Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 6 July 2021 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] 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 (s 269ZZG(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.

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.

[1] By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: Baowu Group MTM Rail Transit Materials Technology Co Ltd, referred to as 'MTM' throughout this application.
Address: No. 700 Yinhuang East Road, Economic and Technological Development Zone, Ma'anshan City, Anhui Province, China
Type of entity (trade union, corporation, government etc.): Corporation

2. Contact person for applicant

Full name: Mr Yang Wenwu
Position: Senior Vice President
Email address: 471705689@qq.com
Telephone number: +86 13965372166

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

MTM is a producer and exporter of the subject goods.

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.*

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 description of railway wheels exported from China that are subject of the reviewable decision are:

Forged and rolled steel, high hardness, nominal 38-inch (or 966 mm to 970 mm) diameter, railway wheels, whether or not including alloys.

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

The relevant tariff classification for the subject goods are:

Tariff Classification	Statistical code
8607.19.00	20

8. Anti-Dumping Notice details:

Anti-Dumping Notice (ADN) number: ADN 2024/036
Date ADN was published: 11 July 2024. Refer to **Attachment A**.

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 highlighted in yellow, and the document 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:

Please refer at **Attachment B**.

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:

Please refer at **Attachment B**.

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

Please refer at **Attachment B**.

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

Please refer at **Attachment B**.

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

Attachment A – ADN 2024/036
Confidential Attachment B - Grounds of review
Confidential Attachment C – Evidence of arms length market price.
Confidential Attachment D – Dumping margin simulation: Ground 1 proposed correct decision.
Confidential Attachment E – Dumping margin simulation: Ground 2 proposed correct decision.
Confidential Attachment F – Dumping margin simulation: Grounds 1 & 2 combined proposed correct decisions.

PART D: DECLARATION

The applicant's authorised representative 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: 

Name: JOHN BRACIC

Position: DIRECTOR

Organisation: J.BRACIC & ASSOCIATES PTY LTD

Date: 08 / 08 / 2024

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: MR JOHN BRACIC
Organisation: J.BRACIC & ASSOCIATES PTY LTD
Address: PO BOX 3026, MANUKA, ACT 2603
Email address: john@jbracic.com.au
Telephone number: +61 (0)499 056 729

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: 

(Applicant's authorised officer)

Name: MR YANG WENWU

Position: SENIOR VICE PRESIDENT

Organisation: BAOWU GROUP MTM RAIL TRANSIT MATERIALS TECHNOLOGY CO LTD

Date: 08 / 08 / 2024

J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

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9 August 2024

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry, Science and Resources
GPO Box 2013
Canberra ACT 2601

INTRODUCTION

On 11 July 2024, the Anti-Dumping Commission ("Commission") published its final report ("Report 632") into the continuation of anti-dumping measures on certain railway wheels exported to Australia from the People's Republic of China ("China") and the French Republic.

Baowu Group MTM Rail Transit Materials Technology Co Ltd ("MTM") is a producer and exporter of railway wheels to Australia, and fully cooperated with the Commission's inquiry.

The Minister for Industry and Science (The Minister) accepted the recommendations contained in Report 632, and decided that the measures should continue to apply to railway wheels exported from China. The Minister also decided to fix different specified variable factors in relation to MTM's exports, at a rate equal to 13.3%.

MTM's application for review of the Minister's decision sets out grounds on which it considers that the Minister's decision to continue the measures, and determine a dumping margin of 13.3%, are not correct or preferable.

Ground 1: The Minister erred in rejecting MTM's actual steel billet costs for the purposes of constructing normal values.

1. Grounds for review

Section 6.3 of Report 632 sets out the Commission's methodology and reasoning for determining MTM's export prices and corresponding normal values. In considering options for establishing normal values, the Commission assessed and concluded that there were no domestic sales of like goods pursuant to s.269TAC(1) of the Act, that were suitable for comparison with export prices. The Commission considered it appropriate in those circumstances to construct normal values pursuant to s.269TAC(2)(c) of the Act.

In determining the cost of production of the goods in the country of export pursuant to s.269TAC(2)(c)(i) of the Act, the Commission rejected MTM's actual recorded steel billet costs on the following grounds[3]:

> *Steel billet is the main component of the cost of production for the goods. MTM purchased all steel billet used to produce the goods from its related party parent company and supplier, MIS. MIS produced a category of steel billet grades called 'special steel billet', which included the grade of billet sold to MTM and consumed to produce the goods. The Commissioner notes that 'special steel' is an industry term for steel with higher strength or toughness and steel with higher proportions of microalloying elements. The Commissioner finds that MTM's steel billet records did not reasonably reflect raw material input costs associated with production of the goods in China. Specifically, the Commissioner finds that MTM purchased steel billet from MIS in transactions that were not at 'arms length'. The Commissioner assessed that the steel billet purchase price in MTM's records was influenced by the relationship between MTM and MIS, based on the available evidence.*

After rejecting MTM's actual steel billet costs, the Commission determined[4] that it is appropriate to use the records of MIS and '… *calculate a steel billet raw material cost based on the cost to make and sell steel billet plus an amount for profit and delivery expenses. The Commissioner is satisfied that MIS's records are suitable to ascertain the raw material input costs associated with the production of the goods in China. The Commissioner considers that MIS's records can be used to ascertain the steel billet costs that MTM would have incurred if it had purchased billet at 'arms length*'.

MTM contends that the Commission erred by including a gross margin onto MIS' steel billet cost of production, as this goes well beyond establishing an arms length price in the circumstances. As the Commission notes in Report 632, some of MIS's steel billet production facilities are co-located within MTM's wheel production facilities, and the related parties had common management during the period that the parties established the steel billet pricing mechanism.

In effect, MTM and MIS manufacturing operations functioned effectively as an integrated group, with MIS responsible for manufacturing of steel billet, and MTM responsible for the manufacturing of the finished wheels. The integrated nature of the operations is further supported by the fact that essentially all steel billet produced by MIS for use in railway wheels, was sold/transferred to MTM.

In the circumstances where the manufacturing operations of the producer of the subject goods, and the related supplier of the main raw material input, are so closely intermingled, the Commission is obliged to follow its own practice of establishing reasonable market costs. As the Commission's Dumping & Subsidy Manual ("Manual") notes, the concept of a reasonable market price is not taken to prevent an exporter buying inputs from arms length suppliers at the prevailing price even if that input had been sold at below cost or dumped.

[3] Report 632, page 46
[4] Ibid., page 47

The Manual[5] goes on to outline the approach for establishing 'reasonable' costs in circumstances where the exporter is supplied major inputs within an integrated structure:

> *Where a major input is produced by a subsidiary company over which the exporter exercises control, or from an integrated processor*
>
> *In these circumstances the cost records relating to the input may be examined. The transfer price of the producer will be examined to determine whether it is reasonable given the known full cost of production for that input. For example, in relation to an integrated process, the Commission will examine the records of account of an exporter/producer to ascertain whether the transfer price of the producer is not unreasonable given the full cost of production for that input.*

It has been the Commission's long standing policy and practice to assess and establish reasonable costs for inputs within an integrated structure, by reference to the '*known full cost of production of that input*.' This also accords with generally accepted accounting principles which allow for integrated entities to transfer input costs at the full cost of production.

It is unreasonable in these circumstances to establish a cost for the steel billet which includes a gross margin (includes selling, general and administrative expenses, plus profit). This is especially unreasonable when the arms length market price of steel billet sold by MIS to unrelated customers, is demonstrated to be below cost as evidenced at **Confidential Attachment C**.

That is, MIS made arms length sales of steel billet to unrelated customers, at prices well below the full cost of production. This indicates that the reasonable market price for steel billet is below MIS's full cost of production. It is irrational in these circumstances to suggest that an arms length transaction between the intermingled entities of MTM and MIS, ought to include a gross margin, when the Commission's normal practice is to establish a cost at the full cost of production.

Given that the Commission are seeking to establish a steel billet cost in China, and the available evidence demonstrates that the market price for steel billet is below the full cost of production, it is unreasonable for the steel billet cost to incude a gross margin. MTM contends that the steel billet cost ought to reflect MIS's full cost of production.

2. Applicant's opinion of the correct or preferable decision

MTM submits that the Commission erred in establishing a reasonable cost for steel billet, by including a gross margin onto the full cost of production, given the integrated nature of the manufacturing operations. MTM contends that as no profit was included in the related transfer price between MTM and MIS, and sales of billet to unrelated customers were also unprofitable, the Commission was obliged to follow its practice of establishing a reasonable cost by reference to MIS's known full cost of production.

3. Support for the proposed correct or preferable decision

Support for the proposed decision stems from the Commission's stated policy and practice, along with verified steel billet sales information presented to the Commission during the course of the inquiry.

[5] Dumping & Subsidy Manual, December 2021, page 37

4. Reason why the proposed decision is materially different from the reviewable decision

Report 632 has determined a dumping duty rate of 13.3% applicable to MTM's exports. Had the Minister made the proposed correct decision and not included the gross margin in establishing the reasonable steel billet cost, the revised dumping duty rate would be reduced to 4.0%.

Calculations reflecting the proposed correct decision and supporting the 4.0% dumping margin at contain in **Confidential Attachment D**.

Ground 2: The Minister erred in adjusting MTM's steel billet costs as outlined in ground 1, without making the corresponding and necessary adjustment to MTM's steel scrap offset costs.

1. Grounds for review

As detailed in Ground 1 above, the Commission rejected MTM's actual steel billet costs and replaced with a constructed steel billet cost based on cost information submitted by MIS. In reporting its total quarterly raw material costs for each model control code, the reported costs included two components, being the incurred steel bill costs and the corresponding offset value relating to recycled scrap steel.

As the Commission is aware, the internal transfer value of recycled scrap steel correlates to a [redacted] **[valuation method]**. Therefore, when the cost of billet rises, the value of recycled steel also rises, and viceversa.

Despite the known correlation between the steel billet cost and value of recycled steel, upon adjusting the cost of steel billet taking into account MIS's cost of production plus a gross margin, the Commission made no corresponding adjustment to MTM's recycled steel offset values. This is evident from the cost replacement summary table shown below, with the cells highlighted in yellow depicting the adjusted billet costs, and all other values being MTM's unadjusted costs.

[CONFIDENTIAL TABLE REMOVED]

The omission of an equivalent and corresponding adjustment to the quarterly recycled steel offset values, unfairly overstates the costs of the railway wheels. Had MTM purchased the steel billet costs from MIS at the levels determined by the Commission to be arms length market prices, MTM's recycled scrap steel offset values would have also increased. Again, this is consistent with generally accepted accounting principles.

Therefore, by adjusting the steel billet costs without an equialvent and corresponding adjustment to MTM's reported scrap steel offset values, the production costs of the exported railway wheels are inflated.

2. Applicant's opinion of the correct or preferable decision

MTM submits that the Commission erred by not providing for an equivalent and corresponding adjustment to its recycled steel values. MTM contends that the recycled scrap steel values ought to have been adjusted by the comparative change made to the steel billet costs.

3. Support for the proposed correct or preferable decision

Support for the proposed decision is derived from MTM's accounting practices and generally accepted accounting principles.

4. Reason why the proposed decision is materially different from the reviewable decision

Report 632 has determined a dumping duty rate of 13.3% applicable to MTM's exports. Had the Minister made the proposed correct decision and made the necessary comparative adjustment to MTM's recycled steel values, the revised dumping duty rate would be reduced to 8.9%.

Calculations reflecting the proposed correct decision and supporting the 8.9% dumping margin at contain in **Confidential Attachment E**.

When the proposed correct decisions for both grounds 1 and 2 are applied, the revised dumping duty rate is reduced to 1.0%. Calculations reflecting the combined proposed correct decisions are contained in **Confidential Attachment F**.

Ground 3: The Minister erred in finding that recurrence of material injury was likely in the absence of measures. The Minister did so by failing to properly isolate and distinguish known injurious factors other than the subject exports, to ensure that likely material injury caused by the known other factors are not attributed to the subject exports.

1. Grounds for review

A recommendation that the Minister decide to secure the continuation of the anti-dumping measures, cannot be made '… *unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*'[6]

The term 'material injury' in Division 6A is to be interpreted in accordance with the Subsection 269TAE of the Customs Act 1901 (the Act), which sets out a non-exhaustive list of matters that the Minister may have regard to in assessing and determining whether material injury to the Australian industry is likely to recur or continue.

Determinations under subsection 269TAE(1) are subject to subsections 269TAE(2A) and (2AA) of the Act. Subsection 269TAE(2A) of the Act requires that injury caused by factors other than dumping ought not be attributed to the subject goods, whilst subsection 269TAE(2AA) of the Act requires that the material injury determination must be based on facts and not merely on allegations, conjecture or remote possibilities.

Of the four end users in the Australian market, only BHP and Rio Tinto cooperated fully with the Commission's inquiry. Both BHP and Rio Tinto presented strong views supported by evidence, that a factor other than the price of the subject imports, was the primary reason behind their decisions to continue to avoid placing orders with the Australian industry.

Specifically, the end users highlighted that the railway wheels manufactured and offered by the Australian industry member, Commonwealth Steel Company Pty Ltd ("Comsteel"), continue to fail to meet performance, safety and technical specification standards, required of the railway networks operated by BHP and Rio Tinto.

[6] Subsection 269ZDA(1A)(b) of the Act.

In the case of BHP, it contended that Comsteel's railway wheels:

- did not meet BHP's revised specifications;
- were materially inferior;
- had safety concerns which were tied to the quality of Comsteel's railway wheels and incidences of Comsteel's railway wheels cracking;
- required additional monitoring and potentially have a shorter lifespan than the imported railway wheels. This additional monitoring and shorter lifespan also added to the operational cost of using Comsteel's railway wheels;
- increased the operational risks for BHP. Cracking led to a higher risk of catastrophic failure of a railway wheel, which could lead to damage to BHP's train network infrastructure, third party property damage, injury and/or death to its workers and the general public. Catastrophic failures could also interrupt BHP's mining operations and the export of iron ore.

BHP noted that as a result of the issues outlined above, it had not purchased railway wheels manufactured by Comsteel since 2019. BHP also noted that '… *there had not been the same quality issues with the railway wheels supplied by MTM*.'[7]

Similarly, Rio Tinto also highlighted its ongoing concerns surrounding the performance and safety risks associated with Comsteel's railway wheels. Rio Tinto contends:

- railway wheels supplied by Comsteel and MTM are not necessarily directly substitutable.
- operational performance and safety are key functional elements for the goods. Train derailments are a significant operational risk which could have a material impact.
- the integrity and continuity of operations are also crucial. In the overall profile of the business, railway wheels are not a significant cost but the cost of a potential safety issue or train derailment would be significant. Therefore, quality is a significant consideration.
- cracking was only specific to Comsteel's railway wheels, with evidence provided in support.

So both of the major end users of railway wheels, made clear and strong statements that the railway wheels manufactured by Comsteel, presented them with operational risks as they were prone to cracking. The highlighted issues are considered so serious, that BHP has not purchased like goods from Comsteel over the past five years.

In Report 632[8], the Commission notes and accepts that performance and safety are paramount issues of concern for the mining companies:

> *The integrity of the wheels is important for the safe and efficient operation of the railways. Wheel failures have the potential to cause train derailments. While the railway lines on which the wheels operate are private, they cross over public roads and enter other populated areas.*

The Commission also notes[9]:

[7] Report 632, page 25.
[8] Ibid., page 28.
[9] Ibid., page 71-72.

> *Each purchaser has unique specifications for railway wheels. Furthermore, it is essential that the railway wheels supplied provide for the safe and efficient operation of the railways. For the purchasers of railway wheels, procurement decisions will be made by reference to a range of factors including specification requirements, quality and safety, reliability and continuity of supply and price.*
>
> …
>
> *The Commissioner accepts that wheel failures are a serious matter for mining companies. The seriousness with which the companies view such events is demonstrated by the exacting wheel specification and design requirements imposed by the mining companies, their scrutiny and approval of potential suppliers, the monitoring of the condition of the wheels and the extensive investigation into wheel failure events.*

Despite acknowledging that performance and safety were critically important factors in the operations of the mining companies, and railway wheels were seen as a high potential risk factor to those operations, Report 632 simply disregards any notion that performance and safety are a relevant factor in the purchasing decisions of BHP or Rio Tinto.

The sole basis for dismissing the quality claims of BHP and Rio Tinto as a relevant factor, appears to be merely for the reason that some purchases from Comsteel continue to be made, and in the case of BHP, it continues to use railway wheels held in inventory following purchases made prior to 2019. Report 632 also relies on purchases by the other two end users in the Australian market, notwithstanding that neither of those parties cooperated with the inquiry.

The sharp dismissal of the quality issues as a known other injurious factor, demonstrates a clearly passive investigatory role undertaken by the Commission. This falls well short of the active role investigating authorities are required to meet in continuation inquiries.

The Appellate Body in *US - Corrosion-Resistant Steel Sunset Review*[10] concluded:

> *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. In view of the use of the word 'likely' in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.*

The Panel in *EU – Footwear (China)*[11] held the principles set out by the Appellate Body in *US - Corrosion-Resistant Steel Sunset Review*, also applied in connection with the likelihood of continuation or recurrence of injury determinations in expiry reviews:

[10] WT/DS244/AB/R, para 111, pages 39-40.
[11] WT/DS405/R, para 7.333, page 158.

> *In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a 'reasoned conclusion', which would result in a violation of Article 11.3 of the AD Agreement.*

The lack of objective examination of the quality issues raised by BHP and Rio Tinto is apparent.

In the case of BHP, it had already explained to the Commission that the use of old stock required implementing additional monitoring at significant cost, yet this is ignored without explanation. The fact that BHP has made no purchases of railway wheels from Comsteel since 2019 is also ignored, despite the strong public statements by BHP that it refuses to purchase such goods regardless of the price, due to the noted performance and safety concerns.

Given that BHP's imports account for over [redacted]% of total imports from China, it is illogical to suggest that BHP's refusal to procure railway wheels from Comsteel due to quality concerns, has not had a material effect on Comsteel's economic performance during the injury analysis period. It stands to reason, that BHP's continuing refusal to purchase Comsteel railway wheels into the foreseeable future due to the highlighted quality issues, would result in Comsteel continuing to experience injury prospectively.

With regards to Rio Tinto, the Commission has totally ignored the supporting evidence referenced in the importer verification report, which demonstrates the quality issues raised. The Commission appears to simply assume that any purchase, no matter how small or in what context it is used, refutes all submitted evidence and stated claims. The Commission makes no effort to understand whether Rio Tinto's purchases of railway wheels from Comsteel also included implementing additional monitioring procedures.

Finally, confirmation of the Commission's passive role in this inquiry is evident by its reference to the other two end users that chose not to cooperate with the inquiry. the Commission notes[12] that it '*has no information from those suppliers as to quality of the goods produced by Comsteel or in China.*'

It is therefore clear that Report 632 has failed to properly examine and consider, whether injury attributable to dumping, was likely to recur or continue, in the absence of measures. Instead, by briskly disregarding the quality issues raised by the key end users, the Commissioner's prospective analysis unfairly attributes material injury caused by a known other factor to the subject goods. This approach is inconsistent with the requirements of subsection 269TAE(2A) of the Act, which requires that the Minister must consider whether any injury '*… is being caused or threatened by a factor other than the exportation of those goods…*'

The obligation to ensure non-attribution is found in Article 3.5 of the Anti-Dumping Agreement ("ADA") and has been interpreted by the Appellate Body in *US – Hot rolled steel*[13], which ruled:

> *The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying*

[12] Report 632, page 72.

[13] WT/DS184/AB/R, para 223; pages 74-75.

> *Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties. We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.*

The Appellate Body added[14]:

> *[A]lthough this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors.*

Without having properly separated and distinguished the effects of the subject imports, from the effects that the cracking of Comsteel's railway wheels have had on the purchasing decisions of the key end users, the Commissioner cannot reasonably conclude on the basis of positive evidence, that material injury caused by the subject imports is <u>likely</u> to recur or continue in the absence of measures. Had the Commissioner undertaken an appropriate assessment and analysis, which separated the effects of other known factors from the subject imports, MTM contends that the Commissioner would have found that the recurrence of material injury attributable to the subject imports was <u>not likely</u>.

By lumping the effects in its undeveloped approach contained in Report 632, MTM contends that the Commissioner has not met the evidentiary standard required to be satisfied that material injury caused by dumping is <u>likely</u> to recur or continue.

Section 269ZHF(2) of the Act explicitly requires that the Commissioner:

> *must not recommend that the Minister take steps to secure the continuation of the antidumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of,*

[14] Ibid., para 228, page 76.

> *the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*

The Commission's Manual[15] provides further guidance on the threshold test for establishing whether recurrence of dumping is 'likely'. It explains that:

> *In examining the likelihood of injury as a result of any future dumping or subsidy, the Commission takes guidance from WTO jurisprudence where 'likely' has been taken to mean 'probable'…*

In *US Drams*[16], the Panel found that the continued imposition of measures must be based on 'positive evidence'. The Panel stated:

> *Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.*

Finally, the ADRP report on FSI Pineapple from Thailand[17] observed that:

> 27. Undertaking a continuation inquiry requires a prospective examination of the likelihood of future dumping and material injury. In its reinvestigation report (REP 389) the ADC referred to the decision of the Federal Court in *Siam Polyethylene Co Ltd v Minister for Home Affairs (No.2)*,8 where the Court held that the word *"likely"* in section 269ZHF(2) of the Act was taken to mean *"more probable than not"*.

The Act therefore requires that the Commissioner recommend expiry of the measures, unless there is positive evidence to demonstrate that the recurrence of dumping in the future is likely or probable (ie. implying a greater degree of certainty that the event will occur than a finding that the event is not "not likely").

Again, by simply lumping the effects and attributing the totality of those effects to the subject imports, the Commissioner has unfairly and unreasonably attributed positive evidence stemming from the known quality issues affecting the Australian industry's past, present and future economic performance, to the subject imports. By failing to properly isolate and distinguish the effects of the identified quality issues, the Commissioner has failed to undertake a prospective examination of the likelihood of material injury caused by the subject imports, and as such, failed to make a determination on the basis of positive evidence.

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[15] Dumping & Subsidy Manual, December 2021, page 130.

[16] WT/DS99/R, para 6.42, page 139.

[17] ADRP Report No. 50, pages 8-9.

In summary, MTM contends that the Minister erred in finding that recurrence of material injury was likely in the absence of measures, due to the following issues contained within Report 632:

- the Commission was passive in its investigatory role in assessing the principal issue of quality concerns surrounding railway wheels by the key end users, which directly impacted the end users purchasing decisions;
- the Commissioner's causation likelihood analysis was flawed as it did not properly isolate and distinguish the other known injurious factors from the subject imports;
- by failing to ensure non-attribution from the effects of other known factors, the Commissioner's likelihood assessment with respect to the subject imports is flawed, as it attributes positive evidence from the quality issues impacting the Australian industry, to the subject imports.

2. Applicant's opinion of the correct or preferable decision

MTM contends that the Commission was required to properly isolate and distinguish the injurious effects stemming from the end users' decisions to cease or limit purchases from the Australian industry, due to cracking of their railway wheels. In doing so, the remaining causation analysis of the subject imports would have demonstrated that the present and prospective injury was not attributable to the subject goods from China.

As such, the Commissioner ought not have recommended that the Minister take steps to secure the continuation of the anti-dumping measures against MTM's exports, as the Commissioner could not have been satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure is intended to prevent. The correct and preferable decision was for the Minister to not secure the continuation of the measures, and that the measures subject to the notice should expire, pursuant to subsection 269ZHG(1)(a) of the Act.

3. Support for the proposed correct or preferable decision

The proposed correct and preferable decision outlined above, is supported by the referenced relevant provisons of dometic legislation, the Commission's policy and practice outlined in its Dumping and Subsidy Manual, and the referenced WTO jurisprudence. The reasoning outlined above provides support for the making of the proposed correct or preferable decision, as it establishes that the Minister's decision was based on flawed causation analysis and reasoning contained in the Commissioner's Report 632.

4. Reason why the proposed decision is materially different from the reviewable decision

MTM's exports are currently subject to a 13.3% combination rate of dumping duty. Had the Minister made the proposed correct decision, MTM's exports would no longer be subject to interim dumping duties.

ANTI-DUMPING NOTICE NO. 2024/036

Customs Act 1901 – Part XVB

Certain railway wheels

Exported from

the People's Republic of China and the French Republic

Findings of Continuation Inquiry No 632 into Anti-Dumping Measures

Public Notice under subsection 269ZHG(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed an inquiry, which commenced on 14 August 2023, into whether the continuation of the anti-dumping measures in the form of a dumping duty notice applying to certain railway wheels exported to Australia from the People's Republic of China (China) and the French Republic (France) is justified.

Recommendations resulting from that inquiry, reasons for the recommendations, and material findings of fact and law in relation to the inquiry are contained in *Anti-Dumping Commission Report No 632* (REP 632).

I, ED HUSIC, the Minister for Industry and Science, have considered REP 632 and have decided to accept the recommendation and reasons for the recommendation, including all the material findings of facts and law therein and have decided that **the anti-dumping measures applying to certain railway wheels exported to Australia from China should continue from 17 July 2024.**

Under subsection 269ZHG(1)(b) of the Act, I declare that I have decided to secure the continuation of the anti-dumping measures.

I determine that:

- pursuant to subsection 269ZHG(4)(a)(ii) of the Act, the notice continues in force after 16 July 2024 but, after this day, ceases to apply in relation to exports from France.
- pursuant to subsection 269ZHG(4)(a)(iii) of the Act, the notice continues in force after 16 July 2024 but, after this day, has effect as if different specified variable factors had been fixed in relation to exports from China by Baowu Group Masteel

Rail Transit Materials Technology Company Limited and all other exporters.

In accordance with subsection 8(5BB) of the *Customs Tariff (Anti-Dumping) Act 1975*, and the *Customs Tariff (Anti-Dumping) Regulation 2013* (the Regulation), the duty that has been determined is an amount worked out in accordance with the combination of fixed and variable duty method pursuant to subsections 5(2) and (3) of the Regulation, as detailed in the table below.

Particulars of the dumping margins established for each of the exporters and the effective rates of duty are also set out in the following table.

Country	Exporter	Dumping margin	Effective rate of interim dumping duty	Duty method
China	Baowu Group Masteel Rail Transit Materials Technology Company Limited	13.3%	13.3%	Combination of fixed and variable duty method
	All other exporters	13.3%	13.3%	Combination of fixed and variable duty method

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel (www.adreviewpanel.gov.au), in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

REP 632 has been placed on the public record, which may be examined at the Anti-Dumping Commission Office by contacting the case manager on the details provided below. Alternatively, the public record.is available at www.adcommission.gov.au

Enquiries about this notice may be directed to the Case Manager on telephone number +61 3 8539 2514, fax number +61 3 8539 2499 or email investigations4@adcommission.gov.au.

Dated this 11 day of JULY 2024.

ED HUSIC
Minister for Industry and Science