PUBLIC VERSION

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Director Operations 1
Anti-Dumping Commission
GPO Box 1632
Melbourne VIC 3011

Investigation into rod in coils exported from the Peoples Republic of China

Dear Director,

This submission is made on behalf of Jiangsu Shagang Group Co., Ltd, (Shagang) in response to the Anti-Dumping Commission's (the Commission) preliminary findings outlined in Statement of Essential Facts Report (SEF 301).

SEF 301 – Deficient in reporting facts and analysis

Shagang submits that if the Commission has formed the view that certain raw material costs are impacted by distortions considered to exist in the Chinese domestic market, such that those costs are not considered to reflect competitive market costs, it is incumbent on the Minister, pursuant to section 43 of the *Customs Regulations (International Obligations) 2015* (Regulation), to only make adjustments to those particular raw materials found to not reflect competitive market costs. As explained later in this submission, a rejection of this interpretation would provide the Minister with an unfettered discretion which is clearly not provided under Australia's domestic legislation or the WTO Anti-Dumping Agreement (ADA).

In addressing the Commission's preliminary findings set out in SEF 301, Shagang is concerned by the Commission's lack of transparency and use of ambiguous language and analysis in explaining its reasoning and findings. In particular, Shagang requests greater clarity and transparency from the Commission surrounding the particular raw materials considered to not reflect competitive market costs. This information is considered necessary for Shagang to properly respond and address the Commission's preliminary findings.

It appears that the Commission holds the view that the impact of the GOC's policies go well beyond the raw materials used to produce steel billet, to possibly include labour and manufacturing overheads.

The Commission states in SEF 301 that it "*considers that various plans, policies and taxation regimes have also distorted the prices of* ***production inputs*** *including (****but not limited to****) the raw materials used to make steel in China and render them unsuitable for cost to make and sell (CTMS) calculations.*" [emphasis added]. The use of ambiguous language provides interested parties with little clarity and understanding of the preliminary findings and as such restricts the ability of interested parties to properly respond to the issue.

It also appears to indicate the boundless discretion that the Commission considers is conferred onto the Minister by the Regulation. That is, where an unidentified cost (of either production inputs or production overheads) is found to not reflect competitive market costs, the Commission appears to hold the view that the Minister has the discretion to reject any or all other costs in the records of the exporter, irrespective of whether:

a) evidence shows that the other costs in the records of the exporter are reflective of competitive market costs; or
b) the amount by which the affected cost is less than a competitive market cost is negligible; or
c) the value of the affected cost relative to the total cost of production of the goods under investigation is material or not.

Given the lack of sufficient explanation of the Commission's interpretation and scope of the Minister's discretion conferred by the Regulation, Shagang considers that its ability to properly respond and defend its interests are restricted. As such, SEF 301 is considered to be critically deficient.

Given that statement of essential facts reports are supposed to be just that, preliminary reports outlining the essential facts of the investigation to date, Shagang considers that SEF 301 also falls well short of the Commission's normal practice of ensuring that the SEF informs interested parties of the facts, analysis and findings. This is further highlighted when contrasted against SEF reports listed in the table below, which have made similar preliminary findings regarding raw material costs not reflecting competitive market costs. In each of the cases identified below, exporters were made aware of the particular raw materials considered to not reflect competitive market costs.

Product	**Country**	**SEF No.**	**Finding of fact**	**Directly purchased inputs found to not reflect competitive market costs.**
Prepare or preserved tomatoes	Italy	276	Section 6.4	Raw tomatoes
Wind Towers	China	221	Section 5.4	Plate steel
Hot rolled plate steel	China	198	Section 6.3	Coking coal
Zinc coated steel / Aluminium zinc coated steel	China	190	Section 9.3	Hot rolled coil steel
Aluminium road wheels	China	181	Section 6.4	Primary aluminium / Aluminium alloy
Hollow structural	China	177	Section 6.4	Hot rolled coil steel

sections				
Aluminium extrusions	China	148	Section 6.4	Primary aluminium

By way of further comparison, it is noted that in the current dumping investigation into grinding balls from China, the Commission published on day 60 of the investigation, an issues paper seeking views and comments from interested parties on the most appropriate methodology for determining a competitive market cost for grinding bar. That process provides interested parties with increased transparency, greater opportunity to defend their interests and overall confidence that the Commission is conducting an objective investigation.

Therefore, Shagang does not consider that SEF 301 discloses the essential facts underlying the findings and conclusions relating to the determination of dumping, that is the basis of the preliminary decision to recommend the imposition of definitive measures.

LACK OF SUBSTANTIVE ANALYSIS AND ASSESSMENT OF REASONABLENESS OF COSTS

Shagang notes that Section 43 of the Regulation is intended to reflect the rules set out in Article 2.2.1.1 of the ADA. Those rules require that the costs to be used in constructing normal value are to '*be calculated on the basis of records kept by the exporter or producer under investigation*', subject to the following two conditions being satisfied:

i) the exporter's records are in accordance with the generally accepted accounting principles of the exporting country; and
ii) the exporter's records reasonably reflect the costs associated with the production and sales of the product under consideration.

By comparison, the two corresponding conditions outlined in the Regulation require the exporter's records:

i) to be in accordance with generally accepted accounting principles in the country of export; and
ii) reasonably reflect <u>competitive market costs</u> associated with the production or manufacture of like goods. [emphasis added]

It is plainly evident that the addition of 'competitive market' in the second condition within the Regulation introduces a unique consideration and assessment that is incompatible with the requirements and obligations imposed on investigating authorities by Article 2.2.1.1 of the ADA. In Shagang's view, Article 2.2.1.1 of the ADA requires the investigating authority to construct a normal value by using the costs on the records of the exporter, where those records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the goods under investigation.

This is supported by the Panel's view in *US — Lumber V*[1] which found:

[1] Panel Report – US – Final dumping determination of softwood lumber from Canada, WT/DS264/R, para 7.237, p 131.

> Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *insofar as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. [original emphasis]

Whilst the Commission may not consider Article 2.2.1.1 of the ADA to be relevant in interpreting and applying the domestic legislation in these circumstances, Shagang disagrees and contends that the obligations imposed on investigating authorities in that Article are directly pertinent to this case, as explained below.

In the current WTO panel proceeding initiated by Argentina against the *European Communities – Anti-Dumping Measures on Biodiesel from Argentina* (DS473), the parties disagree on the interpretation of Article 2.2.1.1 and whether Article 2.2.1.1 allows the "*investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be 'abnormally or artificially low'* ".[2]

The dispute revolves around the application of Article 2(5) of the European Union's (EU) Basic Regulation, which states:

> 5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.
>
> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

Shagang considers that the views of Third Party Members to the dispute are particularly relevant and instructive on the obligations of the investigating authority in assessing whether the records and costs of the exporter are to be relied upon for constructing normal values. We wish to focus on the views and interpretations made in third party submissions by Australia and the United States. Both of which have generally supported the EU in this case.

In its third party submission to DS473[3], Australia submitted that:

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[2] Argentina's First Written Submission, para. 132.

[3] http://dfat.gov.au/international-relations/international-organisations/wto/wto-dispute-settlement/Documents/european-union-anti-dumping-measures-on-biodiesel-from-argentina-wtds473.pdf.

6. *Argentina argues that records that detail the actual expenses of the exporter or producer would reasonably reflect the costs associated with production and sale of the product under consideration, and so must be used in the production cost calculation under Article 2.2.1.1. In Australia's view, this may not always be the case. Rather, Article 2.2.1.1 permits investigating authorities to look beyond the records to consider whether the costs reflected therein are reasonably related to the cost of producing and selling the product. The reasonableness of costs of inputs or raw materials would be relevant to this analysis.*

7. *In this respect, Australia recalls the Panel's approach to analysing the calculation of cost of production in Egypt – Rebar (Turkey), where the Panel considered that it must*

   …reach a conclusion as to whether…there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

8. *This supports a reading of Article 2.2.1.1 whereby any element that "reasonably" relates to the cost associated with production and sale should be taken into account, including in relation to inputs or raw materials, and might lead to the adjustment or replacement of certain costs. Indeed, this appears to be the situation in US – Softwood Lumber, where the Panel did not take issue with respect to testing for arm's length prices. In such cases, where the investigating authority has established that the records do not reasonably reflect the costs, there is no obligation under Article 2.2.1.1 to calculate costs using the records.*

In Australia's view then, the Minister's corresponding obligations pursuant to the Regulations, demands an analysis of the reasonableness of costs of inputs or raw materials. Shagang agrees, as the clear objective is to ensure that any inputs that reasonably relate to the costs associated with production and sales, be taken into account in constructing normal values. Equally, the analysis is necessary to assist in either adjusting or replacing costs found to not reasonably relate to the cost associated with production and sale.

It is apparent to Shagang then that the Commission's approach to determining costs of production in this rod in coil investigation, does not comply with Australia's own submitted view and interpretation of the required analysis to be conducted by the investigating authority. That is, the Commission does not appear to have performed any analysis of the purchased raw materials used by Shagang in the production of rod in coil to assess the reasonableness of those costs.

As noted in previous submissions, iron ore is the largest raw material cost item in the production of rod in coil, representing approximately [redacted]% of the total cost of producing steel billet. SEF 301 contains no analysis or assessment of Shagang's iron ore costs against prevailing international spot prices for iron ore. Given that iron ore is the largest input to

production of rod in coil by Shagang, the Commission's refusal to examine the reasonableness of iron ore costs makes the consideration, analysis and determination of costs set out in SEF 301 defective.

In its third party submission to DS473[4], the United States generally supported the EU's position and submitted:

> 21. *When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive reasonableness standard for the costs reflected in the producer's or exporter's records. That is, Article 2.2.1.1 does not require investigating authorities to rely on the costs reflected in a producer's books or records if the evidence establishes that those costs are unreasonable because those records would then not reasonably reflect the costs associated with the production and sale of the product.* [emphasis added]

Like Australia, the United States also references the finding of the Panel in *Egypt - Rebar*[5] to support its view that the question is whether the cost of an input is a cost associated with the production and sale of the good under investigation. The Panel concluded:

> 22. *…we believe that the provision itself makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation. This determination in turn hinges on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question in that case.* [emphasis added]

The United States summarises its position by stating:

> 23. *To the extent that a cost reflected in those books and records does not reasonably relate to the production and sale of the product under consideration, an investigating authority need not use that cost in its calculations under Article 2.*

The United States seems to hold the same view as Australia, which allows for the adjustment or replacement of a particular cost, where that particular cost is found to not reasonably reflect the cost associated with production or sale. Conversely, where particular cost elements reasonably reflect the cost associated with production or sale, the investigating authority is required to rely upon that particular cost as reflect in the records of the exporter.

In Shagang's view then, in order to ensure that only particular cost items found not to reasonably reflect costs associated with production or sale are adjusted or replaced, the investigating authority is compelled to examine and analyse each and every particular cost element in assessing whether that particular cost reasonably reflects the cost associated with production or sale.

For this reason, Shagang submits that SEF 301 is defective as the Commission does not appear to have performed any substantive analysis or assessment of individual cost

[4] https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.3rd.Pty.Sub.Fin.Public.pdf
[5] Panel Report – Egypt – Definitive anti-dumping measures on steel rebar from Turkey, WT/DS211/R, para 7.393, p 97.

elements used in the production or sale of rod in coil. Instead, the Commission's position appears to be that where any particular cost element is found to not reasonably reflect costs associated with production or sale, all other raw material costs and manufacturing overhead costs are able to be adjusted or replaced.

This is clearly an incorrect interpretation and application of the obligations imposed on the Minister by the Regulations, in determining the costs of production for the purposes of constructing normal values.

COMPARISON OF KEY RAW MATERIALS AGAINST PUBLISHED DATA

As highlighted above, Shagang contends that the Commission has erred by not undertaking a proper analysis of the reasonableness of each particular cost. Given that iron ore represents the largest input cost in production of rod in coil, the Commission ought to have at the very least examined whether Shagang's iron ore costs reasonably reflect costs associated with production. In the absence of any such analysis by the Commission, Shagang has prepared its own analysis demonstrating that its purchase costs of iron ore plainly reflect competitive market costs.

It is important to note that Shagang has provided all requested information to the Commission demonstrating that all of its purchases of iron ore were imported from unrelated parties. As explained to the Commission, Shagang's iron ore input costs were based on international spot market prices. As such, Shagang considers that this is sufficient to substantiate that its iron ore input costs are reflective of competitive market costs.

Notwithstanding the above, Shagang also submits that its iron ore purchase prices are reasonable when compared against freely available published iron ore spot prices for the corresponding period. To demonstrate, the chart below compares the movement of spot iron ore prices against Shagang's corresponding iron ore purchase prices. It reveals that Shagang's monthly average delivered import prices were greater than published monthly average CFR Qingdao prices[6] in each month over the 15-month period between January 2014 to June 2015, with purchases prices being approximately [redacted]% higher than published spot market prices over the analysis period. Even allowing for the additional import clearance and inland transport expenses associated with its purchases, Shagang's purchase costs are significantly above prevailing global spot prices.

[Confidential chart removed]

Source: Metal Bulletin Iron Ore Index (MBIOI)

Shagang therefore submits that the evidence on the record clearly shows that its imported iron ore input costs reflect competitive market costs. In these circumstances, the Commission is obliged to rely on the iron costs reflected in Shagang's records.

Further, it is noted that there have been no claims made or evidence presented by the applicant in this dumping investigation, which questions the reliability or reasonableness of Shagang's iron ore costs. Also relevant is that the applicant has not identified iron ore

[6] Source: Metal Bulletin Iron Ore Index, Prices based on Iron Ore 62% Fe, CFR China

purchases by Chinese exporters of rod in coil as conferring a benefit within its application for the imposition of countervailing duties[7].

RELEVANCE OF CONCURRENT SUBSIDY INVESTIGATION

Shagang notes that the Commission has commenced a concurrent investigation into allegations of subsidisation of rod in coil exported from China (case 331). The investigation period for this investigation is identical to the current dumping investigation.

The findings of case 331 are considered to be directly relevant to the current dumping investigation for the following reasons:

1. the applicant's primary claims revolve around the provision of raw materials (billet, coking coal and coke) at less than adequate remuneration.
2. the applicant's particular market situation claims rely on claims of subsidisation;
3. the Commission's market situation assessment in SEF 301 includes references to subsidies;
4. the obligation on the Commission to ensure that in circumstance where dumping and countervailing duties are imposed on the same goods, it avoids the double counting of duties where the normal value is derived from surrogate information.

For these reasons Shagang submits that the Commission must not make any findings of fact in the current dumping investigation, which relate to the alleged subsidy programs being investigated in case 331, until the subsidy investigation has been finalised. Further, any findings of subsidisation which are associated with the Commission's use of steel billet surrogate benchmark prices, must be addressed to ensure that the imposition of dumping and countervailing duties are not double counted.

As such, Shagang requests the Commission to extend the date of the final report to ensure that the findings and outcomes of the subsidy investigation are properly aligned with the findings and outcomes of the current dumping investigation.

ISSUES RELEVANT TO SHAGANG PRELIMINARY DUMPING MARGIN

Formula error in domestic sales

Prior to the publication of SEF 301, Shagang brought to the Commission's attention an obvious formula error which resulted in the net invoice values for domestic sales being inclusive of inland transport. By reply email on 5 February 2016, the Commission confirmed the error and provided a revised report which corrected the calculations.

Upon review of the preliminary dumping calculations relied upon in SEF 301, Shagang notes that the original error remains uncorrected.

To repeat, the report and calculations correctly identify that the gross invoice values for domestic sales shown in "Column AI" are all delivered prices, with the corresponding inland freight expenses reported in "Column AP". However, the formula to calculate the net

[7] EPR 331, Record No. 003.

invoice values shown in "Column AV" is adding the inland freight to the gross invoice value (AV=AI+AP), which in effect is double counting the inland freight twice and then subsequently adding on the export inland freight from "Column BF". The correction is simply a matter of subtracting the inland freight from the gross invoice value (AV=AI-AP) to arrive at an ex-works net invoice value, before adding the export inland freight to arrive at a FOB NV.

Shagang again requests that the Commission correct this error in finalising its recommendations.

Calculation of VAT adjustment

Shagang notes that in calculating the VAT adjustment, the Commission has disregarded the actual amounts of non-refundable VAT incurred by Shagang on its exports of rod in coil to Australia. Instead the Commission has calculated a notional amount of non-refundable VAT that would have been incurred if the exported goods were sold to Australia at the normal value. Shagang disagrees with this approach.

In constructing normal values pursuant to subsection 269TAC(2)(c) of the Act, it is required to assume '*that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export*'. Clearly, had the exported goods been sold on the domestic market, Shagang would not have incurred any non-refundable VAT on those domestic sales.

In that scenario, where the Commission considers that adjustment is then required to be made to the normal values to take account of the actual amount of non-refundable VAT incurred by Shagang in making its export sales, the upward adjustment should reflect the actual amounts incurred and not some notional amount based on a constructed normal value.

Based on the method adopted by the Commission, the notional amount of non-refundable VAT exceeds the actual amount of non-refundable VAT incurred by Shagang in each quarter of the investigation period, as shown in the table below:

[Confidential table removed]

It is clear then that the Commission has adjusted the constructed normal values to take account of non-refundable VAT, by amounts that significantly exceed the actual amounts of non-refundable VAT incurred by Shagang on its exports during the investigation period. Shagang submits that this approach is flawed and requests the Commission to amend its calculations to reflect the amounts actually incurred by Shagang.

Determination of profit

Shagang notes that the domestic profit achieved on sales of [redacted] in the ordinary course of trade differs to the profits achieved on domestic sales of other like goods. Given that [redacted] was the product exported to Australia during the investigation period, Shagang requests the Commission to consider whether the profit from these comparable like sales should be used to construct normal values. The profit achieved on domestic sales of

[redacted] is considered to be representative of a profit that could be achieved on sales of like goods on the domestic market in China.

Yours sincerely

John Bracic