



Australian Government  
Anti-Dumping Review Panel

# Application for review of a Ministerial decision

*Customs Act 1901 s 269ZZE*

This is the approved<sup>1</sup> form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 19 February 2020 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party<sup>2</sup> may lodge an application to the ADRP for review of a Ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

## Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

## Conferences

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

## Further application information

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 9, 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

## Withdrawal

You may withdraw your application at any time, by completing the withdrawal form on the ADRP website.

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<sup>1</sup> By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

<sup>2</sup> As defined in section 269ZX *Customs Act 1901*.

**Contact**

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email [adrp@industry.gov.au](mailto:adrp@industry.gov.au).

**PART A: APPLICANT INFORMATION****1. Applicant's details**

Applicant's name: <a href="#">Austube Mills Pty Ltd (Austube Mills)</a>
Address: <a href="#">Building 7, Industrial Drive, Mayfield, NSW 2304</a>
Type of entity (trade union, corporation, government etc.): <a href="#">Corporation</a>

**2. Contact person for applicant**

Full name: [REDACTED]
Position: [REDACTED]
Email address: [REDACTED]
Telephone number: [REDACTED]

**3. Set out the basis on which the applicant considers it is an interested party:**

<a href="#">The applicant considers it is an interested party within the meaning of paragraph 269ZX(ab) of the <i>Customs Act 1901</i><sup>3</sup>, as it was an applicant in relation to an application under s.269ZHB that led to the making of the reviewable decision.</a>
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**4. Is the applicant represented?**

Yes ☒ No ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

***\*It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.\****

<sup>3</sup> All legislative references in this application are to the Customs Act 1901, unless otherwise stated.

## PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

### 5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) – decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☒ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed**.

### 6. Provide a full description of the goods which were the subject of the reviewable decision:

The goods which were the subject of the reviewable decision are:

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 HSS (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.

#### Excluded goods

The following categories of HSS are excluded from the measures:

- 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)

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which do not exceed 0.6mm in order to maintain vibration free rotation and minimum wind noise during operation);

- precision RHS with a nominal thickness of less than 1.6 mm (i.e. not used in structural applications); and stainless steel CHS and RHS sections.

### 7. Provide the tariff classifications/statistical codes of the imported goods:

The goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

- 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37), circular hollow sections;
- 7306.50.00 (statistical code 45), other circular cross-sections of other alloys of steel;
- 7306.61.00 (statistical codes 21, 22, 25 and 90), rectangular or square hollow sections;
- 7306.69.00 (statistical code 10), other non-circular cross-sections; and
- 7306.90.00 (statistical code 12), other.

### 8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number:

2020/070

Date ADN was published:

27 July 2020 - A copy of the notice of the reviewable decision is attached as **Appendix A** to this application.

***\*Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application\****

## PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

**9. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision:**

**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 the negative dumping margin found during the inquiry period was likely to continue beyond the expiry of the measures.

**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.

**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.

**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.

**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 normal values and dumping margins for all exporters from Thailand.

**10. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 9:**

**Grounds 1-4:**

The correct or preferable decision would be for the Minister:

- in accordance with paragraph 269ZHG(1)(b) to declare that she has decided to secure the continuation of the anti-dumping measures relating to HSS exported to Australia from Thailand by all exporters; and
- in accordance with sub-paragraph 269ZHG(4)(a)(i) to determine that the dumping duty notice continues in force after the specified expiry date of 19 August 2020 and as such continues to apply to all exporters from Thailand.

**Ground 5:**

- For the purpose of this reviewable decision, the correct or preferable decision would be for the Minister for the purpose of OCOT tests to take into account the cost of import and other duties in coil used for domestic production of HSS;
- for the Minister for the purpose of whether there are suitable sales under subsection TAC(1) to take account of such costs;
- for the Minister for the purpose of constructed normal values under sub-paragraph TAC(2)(c)(i) where required to take account of such costs; and
- for the Minister to determine dumping margins based on those normal values.

**11. Set out how the grounds raised in question 9 support the making of the proposed correct or preferable decision:**

Elaboration of the grounds raised in question 9 can be found at **Appendix B**, attached.

**12. Set out the reasons why the proposed decision provided in response to question 10 is materially different from the reviewable decision:**

*Do not answer question 11 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.*

The correct or preferable decision provided in response to question 10 is materially different from the reviewable decision as follows:

**Grounds 1-4:**

A decision by the Minister under paragraph 269ZZM(1)(b) to revoke the reviewable decision and substitute a new decision may result in a declaration under paragraph 269ZZM(3)(d) that the dumping duty notice, as in force immediately before its expiry, is reinstated and applies to all exporters from Thailand.

**Ground 5:**

The re-determination of the normal values for all exporters from Thailand will likely increase the normal value ascertained for all exporters from Thailand and increase the levels of dumping for all exporters from Thailand the subject of the reviewable decision.

**13. Please list all attachments provided in support of this application:**

[Appendix A : ADN 2020/070](#)

[Appendix B: Elaboration of the grounds raised in question 9](#)

**PART D: DECLARATION**

The ~~applicant~~/the applicant's authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected; and
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: [sgd]

Name: [REDACTED]

Position: [REDACTED]

Organisation: [REDACTED]

XXXXXX Date:

26/08/2020



**PART E: AUTHORISED REPRESENTATIVE**

*This section must only be completed if you answered yes to question 4.*

**Provide details of the applicant's authorised representative:**

Full name of representative: [REDACTED]
Organisation: [REDACTED]
Address: [REDACTED]
Email address: [REDACTED]
Telephone number: [REDACTED]

**Representative's authority to act**

***\*A separate letter of authority may be attached in lieu of the applicant signing this section\****

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature: [sgd]

(Applicant's authorised officer)

Name: [REDACTED]

Position: [REDACTED]

Organisation: Austube Mills Pty Ltd

Date: 21/08/2020



## **ANTI-DUMPING NOTICE NO. 2020/70**

*Customs Act 1901 – Part XVB*

### **Hollow structural sections exported from the Kingdom of Thailand**

### **Findings of Continuation Inquiry into Anti-Dumping Measures No. 532**

***Notice under section 269ZHG(1)<sup>1</sup>***

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry concerning the continuation of the anti-dumping measures, in the form of an anti-dumping notice, applying to hollow structural sections (HSS, or the goods) exported to Australia from the Kingdom of Thailand (Thailand).

Recommendations resulting from the inquiry completed by the Commissioner, reasons for the recommendations and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No. 532* (REP 532).

I, KAREN ANDREWS, the Minister for Industry, Science and Technology, have considered REP 532 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of fact and law, therein. Under section 269ZHG(1)(a) of the Act, I **declare** that I have decided not to secure the continuation of the anti-dumping measures currently applying to the goods exported to Australia from Thailand.

REP 532 has been placed on the public record which may be examined on the Anti-Dumping Commission website.<sup>2</sup> Enquiries about this notice may be directed to the Anti-Dumping Commission at: [clientsupport@adcommission.gov.au](mailto:clientsupport@adcommission.gov.au)

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel<sup>3</sup>, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Dated this 27<sup>th</sup> day of July 2020

KAREN ANDREWS  
Minister for Industry, Science and Technology

<sup>1</sup> All legislative references are to the *Customs Act 1901* (the Act), unless otherwise stated.

<sup>2</sup> The public record is available at [www.adcommission.gov.au](http://www.adcommission.gov.au)

<sup>3</sup> The Anti-Dumping Review Panel website may be accessed via <http://www.industry.gov.au/about-us/our-structure/anti-dumping-review-panel>

APPENDIX B

Elaboration of the grounds raised in question 9

**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.**

The Commission's assessment of the likelihood of dumping and material injury continuing or recurring is contained in Chapter 7 of Continuation Report 532 (**REP 532**).

Dumping continuing or recurring

*The Commission has found that all HSS exported from Thailand to Australia has been at undumped prices **during the inquiry period** and therefore the dumping found in REP 254 has not continued.*

*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**.<sup>1</sup> (emphasis added)*

The reliance on the degree of the negative dumping margins found in the inquiry period has significantly and disproportionately influenced the Commission's findings on whether dumping and material injury will continue or recur.

Austube Mills submits that given Thailand has no global competitive advantage as a producer of HSS products, then the Commission has 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.

WTO jurisprudence supports Austube Mills' contention that the Commission has an obligation to actively investigate rather than simply report.

*This language in Article 11.3 makes clear that it envisages a process combining both investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.<sup>2</sup>*

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<sup>1</sup> REP 532, p.62

<sup>2</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111. Also see Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 179.

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Austube Mills contends that 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. The Commission has found that Saha Thai has a negative dumping margin of 13.1%. If this finding is correct, it means that it is significantly more profitable; at least 13.1% more profitable; for Saha Thai to sell into the Australian market than the Thai domestic market.

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, despite the reported higher profitability of exports sales of HSS to Australia and significant excess capacity, Thai exporters' market share has fallen by nearly 50% 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). Austube Mills submits that the Thai exporters' behaviour was influenced by the effectiveness of the measures.

Austube Mills 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.

However, 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 Investigation 254 have achieved their stated objective as submitted by Austube Mills during the Inquiry:

*Austube Mills submits that the measures have largely been effective in preventing dumping and the injury caused by dumping, and that without them Thai exporters would likely recommence dumping. The success of the measures should not be a reason that they are discontinued.<sup>3</sup>*

*The situation where an exporter is not found to be dumping following the imposition of measure and in the course of a continuation inquiry is envisaged by the legislation through the use of prospective language, such as, in the phrase "would lead, or would be likely to lead to a recurrence of the dumping that the measures are intended to prevent". The cessation of dumping following the imposition of measures is the intended function of the anti-dumping system.*

*The Anti-Dumping Review Panel (ADRP) considered this issue in ADRP Report No. 70 (REP 70) in regard to Hot Rolled Coil (HRC) where the Commission had recommended the continuation of the measures.*

*Whilst exports by the Applicants were found to not be dumped during the inquiry period by negative margins, the Commission considered, if the measures were not continued, it is likely that future exports of HRC from the Applicants would be dumped, and that it was likely that material injury would be experienced by BlueScope as a result of that dumping.*

*The ADRP Panel Member in REP 70 affirmed the Commission's recommendation that measures be continued noting in relation to the finding of no dumping:*

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<sup>3</sup> EPR CON 532/027, p4.

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*As to the significance of the Applicants' negative dumping margins throughout the inquiry period, neither the Anti-Dumping Agreement nor the Act requires revocation as soon as an exporter is found to have ceased dumping and the continuation of measures is not precluded a priori in any circumstances other than where there is present dumping.<sup>4</sup>*

The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* 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.<sup>5</sup>*

The Dispute Panel in *US – Dynamic Random Access Memory Semiconductors (DRAMs) from Korea* also noted:

*With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, **an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping.** If the only causal factor under consideration is three years and six months' no dumping, the issue of causality **becomes whether injury caused by dumped imports will recur.**<sup>6</sup> [emphasis added]*

There has been only one review of the measures since INV 254, Review 445 (**REV 445**) resulting in a floor price for Saha Thai. Austube Mills has estimated the floor at ■ THB per tonne based on confidential export data that was provided in the application<sup>7</sup>. [commercially sensitive]

What is significant is that the export data provided to the Commission shows that Thai export prices have not dropped below the floor price estimated for the Review period since the review of the measures. 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.

That the Australian market share of Thai exports has fallen 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.

Further, as previously submitted to the Commission, 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%). Austube Mills estimated the value of the interim dumping duties payable on those exports at close to ■ dollars.<sup>8</sup> [commercially sensitive]

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.

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<sup>4</sup> EPR CON 532/027, p.2

<sup>5</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

<sup>6</sup> Panel Report, *US – DRAMS*, para. 6.59.

<sup>7</sup> Refer Conf Att 2 Thai Dumping, Dumping Tab Cell I53.

<sup>8</sup> EPR CON 532/022, p.3

As also previously submitted, the sole importer of Saha Thai goods, ■ has alternative supply options, importing HSS from ■ exporters, who, importantly, will most likely continue to be subject to anti-dumping measures after REV 529 is finalised. Should the measures not be continued for Saha Thai, there would be an incentive for ■ to move import volumes from the other exporters, that will continue to be subject to measures, to Saha Thai<sup>9</sup>. The alternative supply options for ■ was the likely reason they did not buy from Saha Thai when the floor price was effective.  
[commercially sensitive]

**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.**

The Commission summarises as the key reasons that the Commissioner is 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:

- The degree of negative dumping margin
- The market share of the Thai exporters as being stable
- The high degree of price competition in the market
- Significant **existing** price advantage enjoyed by Thai exporters in the Australian market has not had any discernible impact on the economic condition of the Australian industry.

It is important to note that the Commission's observations were made on the basis of only two active Thai exporters during the inquiry period, Saha Thai and Thai Premium Pipe Co Ltd (**TPP**).

However, the Commission has given no consideration to the prospective impact of Pacific Pipe and other Thai exporters re-entering the market as indicated by their co-operation in the Continuation Inquiry. Whilst the Continuation inquiry has generated a negative dumping of 4.3% for Pacific Pipe, this is a theoretical margin calculated on the basis of no export sales.

The Commission determined a dumping margin based on Pacific Pipe's verified exports of HSS to Australia in INV 254 of 15.1%. Samchai Steel Industries Public Company Limited (**Samchai**) is also a Thai exporter that was found to be dumping in INV 254 with a margin of 19.8% whilst all other exporters had a dumping margin determined at 29.7% in INV 254. In REV 445, the margin for Pacific Pipe was 5.6% and uncooperative exporters (that included Samchai), were found to have a dumping margin of 8.7%.

Austube Mills 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. Pacific Pipe, Samchai and all other exporters have a proven record of dumping when they export HSS to Australia. 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 were found to be dumping in REP 254 Thai market share was

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<sup>9</sup> EPR CON 532/022, p.3

almost double the market share that was found in REP 532 and the high degree of price competition in the market that the Commission has already found will intensify.

**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.**

The flawed price analysis leads to the Commissioner's conclusion that:

*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, of the injury that the anti-dumping measure is intended to prevent.<sup>10</sup>*

The Commission 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.

Both analyses are flawed and call into question the reasoning behind the recommendation to the Minister.

### **Export prices since 2011**

The Commission stated in Statement of Essential Facts 532 (**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.<sup>11</sup>*

Austube Mills submitted in response to SEF 532 that

*The Model Control Codes reported in the Thai exporter visit reports show that both Saha Thai and Thai Premium Pipe only exported the lower price painted or non-oiled and painted HSS models ("black") during the inquiry period. Both the Australian Industry and other non-Thai exporters sell a galvanised HSS as part of their product mix that typically sells for an additional \$■/Mt price premium above that of non-galvanised black HSS. (Commercially sensitive pricing) This is likely to be the contributing reason for the lower FOB prices of Thai HSS exports compared to non-Thai exports, along with the fact that Thai Premium Pipe has an ad valorem method of duty calculation and the exporters from other countries have a floor price component, either directly or as part of the combination method.<sup>12</sup>*

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<sup>10</sup> REP 532, p.7

<sup>11</sup> SEF 532, p.51 & REP 532, p.56

<sup>12</sup> EPR CON 532/029, p.5

It would appear that the Commission has relied on FOB export prices from the import database sourced from import entries provided to Australian Border Force upon entry of the HSS.

Galvanised and black HSS are both entered to the same tariff and statistical codes, the quantities and values used to calculate a FOB price would therefore be an average FOB price of galvanised and black HSS.

Galvanised HSS sells at a premium to black HSS of █%<sup>13</sup> in the Australian market based on import offers in the market and Austube Mills verified sales data. It would be expected that the premium in pricing in the Australian market would be reflected in the FOB export prices. [commercially sensitive]

It is Austube Mills understanding that Thailand predominantly exports black HSS, while Korea and China export a mix of galvanised and black HSS and Taiwan predominantly exports galvanised HSS. This view is based on the current and previous investigations into HSS and offers of imported HSS into the Australian market.

It would therefore be expected that FOB export prices of predominately black HSS from Thailand would be █% below FOB export prices from Taiwan of predominately galvanised HSS. [commercially sensitive]

It would also be expected that Thai FOB export prices of predominately black HSS would be some █% below FOB export prices from Korea and China of predominately galvanised HSS (assuming an equal mix of black and galvanised HSS). [commercially sensitive]

The Commission's analysis does 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.

### **Prices in the Inquiry period**

The Commission responded to Austube Mills 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-N-R-350 – is included in the sales*

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<sup>13</sup> Conf Att IPP to Dec 19 provided at verification.



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*of HSS exported from Thailand and in the domestic sales of the Australian industry, as the volumes were immaterial in both instances.<sup>14</sup>*

This analysis appears to be fundamentally unsound.

In the first instance in respect to prices from Taiwan, information on the public record shows that the two cooperating exporters from Taiwan only exported *galvanised* HSS<sup>15</sup>. It therefore appears that the Commission has compared the prices of *black* HSS from *Thailand* to prices of *galvanised* HSS from *Taiwan*.

In the second instance, in respect to the calculation of prices of HSS from Thailand in the Australian market, the analysis appears to rely on unverified data with the Commission 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<sup>16</sup>.*

It appears that the sales information not provided may refer to the incomplete importer questionnaire response provided by ■ with the Commission undertaking a desktop verification of the (incomplete) information provided<sup>17</sup>. Austube Mills notes that no verification report for ■ has been placed on the public record. ■ is the importer of HSS from ■. [commercially sensitive]

The sales information not provided may also refer to ■, who is the importer of HSS from ■. The importer verification report for ■ notes that the Commission was unable to reconcile the sales listing to audited accounts<sup>18</sup> and was unable to confirm that the import listing in the import database was a complete list of imports over the review (inquiry) period<sup>19</sup>. [commercially sensitive]

It thus appears that a substantial part of the information relied on by the Commission to conduct a price comparison exercise for HSS from Thailand consist of unverified or incomplete information. The reliability of the calculation of prices based on the FOB price plus post exportation and selling expenses from the relevant importers is further questionable given that it is unlikely that such expenses were verified to audited statements.

Austube Mills questions how the Commission could be satisfied that all relevant expenses, such as the cost of ■ providing credit to its customers were included and what level of profit, if any was applied, was verified and considered, given the incomplete response. [commercially sensitive]

In the third instance, the calculation and comparison of prices makes no reference to any price premium that Austube Mills and the Australian industry can achieve in the market.

Austube Mills noted as such in its application for the continuation of the measures.

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<sup>14</sup> REP 532, p.57-58

<sup>15</sup> EPR CON 532/026, p.4 & EPR CON 532/041, p.5

<sup>16</sup> REP 532, p.84

<sup>17</sup> REP 532, p.10

<sup>18</sup> EPR CON 532/■

<sup>19</sup> EPR CON 532/■

*Pricing in the Australian market is strongly influenced by export prices from countries subject to the measures. The exporters' export price to Australia is set by negotiations with the importers, the importers themselves are pricing in competition with other importers. Distributors and resellers use the purchase price of the imported HSS product to motivate the domestic producers to sell at a lower price. In addition, some of these imported products are sold into the end-use market place and the domestic manufacturers are forced to either reduce selling price to maintain market volumes via other distribution channels or forego the volume as the target selling price marginalizes the overall business attractiveness.*

*Austube Mills **prices its products based on an import parity pricing (IPP) model, that is import price offers plus a local premium.** Each month Austube Mills collates market intelligence regarding the price of competing imports and determines an import price based on the market intelligence to establish a competitive position. Whilst **ATM aims to obtain a premium above delivered imports, its price is directly influenced by the price of imports, including those from Thailand.** Domestic customers are generally willing to **pay a small premium for locally produced equivalent standard products for a number of reasons:***

- *shorter lead times offered by domestic producers compared to imported HSS allows customers to carry less stock.*
- *customer confidence in the product quality (including ability to resolve quality issues in a timely manner and its compliance with the Australian Standard);*
- *engagement in the market (including its role in developing technology and infield support); and*
- *the research and development put into its HSS products and manufacturing technologies<sup>20</sup>.*

The Commission noted that the Australian industry can achieve a price premium.

*Because of the Australian industry's ability to supply from stock with shorter delivery timeframes than imported sources, the Australian industry is generally able to command a small price premium.<sup>21</sup>*

The product mix adds a high degree of complexity to pricing negotiations with customers. There are different prices and added extras including for:

- ■ [ATM's pricing policy]

The premium that Austube Mills can achieve ■. [ATM's pricing policy]

On a ■ [Pricing intelligence]

Austube Mills provided the Commission with copies of its price books at verification and discussed the different prices in those books and the reasons for variations in pricing. Austube Mills also provided the Commission with a

<sup>20</sup> EPR CON 532/002, pps 21-22.

<sup>21</sup> REP 532, p.22

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copy of its IPP workbook detailing import offers in the market, both in the Continuation application and at verification.

Austube Mills also provided the Commission with examples of the link between IPP, the effect on Austube Mills pricing and the price premiums achieved. These examples showed price premiums achieved [Market pricing intelligence]

A comparison of Austube Mills price for HSS to the XX IPP for the inquiry period also shows a price premium %. [Pricing intelligence]

The price comparison by the Commission may be unsound where the price premium has not been taken into account, in that the amount of undercutting can be magnified.

Lastly, it appears that the Commission has departed from the undercutting exercise of the original investigation, Investigation 254 (INV 254) in its price comparison.

The Panel in *US – Oil Country Tubular Goods Sunset Reviews* was of the view 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:

*If, however, an investigating authority decides to conduct an injury determination in a sunset review, or if it uses a past injury determination as part of its sunset determination, it is under the obligation to make sure that its injury determination or the past injury determination it is using conforms to the relevant provisions of Article 3. For instance, Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. In our view, this means that an investigating authority is not necessarily required to carry out that calculation in a sunset review.*

*However, if the investigating authority decides to do such a calculation, then it would be bound by the relevant provisions of Article 3 of the Agreement. Similarly, if, in its sunset injury determinations, an investigating authority uses a price effect calculation made in the original investigation or in the intervening reviews, it has to assure the consistency of that calculation with the existing provisions of Article 3.<sup>22</sup> (emphasis added)*

It appears that the Commission has not performed a price comparison as undertaken in Investigation 254 during this Continuation Inquiry in its assessment of whether exports of HSS from Thailand will likely cause injury if the measures were to expire.

In Report 254 (REP 254) the Commission:

*compared weighted average free into store (FIS) prices of the imported goods sold by importers, to ATM's net selling price delivered for each product, at a comparable level of trade. The Commission's analysis found that*

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<sup>22</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.274. See also Panel Report, *EU – Footwear (China)*, para. 7.337.

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*the prices of the imported goods from Thailand undercut ATM's domestic selling prices for all of the 12 months during the investigation period.*

*For all importers, the overall undercutting range was 7.2 per cent to 21.0 per cent. The analysis showed price undercutting for all importers over the investigation period.*

The Commission also compared:

*the weighted average FIS prices over the investigation period of imported RHS AS1163-C350L0 Black goods sold by visited importers against ATM's weighted average FIS prices for RHS AS1163-C350L0 Black products. In doing so, the Commission only compared the sales by importers where the grades and finish of the products are identifiable on the sales listings. The Commission noted that in a particular importer's sales listing, the impact test designation (L0) was not provided on the sales product definitions. The Commission then calculated a L0 premium for C350 Black products by adding calculated average profit of the importer from sales of HSS over the investigation period to the verified price extra charged by the exporter for impact testing.*

*For the importers included in this analysis, the Commission's calculations showed that the importers' prices undercut ATM's prices by 3.7 percent over the investigation period.<sup>23</sup>*

It is important to note that the price comparison in INV 254 was based on verified FIS prices by importers compared to Austube Mills net prices for each product at a comparable level of trade for all 12 months of the investigation period.

In comparison, the Commission 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"<sup>24</sup> (**emphasis added**). As the Austube Mills selling prices are presented on a FIS basis it appears that the Commission has deducted an "estimated" amount for freight for those prices. These prices have then been compared on a weighted average quarterly basis.

The price comparison done in REP 532 represents a significant departure from the price comparison conducted in INV 254 and the use of unverified data and "estimated" prices calls into question whether the calculation is consistent with the provisions of the Anti-Dumping Agreement.

The Commission also appears to have not had regard to information provided by Austube Mills on price competition in the Australian market. The Commission states 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,*

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<sup>23</sup> REP 254, pps 57-58

<sup>24</sup> REP 532, p.57

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*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<sup>25</sup>. (emphasis added)*

Austube Mills provided the Commission with evidence of this price competition from Thailand and [REDACTED] other countries, (including [REDACTED]) detailing offers on a [REDACTED] basis between [REDACTED] from [REDACTED] different sources including [REDACTED] from Thailand. [commercially sensitive]

The information was provided as **Confidential Attachment 6 IPP** to the Application<sup>26</sup> and included charts tracking the IPP offers from [REDACTED] exporters, including [REDACTED] from Thailand. The attachment also included examples of price pressure and lost volumes to exports from Thailand. [Market pricing intelligence]

The IPP worksheet was updated with offers to [REDACTED] [date] following initiation of the Continuation Inquiry, the Charts were also updated and an additional chart added tracking the average IPP to the weighted average Austube Mills selling price. As noted above the Commission verified the link between the IPP offers and Austube Mills selling price.

The updated IPP worksheet was provided to the Commission at the verification as **Conf Att IPP to Dec 19** as were [REDACTED]. [market intelligence]

The **Chart: Import Pricing** shown below is from **Conf Att IPP to Dec 19** and shows [REDACTED] offers for HSS in AUD/t.

**Confidential Chart Import pricing [REDACTED] [date range]**

**Confidential Chart removed**

The chart tracks import prices on HSS from importers for [REDACTED] [number] exporters on a [REDACTED] [frequency] basis over a [REDACTED] period from [REDACTED] [date range].

The chart shows intense price competition between exporters and importers from different sources including Thailand. No single exporter stands out as a price setter and all offers generally move within a tight range reflecting the current and previous findings of the Commission on the Australian market for HSS being a price sensitive market.

The information in the IPP worksheet and the chart above is in contradiction to the Commission'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<sup>27</sup>*

The **Chart IPP Austube Mills** tracks the average IPP to Austube Mills selling price from [REDACTED] [date range] on a [REDACTED] [frequency] basis.

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<sup>25</sup> REP 532, p.15

<sup>26</sup> EPR CON 532/002, p.20

<sup>27</sup> REP 532, p.62.

**Confidential Chart Average IPP and Austube Mills Selling Price**

**Confidential Chart removed**

The Chart shows a generally consistent gap between Austube Mills selling price and the average import price that reflects the price premium that Austube Mills can achieve in its sales of HSS. The Chart and associated data was discussed with the Commission during the verification visit as part of evidence of the effect of import prices on Austube Mills pricing and evidence of the price premium. [commercially sensitive]

The Chart demonstrates, as the previous chart does, the intense price competition between exporters, importers and Austube Mills with Austube Mills selling price being directly affected by movements in imported HSS offered into the market.

Austube Mills drew the Commission's attention to the information provided on IPP, import offers and the links to Austube Mills economic performance in the application and during the verification visit as noted, as well as in its submission of 15 May 2020.<sup>28</sup> The highly relevant information appears to have not been given due consideration by the Commission in deciding that measures against Thailand be discontinued.

Austube Mills also drew to the Commission'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<sup>29</sup>.

**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.**

The reasoning for the Commission'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 Thai domestic market in relation to the impact of the COVID-19 pandemic.

The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* wrote 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 does not necessarily suggest that such inferences are not based on 'positive evidence'.**"

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<sup>28</sup> EPR CON 532/022, pps. 7-9.

<sup>29</sup> ERP CON 532/022, pps. 8-9.

Throughout the investigation the Commission fails to objectively assess past evidence to form a view on what is likely to occur based on forecast market conditions. Figure 18 clearly shows Thailand's annual GDP growth (%) was at a low point (approx. 1%) during the period that all Thai exporters were found to be dumping in Investigation 254.



Figure 18: Thailand annual GDP growth (%)

Source: World Bank<sup>77</sup>

Yet despite publishing a projected graph for Thai GDP for 2020 that shows even lower GDP growth, ie -0.3% the Commission states *"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"*<sup>30</sup> (**emphasis added**).

It is not clear what evidence the Commission based this statement on. 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.

The graph on page 53 of REP 532 shows 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.

The Commission also observes that due to the COVID-19 pandemic Thailand is likely to experience negative growth in GDP and that it is likely that the Government of Thailand (GOT) will use investment in infrastructure and development projects to stabilise and lift the Thai economy.<sup>31</sup>

Whilst Austube Mills agreed with this assessment it also noted that no assessment had been done of the impact of the reduction in private investment. Austube Mills also noted the concerns of the Southeast Asian Iron and Steel Institute (SEAISI) that China's increase in steel inventories during the pandemic have the potential to flood other Association of Southeast Asian Nation member countries (including Thailand) and other nations.<sup>32</sup>

<sup>30</sup> REP 532, p.54

<sup>31</sup> REP 532, pps. 54-55

<sup>32</sup> REP 532, pps 55-56

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The Commission 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*”<sup>33</sup>.

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.

The Commission also stated 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<sup>34</sup>.

The Commission noted the concerns of SEAISI of a potential flood of imports of steel products, including HSS from China. Austube Mills provided details of the dumping measures applied by Thailand to exports from China and other countries in its application.

Austube Mills noted in its submission of 15 May 2020 that:

*the secretary-general of the Federation of Thai Industries’ iron and steel industry club, said that the Thai private sector wants the government to find a way to prevent imports that will spill into the future with increasing volumes and a very low price. Importers say the price of steel from China has been continuously offered at a very low price since they could not export to the US and the EU. This is the reason why they dump their stocks in Thailand and other Asean countries.*

And

*With the Thai producers under significant import price pressure domestically, access to export markets having no trade measures in place will become increasingly important and heavily contested – this includes Australia if measures on Thai HSS were to be discontinued.*<sup>35</sup>

Austube Mills in its submission of 9 June 2020 provided further information on the effect of 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.

Austube Mills 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.*”<sup>36</sup>

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<sup>33</sup> REP 532, p.56

<sup>34</sup> REP 532, p.56

<sup>35</sup> EPR CON 532/022, p.6

<sup>36</sup> EPR CON 532/027, pps.7-8.



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Austube Mills had provided information and evidence in the 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, including safeguards and anti-dumping actions, by other countries.

The Commission observed that Austube Mills' assessment of the challenges faced by Thai HSS manufacturers appeared to be an accurate summation of events<sup>37</sup>.

The Austube Mills' assessment referred to by the Commission noted that:

- Thai producers would have excess capacity as a result of various global trade actions including the US Section 232 trade remedies.
- From 2014 excess Chinese volumes of steel products began flooding global markets and Thailand was not immune.
- It is known that the increased exports of Thai HSS to Australia in 2014 were all found to be dumped as this coincides with the investigation period of INV 254 of 1 July 2013 to 30 June 2014.
- In 2015 the market conditions for Thai HSS became more difficult as volumes of Vietnamese HSS added to the increasing volumes from China. Thai exports into Australia were constrained as a result of the effect of the measures imposed in INV 254 but continued to increase to the US.
- Despite Thai exporters of HSS increasing volumes to the US in 2016 by 40% – imports from both China and Vietnam continued to grow rapidly such that the net imports into Thailand grew to negative 200,000 tonnes.
- In 2017 Thai exporters responded by nearly doubling their exports to the US to 130,000 tonnes, an increase of 60,000 tonnes from the previous year. Whilst this significantly reduced the trade imbalance for Thai HSS producers by the end of 2017 it remained at negative 60,000 tonnes.
- In March 2018, the Trump administration imposed Section 232 tariffs of 25% on imports of steel products from all countries including Thailand. With trade measures in effect for Thailand's two major export markets for HSS, namely the US and Australia, Thai exports fell significantly and its net trade imbalance of HSS sections began growing again. By the end of 2019 Thailand's net sales of HSS to the US were minimal and its net trade balance of HSS sections has grown again to negative 165,000 tonnes.
- The Commission appropriately needs to consider the period beyond the life of the current measures to determine if it is likely that dumping of Thai exports of HSS into the Australian market will likely recommence.<sup>38</sup>

Austube Mills also expressed concern that the ongoing challenges faced by Thai producers in their home market, being import competition and the US Section 232 measures, will result in a repeat of the dumping and material injury experienced in the original investigation period.<sup>39</sup>

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<sup>37</sup> REP 532, p.52

<sup>38</sup> EPR 532/027, p.4-7

<sup>39</sup> REP 532, p.52

The Commission then concluded that:

*However, ATM and Orrcon have provided no positive evidence which explains how the section 232 measures and the imports of HSS in the Thai domestic market will affect the volume of HSS exported to Australia from Thailand and why an increase in export volume is likely if the measures are discontinued.<sup>40</sup>*

Austube Mills refers again to the evidence provided in the application and submissions that:

- Thai manufacturers are export orientated as confirmed by statements on their websites and investigations by other authorities and have demonstrated a propensity for dumping into Australia and other export markets;
- the US Section 232 action and anti-dumping actions have severely impacted the Thai export market for HSS;
- export volumes to the US following the Section 232 action substantially declined from a **high of 136,000 tonnes** in the year ended December 2017 to a **low of 463 tonnes** for the five months to May 2019;
- the EU Safeguard measures would further restrict available export markets;
- As global steel demand is forecast to be heavily reduced by COVID-19 the global steel overcapacity is likely to become increasingly problematic as global markets will be under significant pressure;
- the Thai steel industry has reportedly been worried about the risk of oversupply and shrinking demand in China when the logistics system returns to normal. Chinese steelmakers will definitely find a way to release huge stocks of products as exports to Thailand, experts believe;
- other countries have been and will continue to look to their own trade remedy administrations to make sure they do not become the dumping ground for this glut of steel inventory;
- Thai HSS manufacturers are facing increasing domestic pressure from imports from Vietnam and China;
- it would be natural for Thai exporters to look to the Australia markets if there were no measures in place to increase their export volumes – a close geographical export destination with established distribution links;
- the loss of its major export market in the US of 130,000 tonnes would see Thai exporters seek an alternative export market;
- The three cooperating Thai exporters have the spare capacity to supply 100,000 tonnes to the Australian market, this amount does not include the excess capacity of other large known exporters to the Australian market such as Samchai and others;
- The reason why Thai exports have not increased is due to the constraining effect of the measures that have been in place to date;
- Thai exports increased in volume following the termination of the investigation against Thai exports in Investigation 177 and Thai exports decreased in volume following the initiation of and imposition of measures in INV 254 demonstrating the constraining effect of measures or the threat of increased exports in the absence of measures;
- The Australian market for HSS is a price sensitive market and Thai exporters would likely export at reduced prices to increase export volumes; and
- The reduced export prices would likely be dumped and cause material injury to the Australian industry.

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<sup>40</sup> REP 532, p.52

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The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* pointed to the important difference between original investigations and sunset reviews:

*In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be likely to lead to continuation or recurrence of dumping.*<sup>41</sup>

Austube Mills considers that the Commission's primary focus has been on dumping in the inquiry period and that evidence provided in the application and submissions supports the determination that the expiry of the measures would be likely to lead to a continuation or recurrence of dumping.

The Panel in *Ukraine – Ammonium Nitrate* made a distinction between making an injury determination in the context of a sunset review and considering the state of the domestic industry following the imposition of original duties, and held that:

*just because an investigating authority considers the existing state of the domestic industry, based, inter alia, on various factors and indices showing the performance of that industry, does not mean that it was seeking to establish that the domestic industry was suffering material injury during the period of review.*<sup>42</sup>

Austube Mills considers that the Commission's primary focus has been on whether injury was caused in the inquiry period and whether the measures had seen any improvement in the Australian industry economic performance.

Austube Mills contends that the evidence provided in the application and submissions supports the determination that the expiry of the measures would be likely to lead to a continuation or recurrence of the material injury that the measures were intended to prevent.

The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* concluded that "investigating authorities are not mandated to follow the provisions of Article 3 when making a likelihood-of-injury determination". However, the Appellate Body added, this does not imply that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3:

*Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that **factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.** An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3—not Article 3—that a likelihood-of-injury*

<sup>41</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/244ABR.pdf&Open=True> para 107

<sup>42</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/493R.pdf&Open=True> para. 7.183.

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*determination rest on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'.<sup>43</sup> (emphasis added)*

Austube Mills provided evidence in the application, at verification and in submissions that addressed the relevant factors of volume, price effects and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, of the material injury that would likely be caused by the dumped exports from Thailand if the measures were to expire.

Austube Mills contends that the correct or preferable decision is to secure the continuation of the anti-dumping measures.

**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.**

Normal values for the three cooperating exporters, Saha Thai, Pacific Pipe and TPP, were determined under subsection 269TAC(1), having regard to whether those domestic sales were in the ordinary course of trade (OCOT) pursuant to section 269TAAD.<sup>44</sup>

Subsection TAAD(5) notes that the costs of manufacture or production of the goods for OCOT must be worked out in such manner, and taking account of such factors, as the regulations provide in respect of those purposes.

The relevant regulation, subsection 43(2) of *Customs (International Obligations) Regulation 2015* (Regulation) states that:

If:

- (a) an exporter or producer of like goods keeps records relating to the like goods; and
- (b) the records:
  - (i) are in accordance with generally accepted accounting principles in the country of export; and
  - (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;

the Minister must work out the amount by using the information set out in the records.

It is Austube Mills' contention that the records of the exporters do not reasonably reflect competitive market costs with respect to Hot Rolled Coil (HRC); being the major raw material associated with the production or manufacture

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<sup>43</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

<sup>44</sup> REP 532, p.63

of like goods. 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 should otherwise be).

#### HRC (cost of coil)

HRC is the major raw material input comprising 90% of the cost to make (CTM) for Thai manufacturers of HSS<sup>45</sup>.

The Thai authorities have imposed both anti-dumping and safeguard duties to imported HRC. The anti-dumping duties range from 14% and safeguard duties from 20% of the value of the imported coil<sup>46</sup>. The duties do not apply to coil that is processed into the finished product (HSS) that is subsequently exported.

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.<sup>47</sup>

In the review of variable factors for CON 532, the Thai exporters presented, and the Commission accepted, their coil costs as a single cost of coil for the CTM of the HSS regardless of whether the HSS was destined for the domestic or export market.

The Commission 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)<sup>48</sup>.

Austube Mills provided submissions throughout CON 532 opposing the acceptance of a single cost of coil 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.*<sup>49</sup>

Essentially, 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 the full costs of duties incurred by the coil to produce that HSS).

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 subsection 269TAC(1) and for a constructed normal value where required.

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<sup>45</sup> REP 254, p.59

<sup>46</sup> EPR CON 532/025, p.3. Also, EPR CON 532/016, p.2 and Confidential Attachments 2 and 4 to the Application.

<sup>47</sup> EPR INV 254/040, pps1-2 and EPR INV 254/052, p.38

<sup>48</sup> REP 532, p.35 and p.40.

<sup>49</sup> EPR CON 532/025, p.1

The understatement of domestic coil costs can be significant. Where the imported coil is evenly consumed for export and domestic HSS and the coil is subject to a 14% dumping duty<sup>50</sup> then the *domestic* coil cost would be *understated* by 7%. Where the usage is weighted towards exported HSS then the understatement of domestic HRC and domestic HSS costs increases.

**Cost of duties in manufacturing costs and reasonably reflect competitive market costs**

Austube Mills submitted in response to SEF 532 that costs used for OCOT tests should as per subsection 43(2) of the Regulation:

*reasonably reflect competitive market costs associated with the production or manufacture of like goods*<sup>51</sup>

Austube Mills noted that the Dumping and Subsidy Manual (**the Manual**) states for cost items that fall within the cost to make 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**)<sup>52</sup> (**emphasis added**)

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.

It is quite clear that imported coil or steel used to make HSS for sale on the domestic market incur anti-dumping and/or safeguard duties<sup>53</sup> and such duties are part of the cost of production.

It is 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.

Importantly, the cost of coil used to manufacture HSS for the domestic market will not “reasonably reflect competitive market costs associated with the production or manufacture of like goods” as required by the legislation and Regulation.

The competitive market cost or price of imported coil or steel, that incurs anti-dumping and/or safeguard duties, used to manufacture HSS for sale on the Thai domestic market would include the full applicable rate of duties. A cost of coil that does not include the full applicable rate does not reasonably reflect a competitive market cost.

The Manual addresses the meaning of “reasonably reflects competitive market costs”, noting that:

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<sup>50</sup> Confidential Attachment 4 to the Application, pps.68-69

<sup>51</sup> EPR CON 532/025, p.2

<sup>52</sup> Manual, p.43

<sup>53</sup> EPR CON 532/025, p.3

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*Concerning the term 'reasonably reflect competitive market costs' for the cost to make used in Regulation 43(2), the Commission gives the term 'reasonably reflect' the following meanings:*

- *that the cost to make items are supported by the accounting records; and*
- *that the costs themselves are 'reasonable' i.e. the cost allocations methods used by the exporter in working out those costs are reasonable.*

*More generally, the Commission may examine whether the cost to make are those costs that would be incurred in a 'competitive' market. The term 'competitive' in Regulation 43(2) is given its usual meaning and this can only be known according to the case circumstances.<sup>54</sup>*

The Commission had regard to the Manual in REP 532 and noted:

*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.*

The Commission also compared the Thai exporter costs against each other and with exporters of HSS from other countries subject to REV 529 in reaching its conclusions that there was no evidence that the Thai exporters HRC costs did not reasonably reflect a competitive market cost.<sup>55</sup>

With respect, Austube Mills considers that the Commission's approach, analysis and conclusion are incorrect.

- The Commissions appears to have only considered the weighted average costs of HRC, that cost is inclusive of imported and domestic HRC.
- The accounting records support that average cost of imported and domestic HRC, the accounting records 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.

Subsection 43(2) of the 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 subsection 269TAC(1) and for costs for constructed normal values under subparagraph 269TAC(2)(c)(i).

Neither subsection 43(2) of the Regulation, nor the Manual, refer to and neither envisages the approach taken by the Commission in comparing the weighted average costs of production for imported and exported goods.

### Allocation of import duties

The Commission noted in REP 532 that:

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<sup>54</sup> Manual, p.45

<sup>55</sup> REP 532, p.36

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*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**<sup>56</sup>. (emphasis added)*

Austube Mills considers 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 Commission 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 subsection 43(2) of the Regulation.

Austube Mills notes that subsection 43(8) of the 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.*

Austube Mills contends 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 subsection 269TAC(1) and for constructed normal values under subparagraph 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.

Austube Mills considers 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.

Austube Mills notes that it provided information in its application of import duties on HRC ranging from 14% for imports from Korea, to 25% from Taiwan, 30% from China and up to 128% from other countries<sup>57</sup>. Austube Mills also notes safeguard duties of 20% also apply to imports of HRC<sup>58</sup>.

Austube Mills therefore considers 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% (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.

### Duty drawback

The Commission 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*

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<sup>56</sup> Rep 532, p.35

<sup>57</sup> Confidential Attachment 4 to the Application, pps.68-69

<sup>58</sup> EPR CON 532/016, p.2



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*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.<sup>59</sup> (emphasis added)*

*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.<sup>60</sup> (emphasis added)*

It appears that the Commission is 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. The Commission appears 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 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.

Austube Mills considers 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 subsection 43(2) of the Regulation and for the purposes of OCOT tests.

Austube Mills notes that in INV 254 Saha Thai and Pacific Pipe both applied for duty drawback adjustments and that the Commission rejected both claims<sup>61</sup>.

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.<sup>62</sup>*

***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.<sup>63</sup>***

Additionally, Saha Thai had submitted in support of its duty draw back claim that:

*The Commission allow the due allowance of **Import Duty paid on HRC used to produce domestically sold SAHA GUC.** (Confidential Attachments refer)<sup>64</sup>*

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<sup>59</sup> Rep 532, p.40

<sup>60</sup> REP 532, p.35

<sup>61</sup> REP 254, pps28 and 39.

<sup>62</sup> REP 254, p.27

<sup>63</sup> REP 254, p.40

<sup>64</sup> EPR INV 254/038, p.1

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***The Commission has verified the amount of duties paid and the volumes of imported HRC used in the production of domestically sold goods.<sup>65</sup>***

***Both logically and evidentially, the cost to make for domestic sales and thus the prices of the produced goods for domestic sales has to be higher because of the Import Duty factor of % on imported HRC used for domestic sales production.<sup>66</sup>***

***We have clearly evidenced that duty exempt HRC is far less expensive than either local HRC or duty paid imported HRC.<sup>67</sup> (emphasis added)***

*The nexus between the exempted duties and NV is simple. Products that are sold in the home market cost more to produce than those sold in export markets because they are either: 1) made using imported hot rolled coil (HRC) that is not exempt from the normal Thai customs duty ; or 2) they are made using domestically produced HRC that is higher priced because of the duty.<sup>68</sup>*

*As is shown in the analysis, on average, during the POI, Saha Thai's domestic steel costs were consistently higher than its imported steel purchased costs. The additional cost reflects smaller volumes, but also the cost of regular (and also antidumping) duties on imported steel.<sup>69</sup>*

*The duty amount paid in the Saha Thai ledger, being import duty paid on ex bond releases, shown to and verified by the investigation team, clearly supports this. Additional to that amount of duty paid, import duty, as evidenced to the Commission was also paid at the time of importation in respect of two shipments and a third duty payment in respect of one shipment originally 'bonded' but subsequently released, was paid at the time of that shipment's release from 'bond'.*

*It has been evidenced to the Commission that as outlined in point 2.6, the 'duty paid' ledger verified by the investigation team understates the duty paid position.<sup>70</sup>*

It appears 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.

Austube Mills also notes 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.*

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<sup>65</sup> EPR INV 254/039, p.1

<sup>66</sup> EPR INV 254/039, p.2

<sup>67</sup> EPR INV 254/036, p.3

<sup>68</sup> EPR INV 254/040, p1

<sup>69</sup> EPR INV 254/040, p.2

<sup>70</sup> EPR INV 254/050, p.5

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*Duty payable on imported materials is X% AND XXXXXXXX AND XXXX XXXXX (Duty on Imported HRC)<sup>71</sup>*

The correct or preferable decision in CON 532 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.

For and on behalf of the Australian industry member, Austube Mills.

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<sup>71</sup> EPR REV 445/009, p.31