian industry as a result of the dumped imports[12] was wrong and should be re-investigated. The essence of CMC's argument appears to be that any injury suffered by the Australian industry was:

(a) caused by other imports, which also took market share from Thai imports during financial year 2014; and

[12] At section 8.7 of the Report.

(b) a decline in the market share of ATM caused by an increase in sales by Independent Tube Mills ("ITM") from the 2% market share identified for that company in Investigation Report 177.

70 In the submission from its agent, Staughtons Trade Advisory Group Pty Ltd (Staughtons), dated 15 November 2015, CMC pointed to the finding in Statement of Essential Facts 291 of 5 November 2015 that circumvention activity has occurred in respect of HSS exported from China, Malaysia and Korea. While acknowledging that the SEF 291 had not been published until 5 November 2015, and could not be taken into account directly by virtue of s 269ZZK of the Act, CMC asserted that the facts on which the conclusions expressed in SEF291 were based would have been known by the Commission in sufficient time for those facts to form part of the "relevant information" that the Commission should have taken into account.

71 However, Statements of Essential Facts set out findings which the Commission proposes to make. Parties may, and frequently do, dispute the facts set out in those documents in submissions made under s 269TDAA(2). The facts ultimately found by the Commission in its final report may differ from those identified in the Statement of Essential Fact. I do not consider that the Commission was obliged to pre-empt the result of separate investigation when reaching conclusions in this investigation or the Report.

72 In any event, the Commission conducted a comparison of the export prices of goods from Thailand, China, Malaysia and the United Arab Emirates. That analysis showed the export prices of goods from Thailand were lower than the export prices from China, Malaysia and the United Arab Emirates, despite being higher value grades. This minimizes the impact of imports from those countries. The impact of imports from other countries was also considered in the Report.

73 Finally, the fact that goods from countries other than Thailand caused injury to the Australian industry does not preclude the Commission and the Mininister

concluding that material injury has been caused to the Australian industry. Although the Minister is obliged by s 269TAE(2A) of the Act to consider other causes of injury in determining whether there has been material injury, the fact that some injury has been caused to the Australian industry by factors other than dumping does not mean that dumping has not caused material injury.

74 The position in relation to the market share of Australian Pipe and Tube Pty. Ltd. ("APT") was less satisfactory. The Commission confessed to working in something of a vacuum. ATM was the original applicant. The other participants in the Australian market were Orrcon and APT. Although Orccon's position in the market had been verified in connection with Investigation 177, that did not occur in connection with this application. Orrcon supported ATM's application, but APT provided no information to the Commission in connection with this investigation. The Commission proceeded on the basis of the verified market shares established during Investigation 177, both in SEF 254 and in the Report. In Staughtons' letter dated 6 July 2015[13] it said that CMC "disputes this estimate on the basis that APT would have produced circa 24k Tonnes during the IP and it would seem that the Commission has not sought to verify APT's production." CMC did not provide hard data supporting its contention. The Commission cannot reasonably be criticized for proceeding on the basis of the last verified information to hand.

75 The forms of injury suffered by the Australian industry included price suppression and reduced profits and profitability. In a situation where:

(a) Thai imports occupied a significant market share in Australia;

(b) the dumping margins of the Thai exporters enabled them to enjoy a significant competitive advantage against Australian goods;

(c) the price of Thai imports significantly undercut Australian prices,

[13] EPR 48.

I consider that it is correct to attribute material injury to the dumped goods, even if there were other factors which also adversely affected the Australian industry, such as dumped exports from other countires and APT's ongoing prescence in the market. The Commissions analysis of the material injury at section 8 of the Report is persuasive.

76 I reject this ground of review.

Recommendation

77 For the reasons given in paragraphs 23 to 31 of this report, I consider that the Decision was not the correct and preferable decision. The Decision ought to have specified the goods to which the Decision applies so that the Decision was consistent with the requirements of s 269TN(2) of the Act. This could be effected by stipulating that the Decision be varied so that, to the extent it applies to goods entered for home consumption between 16 March 2015 and the date of the public notice of the Decision (19 August 2015), it only applies in respect of those goods for which a valid security subsisted as at 19 August 2015.

Scott Ellis
Date: 11 December 2015