NON-CONFIDENTIAL

6 July 2018

Mr Paul O'Connor
Panel Member
Anti-Dumping Review Panel

BY EMAIL adrp@industry.gov.au

Dear Panel Member,

Submission of the Australian industry producing like goods, OneSteel Manufacturing Pty Limited
Re.: Steel Reinforcing Bar exported from the People's Republic of China - Applications for Review by Jiangsu Shagang Group Co., Ltd and Hunan Valin Xiangtan Iron & Steel Co., Ltd, Jiangsu Yonggang Group Co., Ltd.

The Australian industry notes the applications for review by the exporters of the goods, Jiangsu Shagang Group Co., Ltd (**Shagang**), Hunan Valin Xiangtan Iron & Steel Co., Ltd (**Hunan**) and Jiangsu Yonggang Group Co., Ltd. (**Yonggang**)

For the assistance of the Panel, the sole member of the Australian industry, OneSteel Manufacturing Pty Limited, trading as *'Liberty OneSteel'* (**OneSteel**), submits the following observations in response to the matters raised by the exporter applicants for review. References to headings correspond with those contained in the public notice of Panel Member O'Connor under s 269ZZI[1] dated 6 June 2018.

1. The Parliamentary Secretary erred in the retrospective application of section 269TAB(2A) of the Customs Act 1901 (the Act) in the determination of the export price for each of the Applicants

1. As we understand the exporters' applications for review, its representative objects to the application of the amendments made by the *Customs Amendment (Anti-Dumping Measures) Act 2018 (***the *Amendment Act)* on the grounds that *"had the Australian Government intended for the amendments to apply to all reviews underway at the commencement of the schedule, there would have been no need to include the word 'immediately'"*. The representative then attempts to conflate *"a review that was <u>being undertaken</u> immediately before the commencement of"* the amendments, with *"<u>reviews initiated</u> immediately prior to the commencement of the"* amendment.[2] [3] [4]

[1] All legislative references are to the *Customs Act 1901* unless stated otherwise.
[2] ADRP No. 2018/84 (*Application for Review – Shagang*), Attachment B, p. 10.
[3] ADRP No. 2018/84 (*Application for Review – Hunan*), Attachment B, p. 10.

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2. With respect, we fail to see any redundancy in the use of the word "immediately" by the Parliament. In fact, on the ordinary meaning conveyed by the text, the intention of the Parliament was to cover all review inquiries that were "being undertaken", as distinct from 'initiated' immediately before the commencement of the amendment. The review may have been 'initiated' many months earlier, i.e. not immediately prior to the amendments' commencement, but because the review was "being undertaken immediately before" the amendments' commencement (i.e. on the day before), then the amendments properly apply to such reviews.

3. Applied here, *Review Inquiry Nos.411, 412 and 423* are all reviews to which the Parliament intended to apply the operation of the amendments, i.e. they were all reviews being undertaken immediately before the commencement of the amendments. The provisions of the *Amendment Act* commenced on the day after receiving Royal Assent, specifically, 31 October 2017. As at 30 October 2017, the reviews were being undertaken, i.e immediately before, and as such the Commission was right to apply the amendments to these inquiries.

4. Had the Parliament intended the *Amendment Act* to apply only to reviews 'initiated' immediately before the commencement, then the ordinary rules of statutory interpretation would demand that some means of referencing the instruments of initiation be drafted into the language of s 4(b) of the *Amendment Act*. Clearly, there was no such intention, and so s 4(b) properly applied to the current review inquiries. In fact s 4(c) expressly references the instruments of initiation ("*a notice of a review under subsection 269ZC(4), (5) or (6)*"), where it is there the Parliament's intention to apply the amendments to applications lodged prior (but not initiated) to the commencement date.

5. Finally, we consider that the Commission correctly interpreted and applied the *Amendment Act* in Report No. 411, 412 and 423 when making the recommendation to the Minister:

> The explanatory memorandum to the *Customs Amendment (Anti-Dumping Measures) Bill 2017* notes the retrospective impact of the amendments:
>
> > The purpose of retrospectively applying the specific methods to applications lodged, or reviews being undertaken, prior to commencement is to apply the methods to all reviews currently on foot, without extending to reviews already finalised.
> >
> > …

[4] ADRP No. 2018/84 (*Application for Review – Yonggang*), Attachment B, p. 10.

> Procedural fairness will be afforded to affected parties. Affected parties will be notified of the intention to use the alternative methodologies to calculate their export price. Exporters and interested parties will be invited to make submissions prior to a decision being finalised.

Reviews 411, 412 and 423 were being undertaken immediately before the commencement of the amendments, having been initiated on 29 June 2017. Prior to the commencement of the amendments, the review was still underway, the SEF had not yet been published and no declaration under subsection 269ZDB(1) for the review had been made. Accordingly, the Commission is satisfied that the new provisions in section 269TAB should be considered in this review. The Commissioner notified the exporters and other interested parties of the approach to determining the export price in the SEF and invited submissions, including on the determination of export price, prior to the recommendation to the Assistant Minister being finalised.[5]

2. The Parliamentary Secretary incorrectly determined that each of the Applicants were a "low volume exporter" as defined under section 269TAB(2A) of the Act

6. We consider that this ground for review relates to the Commission's assessment of:
   (i) previous volumes of exports by that exporter,
   (ii) patterns of trade for like goods, and
   (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter.

(i) previous volumes of exports by that exporter

7. The applications for review understate the analysis performed by the Commission when considering the previous volumes of exports by the respective exporter (either Hunan or Yonggang), relevantly the exporters' representative states:

> In REP 412 [423], the Commission assessment is limited to the statement that '*Hunan Valin [Yonggang] has previously exported the goods prior to the review period, during both the original investigation period (1 July 2014 to 30 June 2015) and subsequently. Hunan Valin has not exported the goods to Australia since the September 2016 quarter.*' The Commission has not undertaken any further assessment or consideration of the relative volumes as expressed in the explanatory memorandum.
>
> > *14. New paragraph 269TAB(2A)(b)(i) requires consideration of the previous volumes of exports (if any) of the goods that are the subject of the review to Australia by that Exporter. If the previous volumes of exports are* ***much higher*** *than the volume of exports during the period being examined by the review, this may indicate that the Exporter has adopted a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may be relevant in the Minister's determination that the information (if any) provided by the Exporter is insufficient or unreliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should be applied.* [emphasis added]

[5] Report No. 411, 412 and 423 – Steel reinforcing bar – China, p. 11.

…

As such, a reasonable assessment of the data would conclude that the export volumes during the original investigation period were not 'much higher', and in no way are indicative of an intended strategy to exploit the dumping framework. [emphasis added][6] [7]

8. In its application for review, the exporters are incorrectly interpreting the new legislative framework, which broadly requires consideration of "previous volumes of exports", not (narrowly) volumes confined to the 'original investigation period', as the exporters' representative appears to assert.
9. In having regard to 'previous volumes of exports', we observe the Commission's comment in REP No. 300 which indicated significant export volumes in the period immediately following the investigation period, but prior to making the preliminary affirmative determination:

> The Commission has examined import volumes from the ABF import database occurring during and post the investigation period. The Commission observes that import volumes from China for the 8 month period following the end of the investigation period, that is July 2014, are significantly higher than verified volumes during the investigation period. The Commission notes that the total import volume of rebar from China was approximately 22,500 tonnes during the investigation period but the total imports of rebar from China adds up to approximately 46,700 tonnes in the 8 months following the end of the investigation period. That would be an approximately 70,000 tonnes of export volumes at pro rata basis for the next 12 months following the investigation period. This shows more than 300 per cent increase in rebar import volumes from China.[8] [emphasis]

10. Therefore, we consider the exporters' representative suggestion that the 'previous volumes of exports' were not *'much higher'… "than the volume of exports during the period being examined by the review"* entirely without any factual basis, irrespective of whether the comparison is made narrowly against the original investigation period or more broadly. In support of our dismissal of the exporters' assertion, we reproduce a graphic illustrating the Commission's analysis of the verified evidence extracted from REP 411, 412 and 423:

[6] ADRP No. 2018/84 (*Application for Review – Hunan*), Attachment B, pp. 11 - 12.
[7] ADRP No. 2018/84 (*Application for Review – Yonggang*), Attachment B, pp. 11 - 12.
[8] REP 300 – Steel Reinforcing Bar – China, p. 70.

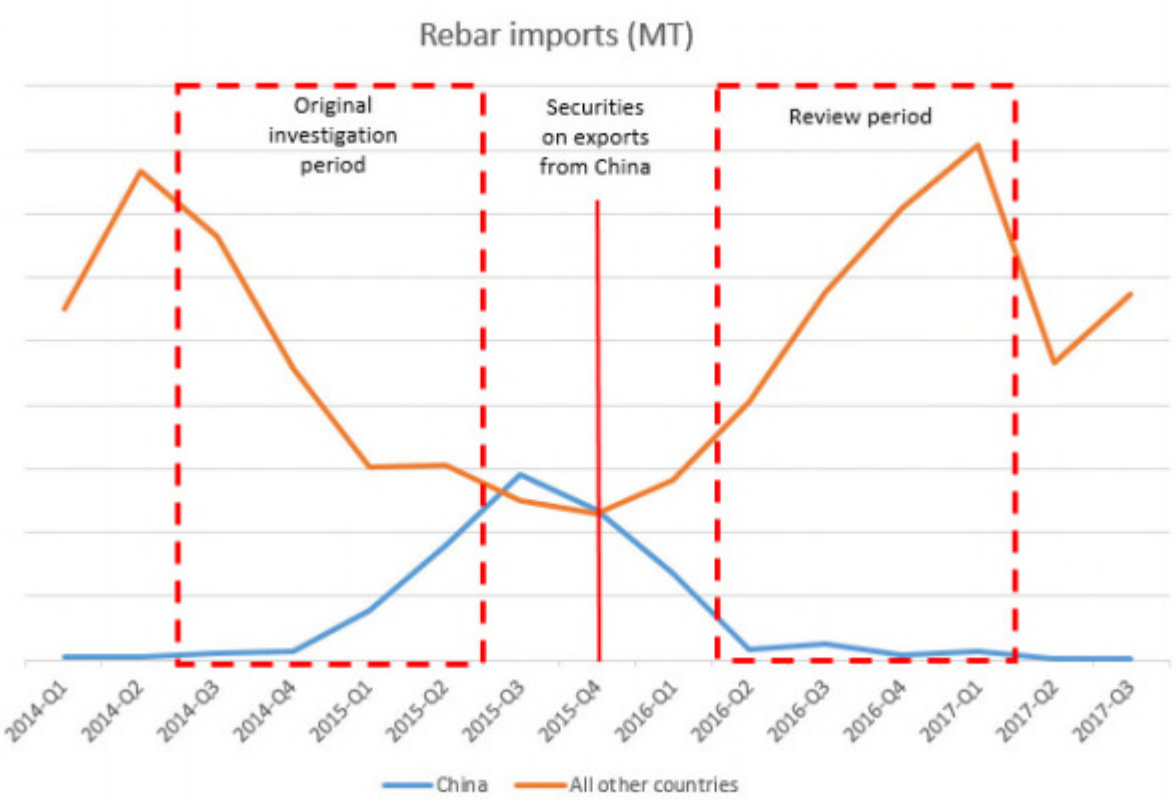

Figure 1

Source: Report No. 411, 412 and 423 – Steel reinforcing bar – China, p. 12

(ii) patterns of trade for like goods, and

(iii) factors affecting patterns of trade for like goods that are not within the control of the exporter

11. The exporters' representative has misinterpreted s 269TAB(2A). The question for the Parliamentary Secretary is whether *"there is insufficient or unreliable information to ascertain the [export] price"* [emphasis added].[9]
12. Where there is an "absence" of exports, then there is "insufficient" information to ascertain the exporter price. Where this is a "low volume" of exports, then it must be decided whether there is "insufficient or unreliable" information having regard to the factors set out in sub-paragraphs (i) – (iii). This interpretation is clearly consistent with the Explanatory Memorandum to the *Customs Amendment (Anti-Dumping Measures) Bill 2017* (***Explanatory Memorandum***), which provides in relevant part:

[9] Paragraph 269TAB(2A)(b)

> 12. If the Exporter made no exports during the period being examined by the review, there is insufficient information to ascertain the export price under subsection 269TAB(1). If the Exporter made a low volume of exports during the review period the Minister must consider whether or not to determine that the information provided by the Exporter in relation to those exports is insufficient or unreliable to ascertain an export price. The Minister must consider the list of factors at new paragraphs 269TAB(2A)(b)(i)-(iii) when making that determination. [emphasis added][10]

13. Applied here, the Commission has concluded that there was an "absence" of exports by the exporter during the review period, in other words there was insufficient information to ascertain the export price:

> … Commission has found that Shagang did not export the goods to Australia during the review period…[11]
>
> … Commission has found that Hunan Valin did not export the goods to Australia during the review period…[12]

14. Therefore, these exporters cannot also be "low volume" exporters. The exporters have taken the Commission's comments concerning testing the sufficiency and reliability of export sales out of context. The Commission was simply stating the alternate proposition that:

> For [the exporter]… to be considered a 'low volume exporter' in accordance with subsection 269TAB(2A), the Minister must have regard to (i) previous volumes of exports by that exporter, (ii) patterns of trade for like goods, and (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter.[subsection 269TAB(2A)(b)] The Commission has considered these elements…[13]

15. After testing the alternate proposition, the Commission also concluded that each exporter can also be considered a "low volume" exporter. In OneSteel's opinion, this additional testing of sufficiency and reliability of low volumes of exports is good administrative practice, but in the case of an absent exporter (as applies in the case of Hunan and Shagang), unnecessary.
16. Irrespective of whether or not the exporter was an 'absent 'or a 'low volume' exporter during the review period, the Commission's extensive analysis of the latter demonstrates that the Commission has adequately considered all three factors pertaining to 'low volume' exports. The *Amendment Act* and the *Explanatory Memorandum* do not point to a hierarchy when considering the factors, or that the presence of all three are necessary to satisfy the Parliamentary Secretary that the 'low volume' of exports are unreliable or insufficient. However, the exporter seeks to point to changes in the pattern of trade as conclusive that its (hypothetical) 'low volume' of exports are in fact reliable and sufficient to determine export price under s 269TAB(1).

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[10] Explanatory Memorandum, *Customs Amendment (Anti-Dumping Measures) Bill 2017*, pp. 30 – 31.
[11] Report No. 411, 412 and 423 – Steel reinforcing bar – China, p. 17.
[12] Report No. 411, 412 and 423 – Steel reinforcing bar – China, p. 11.
[13] Report No. 411, 412 and 423 – Steel reinforcing bar – China, pp. 11, 17 & 18.

17. The suggestion by the exporter that the 'low volume' of exports during the review period is "beyond its control" defies belief. The exporter competes on price, and the exporter may overcome its absence from the Australian market by adjusting its price to Australian market conditions. In other words, the exporter may do exactly what the legislation permits the Minister to do under s 269TAB(2B) (with adjustments under s 269TAB(2G)) in the exporter's absence or low volume, that is:

> to reflect what the export price would have been had there not been an absence or low volume of exports[14]

18. In other words, to suggest that low volume exports to the Australian market on the basis of export price offers by the exporter constitutes a factor "beyond its control" denies the new statutory regime of any purpose when the ordinary meaning of the text is taken as a whole.
19. Accordingly, even if the Commission considers that the exporter was responsible for "low volume exports of the goods", instead of an "absence" of exports, then the suggestion that its export price was a factor "beyond its control" ought to be rejected.

3. The Parliamentary Secretary erred in determining the billet benchmark price for each Applicant was based upon the purchase price of billet sold to other exporters who were not integrated producers

20. In SEF 411, 412 and 423, the Commission considered it appropriate (moving away from previous surrogate Latin American export billet prices) to use "verified costs of steel billet manufacturers (at comparable terms) in Indonesia, Korea, Spain, Taiwan, Thailand and Vietnam for the purpose of replacing the applicants' steel billet costs."
21. In its submission in response to SEF 411, 412 and 423,[15] OneSteel cautioned the Commission on two matters concerning setting the competitive cost benchmark – firstly, that the Commissioner must ensure that costs of billet production obtained from the cooperating exporters and manufacturers are in fact their billet production costs, and not their purchase price for billet. Secondly, given the Commissioner's conclusion in SEF No. 416, that with respect to Vietnam:

> The cost of electricity is significant to an EAF, with a material amount of the cost of making billet coming from the electricity cost. The verification visit undertaken to Hoa Phat confirmed that electricity is a significant cost component.
>
> …

[14] Subsection 269TAB(2G)
[15] See for example: EPR 412 Folio 013

> The Commission is therefore of the view that the level of control exercised by the [government of Vietnam] on electricity prices has artificially supressed the price of electricity in Vietnam.

22. Therefore, OneSteel considered that irrespective of the Commissioner's overall conclusions with respect to the existence or otherwise of a market situation in Vietnam for rod in coils, the use of cost of production information from Vietnamese exporters and manufacturers failed to satisfy the touchstone test under s 43(2) of the *Customs (International Obligations) Regulation 2015*, that costs of production when used in the construction of normal values under s 269TAC(2)(c) must reasonably reflect competitive market costs. Given the Commissioner's conclusion in Investigation No. 416, it was appropriate that the Commissioner exclude the costs of production of Vietnamese exporters and manufacturers from his determination of normal values for the review applicants.
23. In Report 411, 412 and 423, the Commission correctly changed their country selection from six to three benchmark sources where cost to produce billet had been verified and included only "Indonesia, Spain and Taiwan".
24. In the exporters' applications to the Panel for review, they cited the removal of Vietnam as a competitive cost benchmark as:

> The Commission provides **no justification** for its decision to exclude the verified billet costs of the Vietnamese cooperating exporter which is also an integrated steel producer and whose production circumstances were most alike to that of [insert exporter here]. That is, Hoa Phat Group produced steel billet using the basic oxygen steelmaking method utilised by [the respective exporter].[16]

25. This is an entirely untrue and misleading characterisation of the Commission's clear, considered and correct determination on the issue of using Vietnam as a source of competitive benchmark costs. Indeed, the Commission correctly outlined in Report 411, 412 and 423:

> The Australian industry raised concerns that artificially low electricity prices in Vietnam, as discerned in Investigation 416, might make it unsuitable to include Vietnamese producers in the Commission's calculation of a billet benchmark cost. The Commission confirms that no producers from Vietnam are included in the calculation of its billet benchmark cost.[17]

[16] See for example: ADRP No. 2018/84 (*Application for Review – Hunan*), Attachment B, p. 16.
[17] Report No. 411, 412 and 423 – Steel reinforcing bar – China, p. 25.

26. The exporters also make a number of incorrect and false statements in their applications for review with the Panel in terms of the steelmaking methodologies of the competitive cost benchmark sources. For example:

> Hoa Phat Group produced steel billet using the basic oxygen steelmaking method utilised by [exporter]

However, in SEF 416 at [5.5.1.2] the Commission states (at p. 29):

> As outlined in the visit report, Hoa Phat operates both a BOF and EAF to manufacture steel billets used to produce RIC.

27. Similarly, the exporters claim:

> Nervacero S.A. – a Spanish re-roller

Again, this is incorrect as Nervacero S.A's own website gives extensive detail of their steelmaking operations through an EAF steelmaking process:

> Nervacero has an electric furnace with a feeder for the pre-heating of scrap metal with a production capacity of one million tonnes of liquid steel per year.[18]

28. So too, the claim concerning the Thai exporter, Millcon Steel:

> Millcon Steel – integrated Thai billet producer

Yet, as per their own website, Millcon Steel publicly outlines their "Green Mill" EAF steelmaking process commissioned in 2009 as follows:

> The strength of EAF steelmaking is the ability to melt steel scrap to produce billet which is a major raw material in the production process of various types of steel products using electric arc technology (FASRARCTM) and Vacuum Degassing Technology (VD) which will help save energy and reduce pollution.[19]

29. However, it is entirely misleading for the applicants for review (particularly Shagang), to claim that the Vietnamese producer was "most alike to that of Shagang":

> production circumstances were most alike to that of Shagang. That is, Hoa Phat Group produced steel billet using the basic oxygen steelmaking method utilised by Shagang.

For the record, Shagang does not utilise only basic oxygen steelmaking production – they are also the largest electric arc furnace steel producer in China. As publicly reported at all relevant times:

[18] http://www.nervacero.com/Celsa.mvc/Presentacion
[19] http://millconsteel.com/en/company/green_mill_project

> Shagang (EAF) is the largest ferrous scrap consumer in China. It has six electric arc furnaces with a crude steel capacity of 6.8 Mtpa. The EAF plant consumes an estimated 2.0 Mtpa of obsolete scrap. Around 60% of the obsolete scrap is sourced from the seaborne market, mainly from United States and South Korea, making the plant China's largest scrap importer.[20]

30. Finally, OneSteel considers that the Taiwanese re-roller of billet, namely Power Steel, ought to be excluded as they do not have steel-making capacity as 're-rollers' of purchased steel billet only, while the verified costs for EAF steel producer Millcon of Thailand ought to be included.

4. The Parliamentary Secretary erred by incorrectly calculating a timing adjustment in determining the Applicant's export prices

31. We observe from the ADRP Conference Summary dated 27 June 2018, that the arguments supporting Hunan's claims to this ground for review were missing. In spite of undertakings by Hunan's representative to cure this deficiency, no further details have been provided. Therefore, OneSteel considers that Hunan's claims to this ground should be rejected by the Panel Member. OneSteel confines its consideration of this ground to the claims contained in the application for review of Yonggang.

32. In considering the use of a timing adjustment, the Commission used the average published rebar export prices across the original investigation period for INV 300 (1 July 2014 – 30 June 2015) and compared it to the average published rebar export prices across the review period for REV 411, 412 and 423 (1 April 2016 – 31 March 2017).

33. An important consideration when deciding the correct or preferable approach to applying a timing adjustment is that during the original investigation period for INV 300, Yonggang exported very small volumes. However, immediately following the investigation period, they exported significant volumes at low export prices, confident of the limited likelihood that the original measures would be imposed retrospectively by the Parliamentary Secretary. ABF import data will demonstrate that Yonggang continued to export significant volumes at low prices until the imposition of measures in April 2016. Following imposition of measures, the volume of exports decreased significantly to a small number of transactions at higher export prices during the anticipated review period (indeed, Yonggang applied for a review of measures at the earliest opportunity available under Division 5 of the Act) with a view to securing variable factors generating a lower, *de minimis* or ideally, negative dumping margin, indeed, the very activity/mischief the *Amendment Act* sought to prevent.

[20] https://www.woodmac.com/reports/metals-shagang-eaf-steel-plant-16391781

CONCLUSION

OneSteel considers that the detail and depth of the Commission's analysis recorded in REP 411, 412 and 423, exceeds its usual standard and provided both well considered and cogent grounds to support what is both in law and fact, the correct and preferable decision.

FOR AND ON BEHALF OF THE AUSTRALIAN INDUSTRY RESPONDENT

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