



Australian Government
Department of Industry, Science,
Energy and Resources

Anti-Dumping Commission

Anti-Dumping Commission
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Ms Leora Blumberg
Panel Member, Anti-Dumping Review Panel
c/- ADRP Secretariat
Legal, Audit and Assurance Branch
Department of Industry, Science, Energy and Resources

By e-mail: ADRP@industry.gov.au

Dear Ms Blumberg

Hollow structural sections exported from the Kingdom of Thailand

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* (the Act) published on 11 September 2020, advising your intention to review the decision of the Minister for Industry, Science and Technology (the Minister) to publish a notice under section 269ZHG(1)(a) of the Act (the Reviewable Decision). The Reviewable Decision was published on the website of the Anti-Dumping Commission (the Commission) on 27 July 2020, referred to in Anti-Dumping Notice No. 2020/70.

I have considered the applications submitted by Austube Mills Pty Ltd and Orrcon Manufacturing Pty Ltd for a review of the Reviewable Decision and make submissions, pursuant to section 269ZZJ(aa) of the Act, in response. Please find my submissions enclosed as **Attachment A**.

The Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely

Dale Seymour
Commissioner
Anti-Dumping Commission

9 October 2020

Attachment A

I make the following submissions in response to the grounds set out in the notice published on 11 September 2020. These grounds are with respect to the consideration by the Anti-Dumping Review Panel (ADRP) of the Reviewable Decision by the Minister for Industry, Science and Technology (the Minister) to publish a notice under section 269ZHG(1)(a) of the *Customs Act 1901* (the Act)¹ in respect of certain hollow structural sections (HSS) exported from the Kingdom of Thailand (Thailand).

Austube Mills Pty Ltd (ATM) has raised five grounds in its application to the ADRP, and Orrcon Manufacturing Pty Ltd (Orrcon) has raised two grounds.

Grounds raised by ATM

Ground 1: The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand by all exporters 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 negative dumping found during the inquiry period was likely to continue beyond the expiry of the measures.

ATM points to a number of past cases of the World Trade Organization (WTO) which all note that the existence (or absence) of dumping is not, by itself, determinative of the question of whether to continue anti-dumping measures. I agree with this view, as noted in chapter 7.4 of *Anti-Dumping Commission Report No. 532* (REP 532), which examined the evidence relevant to considering whether the measures in respect of HSS exported from Thailand ought to be continued.

The dumping margins found during the inquiry period are one factor that I considered in making my recommendations to the Minister. I also considered a range of other factors. However, I 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. That question was not raised in submissions; I do not consider that such an assessment, if undertaken, would have shed any additional light on the findings already made. I also do not consider that it is necessary to predict the likely *degree* of dumping (or its absence) if the measures were to expire; to do so would be entirely speculative.

ATM has questioned whether the absence of dumping by Thai exporters is “sustainable” and therefore likely to continue beyond the expiry of the measures. I 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. I 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. It is unclear in what sense ATM considers this pattern of behaviour is not “sustainable”.

¹ All legislative references are to provisions of the *Customs Act 1901* unless otherwise indicated.

PUBLIC RECORD

Whilst ATM considers that the large negative dumping margin for Saha Thai Steel Pipe Public Company Limited (Saha Thai) is unusual for a commodity product, by the same reasoning a large *positive* dumping margin (such as those found in *Anti-Dumping Commission Report No. 254* (REP 254)) would also be unusual and may not be “sustainable”. I do not accept ATM’s thesis that, given the large negative dumping margin, “commercial behaviour” would result in Saha Thai’s exports increasing to Australia. 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). It is unlikely that an importer of HSS from Saha Thai (or any other exporter) during the inquiry period would be aware of whether the price it has achieved is an undumped price, or that the importer could discern what the weighted average dumping margin would be in the relevant 12 month period.

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. I established that price is not the sole consideration of purchasers in the market. 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.

Finally, ATM 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. With respect, that is not “the only reasonable explanation”; importers may not apply for a duty assessment for a range of reasons. An importer of the goods from Thai Premium Pipe Company Limited (TPP), for example, may have not paid any interim dumping duty at all on its imports if the export prices had exceeded the floor price applicable at the time. 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.

I relied on verified data for the inquiry period. I do not consider it appropriate to have regard to ATM’s estimates for dumping which it alleges may have occurred in periods which I have not examined. I also do 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.

PUBLIC RECORD

Ground 2: The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand by all exporters 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 other exporters not examined are unlikely to recommence dumping if the measures are allowed to expire.

ATM considers that the dumping margin for Pacific Pipe Public Co., Ltd. (Pacific Pipe) is a theoretical margin calculated on the basis of no export sales. I note that the margin was calculated using the available provisions under section 269TAB. I consider that having regard to the export prices achieved by other exporters (as set out in chapter 6.3 of REP 532) is a reasonable basis for estimating the prices at which Pacific Pipe would have exported during the inquiry period. I note that the dumping margin established for uncooperative and all other exporters is also negative, and was also calculated in accordance with the relevant provisions of the Act (chapter 6.6 of REP 532 refers).

Whilst there may be other potential exporters of HSS from Thailand (such as Samchai Steel Industries Public Company Limited), their absence from the market and lack of cooperation with the inquiry prevents me from establishing their variable factors. However, as noted previously, the existence (or absence) of dumping is only one factor that I considered. The range of other factors I examined (set out in chapter 7 of REP 532), particularly those concerning the prevailing economic conditions in Thailand, are equally applicable to those other potential exporters. I also consider 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. There was no evidence before me which would indicate that it was unreasonable to take that approach.

ATM also claims that some Thai exporters have a “proven record of dumping”. My view is 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, and examined in chapter 7.4.7. Again, the presence or absence of dumping is not the only relevant factor in my consideration.

Ground 3: The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand by all exporters is not the correct or preferable decision as the Commissioner’s analysis of price competition in the Australian market is flawed. The flawed price analysis leads to the Commissioner’s recommendation to the 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.

ATM is critical of the findings reported in chapter 7.4.6 of REP 532, claiming that the analysis is flawed. I acknowledge that there are limitations in this analysis, as the Commission does not have detailed price and grade information for all sales in the market over the 9 year period which has been examined. However, the analysis does describe what is happening in the market generally over that period, and provides useful context for the remainder of the chapter.

PUBLIC RECORD

With respect, ATM has overstated the significance of this analysis in my assessment. The subsequent analyses (such as that indicated in chapter 7.4.7, which specifically compares relevant model control codes (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. I submit that this is clearly apparent from *Confidential Attachment 5* to REP 532.

ATM speculates that the analysis in *Confidential Attachment 5* is incorrect. ATM variously claims that:

- it relies on unverified (and therefore incorrect) information;
- the analysis has had insufficient regard to ATM's price premium achieved (and has therefore magnified the degree of undercutting found); and
- in any event, it is different to the approach taken in REP 254 and is therefore inconsistent with WTO jurisprudence (referring specifically to *US – Oil Country Tubular Goods Sunset Reviews*).

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

As will be apparent from *Confidential Attachment 5*, 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. 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.

Finally, Orrcon did not participate in the investigation set out in REP 254. 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.

ATM submits that I have had insufficient regard to its import price premium (IPP) model. I consider that there are some weaknesses in ATM's arguments on this point. As a starting point, the IPP is based on *known* price offers, so does not reflect all price offers in the market. The known price offers are based on what customers are prepared to share with ATM, which may not always be accurate. The IPP also does not demonstrate what prices were ultimately achieved, and does not account for considerations other than price.

Nevertheless, it is 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. 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 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 IPP is moderated by reference to price offers from all sources, so the relative influence of Thai prices is diluted.

As noted in chapter 7.4.10 and chapter 7.5, I have found that it is not likely that dumping will recur if the measures are allowed to expire. I 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 has a negligible connection with the economic performance of the Australian industry and hence is unlikely to result in material injury.

PUBLIC RECORD

Ground 4: The decision by the Minister not to secure the continuation of the anti-dumping measures applying to HSS exported to Australia from Thailand by all exporters 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.

In respect of this ground, ATM sets out a range of facts which, in contrast to other facts, supports its assertion that the measures ought to have been continued. For example, ATM contends that the Commission 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).

I weighed the evidence before me during the inquiry and reached a different conclusion to the one contended by ATM. I do not consider that the Commission could have done any more in the time available to conduct the inquiry, noting that, unless continued, the measures must expire on the relevant date.

With respect, the prevailing economic conditions in Thailand are relevant only insofar as they provide evidence which might indicate whether Thai exporters may have an incentive to dump HSS into markets like Australia. It is one factor which I considered might be relevant. I explored this topic in the *Statement of Essential Facts No. 532*, ATM and Orrcon made submissions in response, and I addressed these in REP 532 (chapter 7.4.4 refers). Whilst ATM considers that there are contradictory statements in that chapter, I note that there was no evidence which would reliably demonstrate the likely effect of Thailand government interventions in its own market, nor what effect those interventions would have on future exports of HSS to Australia. REP 532 clearly indicates that their impact on the likelihood that HSS would be exported from Thailand to Australia at dumped prices in the absence of the measures was not in my consideration. I also consider that ATM's application ignores the clear reasoning set out in chapter 7.4.10.

I agree that the existence of dumping and injury in the inquiry period is not the relevant test as to whether measures ought to be continued. However, the evidence in the inquiry period is 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 can be made about likely future outcomes. I do not agree that evidence from several years prior (such as that relied on in REP 254) is a preferable evidentiary basis for assessing what would happen in the absence of the measures. All of that information should be considered as a whole, and reasonable conclusions drawn from all of the evidence. I consider that REP 532 does that.

PUBLIC RECORD

A number of ATM's submissions during the inquiry sought to emphasise that the existing measures were effective.² My findings in REP 532 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. I can 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 I cannot definitively establish whether that is because of the measures (and they are "effective"), or in spite of the measures (and therefore they are "ineffective"). It is not necessary for me to do so. Critically, I must 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. The factors I examined led me to conclude that it is not likely. In this instance, my conclusion differs from that contended by ATM.

Ground 5: To the extent that the Commissioner's recommendation to the Minister has had regard to other matters considered relevant to the inquiry (the subject of the reviewable decision); including the variable factors established in the inquiry (to assess whether dumping has occurred during the inquiry period, and whether dumping is likely to continue or recur if the anti-dumping measures were to expire); then the Minister has not made the correct or preferable decision with respect to the determination of the normal values and dumping margins for all exporters from Thailand.

ATM asserts that the records of the exporters of HSS from Thailand must be incomplete, that accounting allocations were incorrect or that the Commission had otherwise failed to demonstrate that the recorded costs of Thai exporters represented competitive market costs. ATM offers no evidence to support these assertions, but infers from other information (such as the fact that there are import duties payable in Thailand) that this must be the case.

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

As was set out in chapter 6.4.2 of REP 532 for Saha Thai, and in the verification reports for TPP and Pacific Pipe, the records of the Thai exporters were kept in accordance with generally accepted accounting principles relevant to Thailand. An absence of detail in those accounting records which enables the source of hot rolled coil (HRC) to be traced through to the ultimate destination of the exported HSS does not, in my opinion, provide a reasonable basis on which to ascertain that those records do not represent competitive market costs. There was no evidence before me which would indicate that the Thailand market is distorted such that it is not operating according to normal commercial principles, nor that HRC costs are understated generally.

² Similar views were expressed by Orrcon in its grounds.

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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 Commission would have replaced the recorded cost of HRC with a suitable benchmark. This would have been derived from the recorded HRC costs of other exporters in the same period, based on information the Commission has obtained in the course of the present review of measures concerning HSS exported from China, Korea, Malaysia, Taiwan and Thailand (case #529). The analysis in that case, which will be published in *Statement of Essential Facts No. 529* in the near future, indicates that the costs of HRC recorded by exporters in Korea, Malaysia, Taiwan and Thailand are comparable. In these circumstances, it is unlikely that such a finding would make any material difference to the dumping margins calculated.

ATM considers that the Commission has erroneously considered the availability of a duty drawback to be relevant for the purposes of section 43(2) of the *Customs (International Obligations) Regulation 2015* and the ordinary course of trade tests. Whilst REP 532 does touch 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. As outlined on page 35 of REP 532, the evidence of HRC import duties in REP 254 and in the present inquiry is similar, as is their accounting treatment. It is therefore unclear why the approach applied in REP 254 (and as advocated at the time by ATM) is now not appropriate in REP 532 (as contended by ATM) when there is no material factual difference beyond the dumping margins that have been established. For completeness, I reiterate that the presence (or absence) of dumping during the inquiry period was only one factor that I considered when recommending not to continue the measures.

Grounds raised by Orrcon

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

Orrcon submits 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 Pipe Company Limited (Atlantic)] and Saha Thai.” I do not agree with this view, as the floor price duty method simply has regard to the last established ascertained normal value. It 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. 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.

Orrcon expresses concerns regarding the price analysis contained in *Confidential Attachment 5* to REP 532. In particular, Orrcon doubts whether the analysis has taken appropriate account of the market situation in China and the mix of black and galvanised HSS. These concerns largely echo those already raised by ATM, and which I have addressed above.

Orrcon contends 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). In some ways, this argument follows on from previous comments about the effectiveness of the measures and the floor price acting as a disincentive to dump. The analysis in chapters 7.4.3 and 7.4.4 of REP 532 addressed these points, and in chapter 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).

Orrcon goes on to contend that the Commission’s analysis concerning the conditions in the Thailand domestic market does not 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.

Orrcon contends that the measures have had their desired effect, that past performance (in terms of previous dumping behaviour by exporters) is indicative of future performance and therefore the measures ought to be maintained.

With respect, by this reasoning, measures would never expire. I also note 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. I consider that greater weight should be given to more recent behaviour in the context of all the historical information available, but again, dumping in the inquiry period is only one factor that I considered.

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Ground 2: 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.

Orrcon makes a series of submissions in respect of this ground that the Commission 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.

Taken as a whole, it is apparent from REP 532 that I have examined the relationship between the measures, prices in the market and the economic condition of the Australian industry. Chapter 4.2.5 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.” I accept that small changes in price could result in injury, and that the Australian industry as a whole may be susceptible to injury. However, the measures do not exist to prevent all injury, merely injury caused by dumping. Having found that future dumping is not likely, I do not agree that it is nevertheless appropriate to continue the measures to prevent a continuation or recurrence of any injury.

Orrcon considers that REP 532 has “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.

I do not consider that REP 532 ignored those findings. However, I note 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. Although past dumping behaviour has some relevance, I do not consider that evidence necessarily has greater weight than findings in the most recently examined inquiry period. If past behaviour is indicative of future behaviour, it is unclear why older past behaviour is more reasonably preferred to more recent behaviour.

Orrcon submits that “It can be further argued that review investigation 445 highlighting the existence of dumping prompted the Thai exporters of HSS to ensure they did not export at dumped prices into the future. Orrcon highlights the importance of measures to focus exporters not to export at dumped and injurious prices in the future.” With respect, by that reasoning, measures would never expire. The imposition of measures is intended to remove the injurious effects of dumping. 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. I note 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.