PUBLIC VERSION

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 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a 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
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

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

Further application information

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

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

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.

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PART A: APPLICANT INFORMATION

Applicant's details

Applicant's name: Jiangsu Shagang Group Co., Ltd

Address: Jinfeng Town, Zhangjiagang City, Jiangsu Province, the People's Republic of China, 215625

Type of entity (trade union, corporation, government etc.): Jiangsu Shagang Group Co., Ltd is a limited liability company.

Contact person for applicant

Full name: Mr Feng Xiaoyi
Position: Manager

Email address: fengxy@shagangintl.com

Telephone number: +86-512-58568261

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

Jiangsu Shagang Group Co., Ltd, (herein referred to as "Shagang") is a producer and exporter of rod in coils exported from the Peoples Republic of China.

Is the applicant represented?

Yes

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PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

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

Provide a full description of the goods which were the subject of the reviewable decision

The description of rod in coil (rod in coil) exported from China that are subject of the reviewable decision are:

Hot rolled rods in coils of steel, whether or not containing alloys, that have maximum cross sections that are less than 14mm.

The goods covered by this application include all steel rods meeting the above description regardless of the particular grade or alloy content.

Goods excluded from this application include hot-rolled deformed steel reinforcing bar in coil form, commonly identified as rod in coil or debar, and stainless steel in coils.

Provide the tariff classifications/statistical codes of the imported goods

The relevant tariff classification for the subject goods are:

- 7213.91.00 (statistical code 44)
- 7227.90.90 (statistical codes 42 & 02)

Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-Dumping Notice 2016/47 is attached at **Exhibit A**.

Provide the date the notice of the reviewable decision was published

The attached ADN 2016/47 was published on 22 April 2016.

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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 grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

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

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: ☒

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.

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 10.

Please refer at Attachment B.

Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.

Please refer at Attachment B.

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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;

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: 20th MAY 2016

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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 6203, Manuka, ACT 2603

Email address: john@jbracic.com.au

Telephone number: +61-0499056729

Representative's authority to act

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

Refer to **Attachment C** for signed letter of authority.

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:

Position:

Organisation

Date: / /

ATTACHMENT B **PUBLIC VERSION**

J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

PO Box 3026
Manuka, ACT 2603
Mobile: +61 499 056 729
Email: john@jbracic.com.au
Web: www.jbracic.com.au

22 May 2016

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry and Science
10 Binara Street
Canberra City ACT 2601

Review of a Ministerial decision – Rod in coils exported from the Peoples Republic of China by Jiangsu Shagang Group Co., Ltd.

INTRODUCTION

On 23 June 2015, OneSteel Manufacturing Pty Ltd lodged an application for the imposition of interim dumping duties on exports of rod in coil from China. The Anti-Dumping Commission (the Commission) notified on 12 August 2015 of its decision to not reject the application.

On 1 December 2015, the Commissioner of the Anti-Dumping Commission (Commissioner) made a preliminary affirmative determination (PAD) and imposed provisional measures on imports of rod in coil from China entered for home consumption on or after 1 December 2015. PAD Report 301 (PAD 301) sets out the grounds and reasons for the Commissioner's decision.

On 13 February 2016, the Commission published its preliminary findings of the dumping investigation in Statement of Essential Facts Report No. 301 (SEF 301). At the same time, the Commissioner made the decision to amend the level of the provisional measures applicable to exports of rod in coil from China.

On 22 April 2016, following the Commission's investigation, the Parliamentary Secretary to the Minister for Industry (Parliamentary Secretary) made the decision under subsection 269TG(2) of the *Customs Act 1901* (the Act) to impose interim dumping duties in accordance with Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* on like goods exported by Shagang. Notification of the Parliamentary Secretary's decision was made on 22 April 2016.

Final Report No. 301 (Report 301) contains the material findings of fact and reasoning that forms the basis for the Parliamentary Secretary's decision to impose duties.

REASONS FOR BELIEVING THAT THE REVIEWABLE DECISION IS NOT THE CORRECT OR PREFERABLE DECISION.

Shagang seeks a review of a following findings and conclusions which led to the decision by the Parliamentary Secretary to impose interim dumping duties on its exports of rod in coil:

Finding 1: The Commission erred in finding that a particular market situation existed and that as a consequence, domestic sales of rod in coil were unsuitable for determining normal values.
Finding 2: The Commission erred by relying on its market situation assessment and findings to form the view that steel billet costs did not reasonably reflect competitive market costs.
Finding 3: The Commission erred in its interpretation of Regulation 43 of the *Customs (International Obligation) Regulations 2015* (IO Regulations) by focusing on the costs themselves, rather than the records of Shagang, in rejecting its steel billet production costs.
Finding 4: The Commission failed to undertake a proper examination and assessment of whether Shagang's records reasonably reflected competitive market costs.
Finding 5: The Commission erred by making due allowance for export VAT that did not affect price comparability.
Finding 6: The Commission erred in determining material injury on the basis of a 'but-for' methodology which as a result incorrectly found that the applicant suffered material injury attributable to the subject goods.

Finding 1: The Parliamentary Secretary erred in finding that a particular market situation existed and that as a consequence, domestic sales of rod in coil were unsuitable for determining normal values.

REP 301 Finding

REP 301 found that a particular market situation existed in China and as such considered that domestic selling prices of rod in coil were not suitable for establishing normal values pursuant to subsection 269TAC(1) of the Act. Appendix 1 to REP 301 sets out the Commission's assessment and reasoning for this finding.

In conducting its market situation assessment, the Commission had regard to the following sources of information:

- the application for the publication of dumping and/or countervailing duty notices concerning steel reinforcing bar exported from the People's Republic of China.
- previous investigations undertaken by the Commission in relation to the Chinese steel industry.
- an investigation into 'certain concrete reinforced bar' originating from the People's Republic of China undertaken by the Canada Border Services Agency (CBSA), and
- information obtained through the Commission's research and analysis.

Based on its assessment of the above information sources, the Commission concluded that the mechanisms through which the Government of China (GOC) exerted its influence on the Chinese steel industry include government directives and oversight, subsidy programs, taxation arrangements and the significant number of state owned steel companies.

Grounds for appeal

It is worth first highlighting that the Commission's particular market situation assessment in this rod in coil investigation principally mirrors the Commission's previous assessments in the corresponding appendices to the respective final reports into steel products exported from China such as galvanised steel, aluminium zinc coated steel, hot rolled plate steel, hollow structural steel sections, deep drawn stainless steel sinks and steel reinforcing bars. Those assessments all reference the same GOC planning documents and directives from as early as 2005.

In this current rod in coil investigation, the Commission's assessment involves little more than simply listing the various planning documents and directives. Whilst it states that it '*reviewed a number of Chinese Government planning documents and directives*'[3], the Commission's assessment does not identify or point to particular aspects of this information that would demonstrate that such factors contributed to and had an effect on domestic selling prices not being established under market principles.

In Shagang's view, the mere existence of broad policies and guidelines aimed at the steel industry in China is not sufficient to be satisfied that distortion in the rod in coil market in China exists, that renders arm's length transactions in the ordinary course of trade in that market unsuitable for use in determining normal values. As previously stated by the GOC in previous steel investigations, these broad policies are aimed at fostering industry efficiency and reflect an aspirational future state of the steel industry in China.

This view is supported by the views of the then Trade Measures Review Officer[4] (TMRO) in considering the extent to which government intervention might give rise to a market situation rendering domestic price unsuitable:

> 83. In my view, a market situation that renders domestic sales unsuitable for determining normal values would not arise if, by reason only of their own commercial decisions, market participants acted in a way that achieved those things that are stated to be the objectives of the Government of China's iron and steel policies – for example, mergers to create higher concentration and increased economies of scale, introduction of more efficient technology, disuse of inefficient technology and relocation of plant to locations closer to export facilities. That activity would simply reflect normal profit maximisation operations of an open market.
>
> 84. Nor do I consider that a market situation that renders domestic sales unsuitable for determining normal values would arise if a government simply encouraged and exhorted market participants to engage in such activity. Indeed, many might think that a government that failed to do so was remiss in the performance of its role to foster the wellbeing of its citizens.
>
> 85. And I do not consider that a market situation that renders domestic sales unsuitable for determining normal values would necessarily arise where a government simply exercised other ordinary functions of government, including by imposing various regulatory controls on market participants that may affect their costs and therefore increase or decrease the prices at

[3] Report 301, page 94.

[4] TMRO Report – Hollow Structural Sections exported from China, Korea, Malaysia, Taiwan, and Thailand, December 2012.

which they sell their productive output. The imposition of at least some regulatory controls such as those designed to ensure occupational health and safety, community health and environmental protection must be viewed as part of an ordinary market economy. As Lee J. said in La Doria (quoted above):

> *Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of subs 269TAC(1).*

The TMRO added:

> 94. Notwithstanding that a suspicion of active government intervention extending beyond ordinary acceptable government regulation may be reasonably formed, suspicion alone is in my view not an adequate basis for a market situation finding. I consider that this requires some more concrete evidence of the implementation of governmental policies and their effect in the market, such as the generation of an evidently artificial domestic price. Only then, in my view, would it be possible to form a defensible view that it was more likely than not that a market situation of the requisite type had arisen.

In the current rod in coil investigation, Shagang does not consider that the Commission has presented any evidence which would sufficiently establish that the policies and plans of the GOC, have materially distorted competitive conditions such that rod in coil domestic prices are unsuitable for proper comparison with corresponding export prices.

Further, the Commission's assessment relies on subsidy programs found to be provided by the GOC to Chinese steel manufacturers of products not relevant to rod in coil and in periods not corresponding to the current investigation. There is no evidence in the current investigation that the Commission can rely upon, which would support the view that Shagang or other Chinese rod in coil exporters had received benefits from such subsidy programs.

In fact, evidence presented to the Commission by Shagang and other Chinese rod in coil exporters as part of the concurrent subsidy investigation into rod in coil (case 322), would demonstrate that the Commission's conclusions and reliance on information from earlier steel subsidy investigations was both flawed and inaccurate. Shagang has not benefited from any of the identified preferential tax policies, tariff exemptions or grants.

In the case of its steel inputs, Shagang is a fully integrated steel producer which produces its own molten iron and steel billet. As such, it did not purchase steel billet during the investigation period and therefore cannot be considered to have benefited from this subsidy. Of its coke and coking coal purchases which were purchased from a mixture of imported and locally sourced in China, it is expected that the Commission will find that any benefits received are negligible.

So even though the evidence shows that Shagang and possibly other Chinese exporters of rod in coil did not receive benefits from the alleged subsidy programs, and the Commission recognises that no factual determinations have been made in respect of these programs during the investigation period, the Commission relies on information from earlier steel subsidy investigations for its market situation finding. This provides further example of the Commission simply relying on previous market situation findings without undertaking any additional examination of the relevance of previously gathered information, to the rod in coil domestic market during the investigation period.

It is also noted that the Commission continues to rely on its subsidy findings with respect to galvanised steel and aluminium zinc coated steel (Report 193), even though the subsidy programs relevant to the provision of raw materials at less than adequate remuneration were found by the Anti-Dumping Review Panel to not meet the definition of a subsidy as they were not provided by public bodies. To that end, Shagang submits that the Commission has failed to meet its own evidentiary standards by ensuring that the evidence relied upon '*must be relevant and reasonably reliable*'[5] and does not fulfil its obligations to conduct an objective examination of positive evidence.

Lastly, it is noted that the applicant referenced in its application, findings made by the Canadian Border Services Agency (CBSA) in its 2014 dumping and subsidy investigation into concrete steel reinforcing bars exported from China. Likewise, the Commission relies on a number of findings made by the CBSA in its final statement of reasons report as support for its view that a market situation exists.

It is important to firstly highlight that the findings referenced by the applicant in its application and the Commission in REP 301, stem from the CBSA's Section 20 inquiry. Whilst the applicant acknowledges that differences exist between the Australian and Canadian dumping systems in the treatment of China as a market economy, it submits that '*both frameworks permit alternative methods of calculating normal values where it is determined that the government has influenced market prices so that they are not reflective of normal competitive markets*'[6].

In Shagang's view, the applicant has understated the critical differences in the assessment of Chinese domestic market sales within the two dumping systems. Shagang also considers that the Commission has relied upon information which may be sufficient to meet the CBSA's evidentiary threshold for a finding pursuant to Section 20 of the relevant domestic legislation[7], but which falls short of the evidentiary threshold for determining that a market situation exists under Australia's domestic legislation. It is therefore important to understand the context of the Section 20 inquiry within the Canadian anti-dumping framework and the impact this has on the standard of proof in rejecting domestic sales for dumping purposes.

China's accession to the WTO in 2001 was subject to terms and conditions outlined in Protocols. Section 15 of the Protocols (commonly referred to as the non-market economy

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[5] Report 301, page 88.

[6] EPR Record no. 25, page 2.

[7] Special Import Measures Act (SIMA) which reflects Canada's implementation of the WTO Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures.

provisions) allowed WTO members to use alternative and exceptional methodology in determining price comparability for dumping purposes, by not requiring a strict comparison with domestic prices or costs in China if the producers under investigation could not clearly show that market economy conditions prevailed in the industry producing the like product with regard to manufacture, production and sale of that product. The Protocols allowed the use of these non-market economy provisions for 15 years from the date of accession.

Within the Canadian anti-dumping system, Section 20 preserves the rights of Canada to apply the non-market economy provisions allowed under China's accession protocols, for determining normal value where certain conditions prevail in the domestic market. In the case of China, an alternative normal value method is applied where, in the opinion of the President, domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market.

By contrast, Australia granted China market economy status in 2005 and in doing so, relinquished the option to apply the non-market economy[8] or economy-in-transition[9] provisions within the Act. As such, the Commission must base its normal value determinations on domestic sales of like goods sold in China in the ordinary course of trade.

However, where the Minister is satisfied that one of the conditions of subsection 269TAC(2)(a) of the Act is met, domestic sales cannot be relied upon to determine normal values. One such condition is the existence of a situation in the market that renders domestic sales unsuitable.

So whilst under both anti-dumping systems, the Commission and the CBSA initiate their respective dumping investigations into products exported from China with a presumption that domestic sales in China are suitable for determining normal values, a difference exists in the standard of proof required to reject domestic selling prices under section 20 of SIMA and subsection 269TAC(2)(a) of the Act.

In the Canadian system, there must be sufficient evidence and information for the President to have a reason to believe and to form an opinion that domestic prices are not substantially the same as they would be in a competitive market. Whereas under Australia's legislation, the Minister is required to be satisfied that a situation exists in the domestic market that renders sales in that market unsuitable for determining normal values. In Shagang's view then, information which may be sufficient within the Canadian Section 20 inquiry framework for the President to have reason to believe, would not automatically or necessarily have sufficient probative value to allow the Minister to be satisfied that a market situation exists under Australia's legislation.

This is further highlighted by the specific evidence from the CBSA's Section 20 inquiry which the Commission gives weight to in its market situation assessment. The Commission references key findings made by the CBSA that '… *classifies the iron and steel industry to be a "fundamental or pillar" industry and therefore the government maintains*

[8] Subsection 269TAC(4) of the Act.

[9] Subsection 269TAC(5D) of the Act.

a degree of control over the industry, through a minimum of 50% equity in the principal enterprises.' [10]

That specific finding by the CBSA is referenced to a 2007 report prepared on behalf of the American steel industry. That report focused broadly on the Chinese steel industry and in particular the GOC's 9th (1996-2000). 10th (2001-2005) and 11th (2006 – 2010) Five-Year Plans. The report itself explains that its '*study is limited to only a few Chinese producers for which public financial statements were available. Even for those companies included in the study, financial statements were not available for all fifteen years.*' [11]

Therefore, it is clear that the report is based upon information gathered from a period up to nearly 20 years prior to the current rod in coil investigation period, and the report's conclusions are general observations about the broader Chinese steel industry based on a limited and select few enterprises. Shagang contends that the conclusions of this report does not provide any reasonable understanding of the dynamics and characteristics of the Chinese domestic rod in coil market during the investigation period, which would allow the Minister to be satisfied that the interaction of supply and demand was no established under market principles.

In conclusion, we contend that the Commission's assessment and finding of a particular market situation in the Chinese domestic rod in coil market is fundamentally flawed as it is premised on information which does not meet the evidentiary threshold for being satisfied, is factually incorrect and inaccurate, outdated and too nondescript to be relied upon for assessing the rod in coil market during the investigation period.

Finding 2: The Commission erred by relying on its market situation assessment and findings to form the view that Shagang's steel billet costs did not reasonably reflect competitive market costs.

REP 301 Finding

Following its finding that domestic sales of rod in coil were unsuitable for determining normal values, the Commission then considered whether normal values could be established using third country exports or constructed selling prices. The Commission rejected third country exports as it considered that the influence of the GOC in the Chinese rod in coil market would also have affected those export prices. Instead the Commission chose to construct normal values pursuant to subsection 269TAC(2)(c) of the Act.

In constructing normal values, the Commission concluded that due to the GOC's influence of both rod in coil prices and the prices of production inputs in the Chinese domestic market as outlined in Appendix 1 to REP 301, the records of Shagang did not reasonably reflect competitive market costs associated with the production of like goods. Accordingly, it rejected all costs associated with the production of steel billet and replaced it with a surrogate external benchmark steel billet price.

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[10] http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1403/ad1403-i14-fd-eng.pdf, page 14.

[11] 2007-07 Money for Metal - Chinese Steel Industry, footnote 4, page 3

Normal values were then constructed using the external benchmark price for steel billet, plus the cost of converting the billet to rod in coil, plus selling, general and administrative expenses and an amount for profit.

Grounds for appeal

In deciding to reject Shagang's steel billet costs, the Commission appeared to rely solely on its market situation findings. In REP 301[12], the Commission stated:

> *As discussed in Appendix 1, the Commission considers that the significant influence of the GoC has distorted prices in the steel industry and RIC market in China. The Commission also considers that various plans, policies and taxation regimes have also distorted the prices of production inputs including, but not limited to, raw materials used to make steel in China, rendering them unsuitable for cost to make and sell (CTMS) calculations.*
>
> *The Commission has formed the view that the GoC influence in the iron and steel industry is most pronounced in the parts of that industry that might be described as upstream from RIC production. In particular, GoC driven market distortions have resulted in artificially low prices for the key raw materials, and this includes other inputs associated with the production of steel billets from which RIC is made.*
>
> *The Commission considers that direct and indirect influences of the GoC affect Chinese manufacturers' costs to produce steel billet and, because of that, Chinese manufacturers' records do not reasonably reflect competitive market costs. The Commission has found that steel billet costs comprise 80 to 85 per cent of RIC CTMS.*

In Appendix 1[13], the Commission further explained the relevance of the market situation assessment to the consideration of whether costs were reflective of competitive market costs:

> *Consideration of whether a situation exists in the relevant market is concerned with the operation of policies and regulations (whether overt or implied) and their potential impact on the suitability of domestic selling prices for normal value purposes. Accordingly, the question to be answered is whether the relevant policies operate in a manner which:*
>
> > *a) leads to a distortion of competitive market conditions in relation to the subject goods such that domestic sales are unsuitable for the purposes of determining normal value; and*
> >
> > *b) affects the conditions of commerce related to the production or manufacture of like goods such that the records of exporters cannot be relied upon to reasonably reflect competitive market costs associated with production in accordance with the provisions of subsection 43(2) of the Regulations.*

Shagang disagrees with the Commission's noticeable effort to link the market situation assessment with the determination of an exporter's costs. The issue of market situation is concerned entirely with the suitability of domestic sales and whether the 'situation' found to exist, does not permit a proper comparison with the corresponding export

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[12] Report 301, page 15.

[13] Ibid, page 87.

prices. In that circumstance, the exporter's domestic selling prices are able to be rejected for establishing normal values.

Following a market situation finding that leads to a rejection of domestic selling prices, the Commission is then obliged to follow the rules and requirements governing the construction of normal values pursuant to subsection 269TAC(2)(c) of the Act.

The market situation assessment is not as the Commission has outlined, used to determine whether an exporter's costs are suitable for construction of normal values. If it were the case, a market situation finding based on government influence in the domestic market would almost always lead to an exporter's costs being rejected. This in effect would allow the investigating authority to bypass the normal rules governing the dumping provisions and instead implicitly utilise alternative rules which are clearly designed to only be applied in exceptional circumstances.

Examples of these exceptional circumstances and the applicable non-standard rules are reflected in the second *Ad* Note to Article VI:1 of the GATT 1994 (GATT) and Section 15 of China's WTO Accession Protocols.

The interpretative second Note *Ad* from Article 6 of GATT states:

> *It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.*

Section 15 of China's Accession Protocols provides:

> *Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:*
>
> *(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:*
>
> *(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;*
>
> *(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.*
>
> …

> (d) *Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.*

The WTO Appellate Body has interpreted the second Ad Note to Article 6 of GATT as an '*exceptional method for the calculation of normal value*'. Of the relevance of China's Section 15 of its Accession Protocols, the WTO Panel and Appellate Body[14] agreed that:

> *Section 15 of China's Accession Protocol contains a similar acknowledgment of the difficulties in determining price comparability as the one contained in the second Ad Note to Article VI:1 of the GATT 1994, in respect of imports from China.*
>
> …
>
> *This provision allows investigating authorities to disregard domestic prices and costs of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country.*
>
> …
>
> *We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the Anti-Dumping Agreement and the GATT 1994…*

Therefore, it is clear that 'exceptional' and 'special' rules are able to be applied in determining normal values, in only very particular situations involving either non-market economies, or in the case of China, only where the importing Member has not yet recognised it as a market economy. In this latter circumstance, the special rules outlined in Section 15 of China's Accession Protocols is limited to a period of 15 years after the date of accession.

Given that Australia recognised China as a market economy in 2005, the exceptional rules that allow for domestic prices and costs to be disregarded and subsequent normal values to be determined on the basis of surrogate external prices and costs, clearly do not apply. Instead the normal rules outlined in the Articles of the Anti-Dumping Agreement are required to be followed.

On this very issue, it is worth noting Australia's third party response to a question by the Panel in the recent dispute *EU – Biodiesel*. The Panel[15] noted that Australia submitted that:

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[14] Appellate Body Report, *EC — Fasteners (China)*, paras. 285, 287–288.

[15] Panel report, WT/DS473/R, footnote 391, page 82.

> *… the "particular market situation[s]" referred to in Article 2.2 encompass distortions that could render a producer/exporter's recorded costs unreasonable as to the cost of production and sale, and thereby justify departing from those recorded costs. However, in our view, Article 2.2 of the Anti-Dumping Agreement only states that a "particular market situation" may necessitate the construction of normal value. It does not address how that construction should be undertaken, which is instead set out in detail in the subparagraphs of Article 2.2.*

The Panel[16] went on to explain:

> *Finally, we note the explicit provisions allowing investigating authorities to disregard domestic prices and costs when determining the normal value that are provided for under the second Ad Note to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof), and in the protocols of accession of certain Members. These provisions lend further support to our understanding of Article 2.2.1.1. At the very least, these provisions suggest to us that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin.*

Therefore, Shagang contends that the Commission erred by relying on its market situation assessment to reject consider whether the requirements of Regulation 43 and Article 2.2.1.1 of the ADA were met, and ultimately reject its costs as being unreasonable and substitute with a surrogate external benchmark. In Shagang's view, the Commission's approach to the determination of normal values in this case is akin to the exceptional methodologies available only to non-market economies.

Finding 3: The Commission erred in its interpretation of Regulation 43 by focusing on the costs themselves, rather than the records of Shagang, in rejecting its steel billet production costs.

Article 2.2.1.1 of the ADA is the relevant provision that is enacted into Australia' legislation by Regulation 43 of the IO Regulation. The rules of Article 2.2.1.1 of the ADA require that the costs to be normally used in construction of 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.

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*[17] which found:

> *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*

[16] Ibid., para 7.241, page 83.

[17] Panel Report, US – Softwood lumber from Canada, WT/DS264/R, para 7.237, p 131.

> *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]

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 competitive market costs associated with the production or manufacture of like goods.

It is evident that a comparison of the relevant text reveals the inclusion of 'competitive market' in the second condition within the Regulation. The Commission's interpretation of the requirements of Regulation 43 appears to place a great deal of emphasis and importance on these two additional words. In effect it appears that the Commission holds the view that the inclusion of 'competitive market' transfers the assessment of reasonableness from the exporter's records to the actual costs themselves.

Shagang strongly disagrees. In its submission of 7 March 2016, Shagang highlighted the views of key WTO members in the dispute in *EU – Biodisel*. In that matter, Argentina claimed that '*the EU erred by determining that the costs of the main raw material in the production of biodiesel, soybean oil and soybeans, were not reasonably reflected in the records kept by the Argentine producers under investigation because those costs were artificially lower than international prices due to the distortion created by the Argentine export tax system.*'

Argentina submitted that '*Article 2.2.1.1 of the Anti-Dumping Agreement requires an investigating authority to calculate a producer/exporter's costs of production on the basis of the records kept by the producer/exporter under investigation, provided that such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country, and reasonably reflect the costs associated with the production and sale of the product under consideration.*' [emphasis added]

In response, the EU argued that '*investigating authorities are only required to use the "costs" reflected in such records under Article 2.2.1.1 where they are "reasonable" for the production of the goods in question. Thus, where such costs are not "reasonable", Article 2.2.1.1 does not preclude investigating authorities from determining that the producer's records do not reasonably reflect those costs, regardless of the fact that they may record the costs that were actually incurred by the producer under investigation.*'

Therefore, the core of the dispute centred around whether Articles 2.2.1.1 of the ADA required investigating authorities to examine whether the records reasonably reflect the costs associated with production or whether the costs themselves were reasonable.

The Panel[18] has since issued its findings and summarised Australia's third party position on this issue:

> *Australia submits that an investigating authority should be permitted to consider whether the costs reflected in the records of the producer/exporter are reasonable, and,*

[18] Panel report, WT/DS473/R, para 7.202, page 74.

> *where they are not, to adjust or replace them in an appropriate manner. Thus, Article 2.2.1.1 permits investigating authorities to look beyond a producer/exporter's actual records and consider whether the costs reflected therein are reasonably related to the costs of producing and selling the product. For Australia, the reasonableness of costs of inputs or raw materials would be relevant to this analysis.*
>
> *In Australia's view, to disallow an authority from considering elements that were beyond the direct control of a producer/exporter would render inutile the provision in Article 2.2 of the Anti-Dumping Agreement for cost construction in circumstances of a particular market situation. Further, to limit an investigating authority's scope of analysis to factors that are endogenous to the foreign producers/exporters implies limitations in Article 2.2 that do not exist, and, moreover, contradicts the ordinary meaning of the term "particular market situation".*

After carefully analysing and interpreting the ordinary meaning of the terms referred to in Article 2.2.1.1, the Panel did not find support for the interpretation by the EU and Australia, that it is the costs themselves that must be reasonable[19]:

> *On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in – within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred*

Importantly, the Panel[20] also highlighted some circumstances where the investigating authority is able to examine the reliability and accuracy of the costs recorded in the records:

> *However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1*

[19] Ibid., para 7.242, page 83.

[20] Ibid., footnote 400, page 83.

> *does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.*

Applying this interpretation and standard to Shagang's circumstances in the rod in coil investigation, it is clear that the Commission's finding focused exclusively on the actual costs themselves, and provided no reason or evidence to consider that the actual costs relevant to the production of rod in coil, were not reasonably reflected in its records.

This confirms that the Commission failed to properly comply with the requirements of Regulation 43 of the IO Regulation and Article 2.2.1.1 of the ADA.

Finding 4: The Commission failed to undertake a proper assessment of whether Shagang's records reasonably reflected competitive market costs.

Notwithstanding the view that the Commission failed to properly examine whether Shagang's 'records', and not its actual costs, reasonably reflected costs of production, Shagang also submits that the Commission failed to properly examine its relevant costs and establish through positive evidence that its actual costs were distorted or not reflecting competitive market costs.

Referring again to the dispute in *EU – Biodiesel*, Shagang considers the views of third party Members 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. In particular, the views and interpretations made in third party submissions by Australia and the United States are relevant. Both of which were generally supportive of the EU in that case.

In its third party submission to DS473[21], Australia submitted that:

> 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 – Rod in coil (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 rod in coil, 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,*

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

> *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 obligations on the Commission and the Minister pursuant to Regulations 43, demands an analysis and consideration of the reasonableness of costs of inputs or raw materials in the exporter's records. Shagang agrees that any finding that results in an exporter's costs being replaced or adjusted, can only be made after careful consideration and assessment of available evidence and relevant information. This aligns with the requirement that the exporter's records be normally relied upon for constructing normal values. Hence, where the investigating authority is considering departing from the normal method, it must only do so after careful consideration and assessment.

Shagang also supports Australia's view that each and every cost element that reasonably reflects the costs associated with production, is required to be relied upon for the purposes of determining the cost of production. It is not appropriate or sufficient for the investigating authority to only examine one or two cost items and then reject all relevant production costs simply because one of the examined costs is found to not be reasonable. Equally, a proper comparative analysis of costs is necessary to assist in either adjusting or replacing those particular cost elements found to not reasonably relate to the cost associated with production and sale.

In its third party submission to DS473[22], 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 - Rod in coil*[23] 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:

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[22] https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.3rd.Pty.Sub.Fin.Public.pdf

[23] Panel Report – Egypt – Definitive anti-dumping measures on steel rod in coil from Turkey, WT/DS211/R, para 7.393, p 97.

> 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 element is found to not reasonably reflect the cost associated with production or sale. Conversely, where there is insufficient evidence to conclude that a particular cost element is unreasonable, the investigating authority is by default required to base its determination of the costs of production on that particular cost as reflect in the records of the exporter.

In Shagang's view then, in order to ensure that only those cost elements 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. It is simply not open to the investigating authority to circumvent or derogate from this requirement by examining a single cost element and then making a broad finding in respect of all costs. Likewise, the investigating authority is not permitted to reject in its entirety, all of an exporter's production costs based on broad and general characterisations about the dynamics in the domestic market. To do so, runs the risk of rejecting a cost element that undoubtedly reflects a reasonable competitive market cost without any proper examination or assessment.

Turning to the Commission's approach in REP 301, it is evident that the Commission did not meet or comply with Australia's own submitted view and interpretation of the required analysis to be conducted by the investigating authority. That is, the Commission confirmed that it did not perform any such analysis or assessment of the reasonableness of any cost elements incurred by Shagang in the production of steel reinforcing bars.

The Commission identified in REP 301 the numerous direct input materials used in the production of rod in coil including those listed below:

- Iron ore;
- Coking coal and/or coke;
- Coal;
- Various alloys such as chromium, vanadium, magnesium, boron, etc;
- Pig iron;
- Alloy;
- Natural gas;
- Electricity
- Water
- Oxygen;
- Nitrogen;
- Steam;
- Lime;
- Dolomite; and
- Auxiliary materials.

The Commission then explains that '*neither exporters' CTMS or raw material purchases information is provided in sufficient detail for the Commission to be able to conduct a comprehensive analysis of all these inputs*.'

This confirms that the Commission itself identified that it was unable to undertake a comprehensive analysis of the relevant costs. Yet notwithstanding the lack of proper examination and analysis, it was able to draw a conclusion that each of the identified cost elements were distorted without possession of relevant evidence.

It is also disingenuous for the Commission to associate the difficulties it encountered in performing the necessary comprehensive analysis with the quality of information submitted by exporters. The Commission's exporter questionnaire requested detailed transactional information only for those raw material costs which represented more than 10% of the total cost of production of like goods, which Shagang complied with. Therefore, the Commission did not request relevant costing information in respect of minor inputs such as alloys, lime, utilities and other auxiliary materials which it now considers was necessary to be able to properly assess the reasonableness of such costs.

Further, the Commission explained that it was unable to properly assess the reasonableness of certain costs because:

> *[s]ome of these raw materials are being sourced in various types and grades. For example, coal expenses are generally expressed as one figure for each product model in the CTMS spreadsheet but may actually contain a mixture of:*
>
> - *gas coal;*
> - *gas-fat coal;*
> - *fat coal;*
> - *high-sulphur fat coal;*
> - *lean coal;*
> - *coking coal;*
> - *high-sulphur coking coal;*
> - *anthracite;*
> - *North Korean coal;*
> - *soft coal and;*
> - *meagre lean coal.*

The Commission adds that '*it is not possible to ascertain whether each of these different sub-types or grades of coal were sourced at competitive market prices. Further, the price of 'iron ore' itself is subject to significant adjustments based on actual iron (Fe) content.*'

Again, Shagang considers that the Commission's explanation for not assessing the reasonableness of such costs is unconvincing. Firstly, as reported in Shagang's questionnaire response, its purchases of raw material inputs which account for more than 10% of the total cost of production of rod in coil, being iron ore, coking coal and coke.

Second, in the concurrent subsidy investigation into rod in coil exported from China, the Commission has requested that Shagang and other Chinese exporters identify their purchases of major raw material inputs in sufficient detail to allow for proper benchmarks to be determined for the various types and grades. This confirms that in the dumping investigation, the Commission did not request from Shagang and other Chinese exporters the necessary level of detail to properly perform the reasonableness test required by Regulation 43 of the IT Regulation.

Finally, the Commission noted in REP 301 '*that some raw materials are sourced in the Chinese domestic market in semi-finished or further processed form in the Chinese domestic market. For example, the Commission found that some domestically sourced iron ore in the exporters' records is actually further processed iron pellets. It is neither practical nor possible for the Commission to compare further refined pellet prices with iron ore prices based on the information provided.*'

Shagang is particularly disappointed by this aspect of the Commission's reasoning, given the numerous submissions by Shagang presented to the Commission highlighting that iron ore is the single largest cost input into the production of steel billet and rod in coil, and its iron ore material costs undoubtedly reflect reasonable competitive market costs given that they are all imported. Therefore, it is completely irrelevant whether iron ore prices reflected refined pellets or other grades of iron ore. It would be illogical to compare Shagang's CFR import price of iron ore from Australia against an international benchmark price which itself reflects CFR export prices from Australia.

Further, on numerous occasions in PAD 301, SEF 301 and REP 301, the Commission has highlighted that '*steel billet costs comprise 80 to 85 per cent of rod in coil CTMS*' and that the GOC influences affect the costs to produce steel billet. Yet at no point in any of its published investigation reports does the Commission confirm or highlight that iron ore is clearly the main raw material used to produce steel billet and as such the largest cost component of the cost of production. In Shagang's case, iron ore material costs represent approximately 40% of the total cost of production.

Shagang has on numerous occasions throughout the investigation brought to the Commission's attention that Shagang sources [redacted]% of its iron ore requirements from imports external to China, with the vast majority of those imports being sourced from [redacted] and [redacted]. Further, all of its iron ore purchases are based on international spot prices that are available to any steel producer around the world. Therefore, there can be no suggestion or finding that Shagang's iron ore costs do not reflect competitive market costs.

Shagang's circumstances with regards to its iron ore input costs are supported by the Commission's Dumping and Subsidy Manual[24]:

> *The purchasing behaviour of the exporter may be examined to determine whether the input has been supplied at a competitive market price. For example, if the exporter buys "on-the-spot" from an external unrelated supplier in another country that will mean that it is a normal competitive market price.*

The above example captured in the Commission's Dumping and Subsidy Manual is precisely the circumstances of Shagang's iron ore purchases, and clearly not a situation where the costs can be determined to not reasonably reflect a competitive market cost.

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 purchases by Chinese exporters of rod in coil as conferring a benefit within its application for the imposition of countervailing duties[25].

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[24] Dumping and Subsidy Manual, page 44.

[25] EPR 322, Record No. 003.

As further support for its position, Shagang demonstrated that its iron ore costs were reasonable and reflected competitive market prices by providing the Commission with a comparison of its iron ore purchase prices against freely available published iron ore spot prices for the corresponding period. 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 CFR import prices were greater than published monthly average CFR Qingdao prices[26] 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.

[CONFIDENTIAL CHART DELETED]

The source of the benchmark prices comes from the highly reputable and often referenced Metal Bulletin Iron Ore Index which provides prices for numerous types and grades of iron ore.

Shagang therefore submits that the evidence on the record clearly shows that all of its iron ore input costs reflect competitive market costs. In these circumstances and consistent with Australia's position and WTO jurisprudence, the Commission is obliged to rely on the iron costs reflected in Shagang's records. Given that iron ore is the single largest cost item in the production of rod in coil, it is clear that the Commission has failed to comply with the requirements of Regulation 43 by failing to properly assess the reasonableness of these costs and instead simply rejecting them without any evidence or reasonable basis.

Lastly, it is noted that in relying on its market situation assessment for the purposes of rejecting costs pursuant to Regulation 43 of the IO Regulation, the Commission's analysis contains no information or evidence in respect of other production costs such as electricity, water, worker's salaries and other manufacturing overheads. There is no mention whatsoever in the market situation assessment at Appendix 1 to REP 301, of any relevant GOC interventions or influences which leads to a distortion of electricity prices, worker's salaries, cost of spare parts, etc. Yet all of these costs have been rejected and replaced without any evidence demonstrating that they do not reflect competitive market costs or that the corresponding costs were not reasonably reflected in Shagang's records. In those circumstances, the Commission has plainly failed to establish the necessary finding on the basis of positive evidence following a careful consideration and assessment.

As previously highlighted, the Commission's findings and its approach in this rod in coil investigation appears to be consistent with the exceptional rules governing the determination of normal value from non-market economies and economies in transition pursuant to subsections 269TAC(4) and 269TAC(5D) respectively.

Finding 5: The Parliamentary Secretary erred by making adjustment to constructed normal values for value-added taxes that did not affect price comparability

As stated in the Report 301, constructed selling prices were adjusted upward by the amount of non-refundable VAT 'incurred' on export sales to Australia during the investigation period. The Commission explains that '*VAT adjustments are recognised according to subsection*

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

269TAC(9). As the VAT liability is incurred on export sales, the Commission treats this liability as having influenced the export price due to the high absorbed cost of the goods subject to VAT.'

Shagang submits that the Commission has erred in both its interpretation and application of subsection 269TAC(9) of the Act.

Subsection 269TAC(9) of the Act requires that:

> *Where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.*

Therefore, the sole purpose of that provision is to ensure that adjustments are made for factors that impact on the ability to properly compare the constructed domestic selling price and the corresponding export selling prices. This is consistent with the Commission's own interpretation in its Dumping and Subsidy Manual which clearly states that '*[a]djustments will be made if there is evidence that a particular difference affects price comparability.*

Conversely, adjustments will not be made if there is no evidence that a particular difference affects price comparability. This is reinforced in the Dumping and Subsidy Manual which highlights that '*[a]djustments may be based upon actual costs incurred, or selling prices achieved, for the sales transactions under examination. Where based on costs it is subject to the principle that adjustments will be made only where evidence indicates that price comparability has been affected.*' [emphasis added]

The totality of the Commission's reasoning in Report 301 is set out in the following two sentences:

> *VAT adjustments are recognised according to subsection 269TAC(9). As the VAT liability is incurred on export sales, the Commission treats this liability as having influenced the export price due to the high absorbed cost of the goods subject to VAT.*

Firstly, whether taxes of any kind are legitimately recognised as an adjustment relevant to ensuring proper comparison is not in dispute. It is accepted that differences in taxes are a legitimate ground for either an upward or downward adjustment. However, the critical consideration as to whether an adjustment of any kind is warranted, is whether that particular factor has affecting the prices in different ways as to result in prices no longer being comparable. This is further supported by the Commission in its recent interpretation and consideration of an adjustment claim for differences in taxes relevant to certain hollow structural sections exported from Thailand[27].

In that case, the exporter claimed an adjustment was warranted for taxes incurred and relevant only to domestic products which results in '*[p]roducts sold in the Thai domestic market are priced higher in order to recover the duty-related costs and Thai domestic prices are higher than Australian prices for the matching group of products.*' In response, the applicant in that case and this rod in coil investigation, argued the adjustment claim ought to be rejected as:

- domestic prices cannot be used to support a claim for an adjustment based on alleged cost differences as such a claim ignores the factors such as supply, demand,

[27] EPR 254, Record no. 054, Final Report, pages 26-27.

economic conditions, profit and market power in addition to cost, that influence the formulation of prices in particular markets, and

- the exporter had been unable to adequately demonstrate that a price differential was evident between domestic sales of HSS produced from imported and locally source HRC.

In considering the various submitted views by interested parties and the requirements of the Act, the Commission explained that the framework for determining whether such adjustments are warranted:

> *Subsection 269 TAC(8)(c) of the Act provides that such an adjustment to normal value is only allowable where it established that normal value and export price of like goods are modified in different ways by taxes or the terms or circumstances of the sales to which they relate. That is, an adjustment should only be allowed when price comparability of domestic and export sales have been affected.*
>
> *Therefore, in order to decide whether an adjustment is warranted, the Commission is required to establish whether the duties paid for the imported HRC that is used in manufacturing of domestically sold HSS has modified Saha Thai's pricing of like goods sold on the domestic market in contrast to the goods exported.*

The Commission reiterated and confirmed its interpretation and position in its response to the Anti-Dumping Review Panel's review of the decision relating to hollow structural sections exported from the Kingdom of Thailand[28]. In its consideration of the grounds for review, the ADRP stated that '*[i]f a difference does not have a demonstrated effect, no allowance should be made in respect of it.*'

Given then that the legal standard for making an adjustment is that the relevant factor has modified or affected prices in such a way as to impact on price comparability, it is apparent that the Commission has not applied this same principle in Shagang's circumstances. The only justification presented by the Commission is that '[a]*s the VAT liability is incurred on export sales, the Commission treats this liability as having influenced the export price due to the high absorbed cost of the goods subject to VAT.*

It is evident from this statement that the Commission has retreated from its interpretation expressed to the ADRP and set out in its Dumping and Subsidy Manual. Instead of requiring to establish whether the taxes paid on the exported goods have actually modified the export prices, it appears that the Commission now considers that is sufficient to simply establish that the taxes have been incurred, irrespective of whether evidence actually demonstrates or supports a view that such taxes have modified the export prices.

Shagang contends that the Commission's interpretation in this case is clearly not correct or preferable, or consistent with its own stated policy or the ADRP's interpretation.

Further, Shagang reiterates is view that its export prices were not modified by the VAT incurred. As explained to the Commission during the verification visit and accurately reflected in the Shagang's verification report prepared by the Commission:

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[28] http://www.adreviewpanel.gov.au/CurrentReviews/Documents/151105%20-%20Response%20to%20ADRP%20-%20Public%20File.pdf

Shagang stated that the domestic sales team [redacted].

[redacted].

There are a number of relevant points from the above paragraphs which have been conveniently overlooked by the Commission in its decision to make adjustment for VAT incurred. Firstly, the [redacted].

Second, the [redacted].

Third, the export customers [redacted].

Therefore, it is inappropriate and unreasonable for the Commission to simply deem that export prices are affected by the VAT expenses incurred. Shagang agrees with the applicant's view that such a position '*ignores the factors such as supply, demand, economic conditions, profit and market power in addition to cost, that influence the formulation of prices in particular markets.*'

To highlight by example, where equivalent contemporary competitive import prices into the Australian market are at $500 per metric tonne, and Shagang's [redacted] price exclusive of VAT is $480 per metric tonne, it is unreasonable to conclude without evidence that Shagang offered a 17% VAT inclusive export price of $550 per metric tonne. This situation would simply not have occurred as the Australian importer would not have accepted the offer from Shagang as it would not have been competitive in the Australian market against other importers with substantially lower cost bases. This is particularly so in the case of a highly commoditised product such a rod in coil where price is the key determinant of purchase.

Finally, the contrasting decline in Shagang's export prices and the increase in the non-refundable VAT over the investigation period is further evidence that the Commission's conclusion that the VAT expense incurred by Shagang has modified the export prices. As shown in the table below taken from the Commission's dumping calculations, in the March quarter 2015, Shagang's weighted average export price fell by [redacted]% or US$[redacted] per metric tonne from the previous quarter, at a time when the non-refundable VAT rate increase from 8% to 17% over the same period or approximately US$[redacted] per metric tonne.

[CONFIDENTIAL TABLE DELETED]

Therefore, Shagang agrees with the positions outlined by the applicant and the Commission in the ADRP's review of *Thailand – Hollow Structural Sections* in respect of the required elements to be determined before an adjustment can be made. Specifically, a mere cost difference between domestic and export goods is not sufficient to justify adjustment without a demonstrable affect or impact on domestic and/or export sales such that prices cannot be properly compared. For that reason, Shagang contends that the Commission is obliged to establish whether the amount of non-refundable VAT paid on exports has impacted the relevant export sales in such a way as to affect comparability with the corresponding sales.

However, it is noted again that the Commission's sole basis for making the adjustment in REP 301 is that export sales have a higher tax burden, without any consideration or assessment of whether those taxes have flowed through to and affected export selling prices.

In Shagang's view then, the Commission has failed to comply with the requirements of the Act and its own stated policy and practice, by making adjustment for taxes which were not demonstrated to have impacted on export selling prices and as such, affected price comparability.

As shown above, Shagang considers that the Commission had sufficient evidence to support a finding that export prices were not modified by the amount of non-refundable VAT incurred by Shagang.

Finding 6: The Commission erred in determining material injury on the basis of a 'but-for' methodology which as a result incorrectly found that the applicant suffered material injury attributable to the subject goods.

REP 301 concludes that

- sales of rod in coil exported to Australia from China at dumped prices undercut OneSteel's prices;
- the price of RIC exported from China would not have undercut OneSteel's prices if that RIC was not dumped;
- throughout the investigation period, dumping duty exclusive prices of RIC imports from China either undercut, or were equivalent to, the lowest priced imports from other countries;
- but for sales of RIC exported from China at dumped prices, the weighted average delivered prices from other exporting countries would not have dropped as much;
- undercutting of OneSteel's prices by RIC exported from China at dumped prices prevented OneSteel from obtaining a greater price for its RIC if not for this price undercutting;
- OneSteel would have been able to increase prices in a market not affected by RIC exported from China at dumped prices. Such increases would have ultimately reflected positively on OneSteel's profits and profitability over the investigation period; and
- the link between RIC exported from China at dumped prices and injury suffered by OneSteel in the form of price, profit and volume effects has

had a negative impact on OneSteel's decisions in respect of other economic factors;

- exports of RIC from China were dumped and have caused the Australian industry to suffer material injury in the form of:
  - price suppression;
  - price depression;
  - less than achievable profits and profitability;
  - reduced employment; and
  - reduced value of assets employed in the production of RIC.

At the outset, Shagang wishes to express its concerns with the lack of detailed analysis and proper reasoning contained in REP 301 to support the Commission's preliminary findings. Shagang considers that the material injury assessment in REP 301 is not based on facts or positive evidence. Instead the findings stem from conjecture and baseless assumptions, and as such, falls well short of the standard expected from an objective investigating authority.

'Actual injury' indicators

Shagang refers to 'actual injury' to describe the tangible levels and observed trends in the applicant's injury indicators. By contrast, Shagang refers to 'hypothetical injury' to describe the notional levels and unseen trends upon which the Commission's causation findings are based.

Shagang notes the following actual injury found to have occurred over the injury analysis period and the investigation period.

<u>Price depression</u>

As noted in SEF 301, "*[p]rice depression occurs when a company, for some reason, lowers its prices.*" Shagang submits that the Commission's assessment of price depression is incredibly restricted and distorted in its analysis. Firstly, it is noted that the injury analysis period defined by the Commission commences from 1 July 2011, yet the prices shown in Graph 4 commence from quarter 1 of 2012. The importance of this discrepancy is evident when the movement in the applicant's selling prices are compared between those in Graph 4 of REP 301 and the corresponding Figure 4 of Final Report 240 (REP 240).

Report 240 outlined the Commission's recommendations and accepted findings in respect of rod in coil exports from Indonesia, Taiwan and Turkey. The investigation period and injury analysis period for Investigation No. 240 was 1 January 2013 to 31 December 2013 and 1 January 2010 to 31 December 2013, respectively.

As highlighted below in Figure 4 from REP 240 and concluded by the Commission in that report, "*[i]t is evident from figure 4 that OneSteel has steadily reduced its selling price since 2011, which is consistent with the claims made in its application, and indicative of price depression.*"

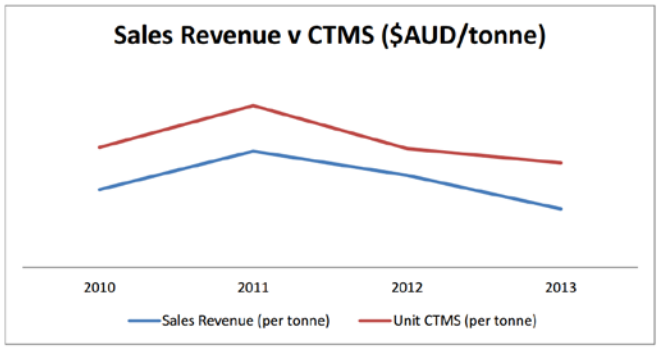


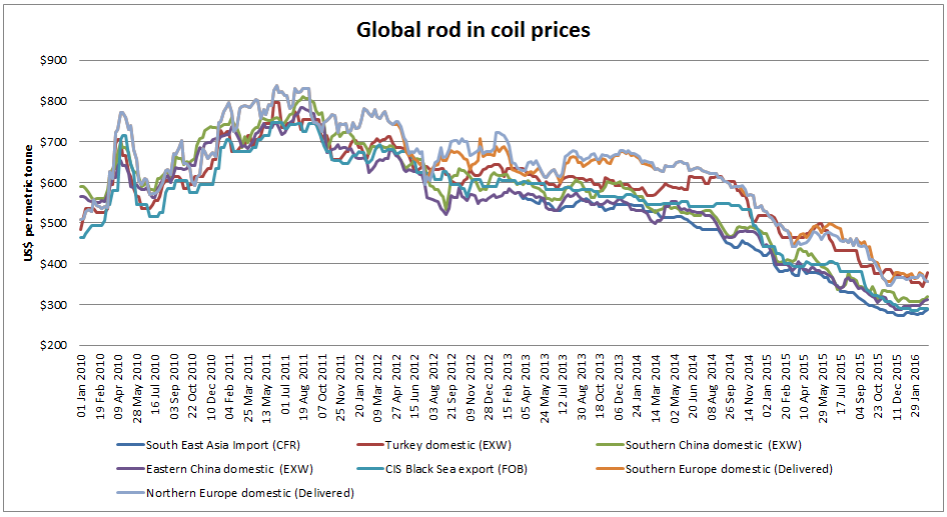
Figure 4 – Sales revenue per tonne vs CTMS per tonne

Therefore, it is misleading for the Commission to conclude in SEF 301 that "*since the start of the Q1 2014 the market has shown indications of significant price pressure at several times.*" As found by the Commission in REP 240, the applicant's selling prices have been in decline since 2011.

To properly assess and explain the trends in the applicant's selling prices, the Commission ought to have revised its analsysi to properly capture prices from the beginning of 2011 and to present the movement on an annual basis to remove any bias in the data due to short-term fluctuations and possible seasonality.

On that revised pricing graph, Shagang expects that the Commission would have found that the applicant's selling prices have been in decline since 2011 and continued on that trend into the 2014-15 investigation period for this investigation. This revised chart is also expected to discredit the Commission's finding that "*[t]he most recent price fall trend aligns with the commencement of Chinese imports from Q4 2014 onwards*" as the Commission has previously determined that the applicant's prices have experienced significant depression since 2011.

Further, it is also important to distinguish the actual and observed prices trends experienced by the applicant in the Australian market and the observed trends in global rod in coil prices. To highlight by example, the chart below shows the movement in rod in coil prices across numerous domestic and export markets since 2010. It is worth noting that the observed trend in rod in coil prices in these markets are very similar to those shown in Figure 4 of REP 240 and expected to show in the revised Graph 3 of SEF 301 as requested earlier.



It is again misleading to even suggest that the entry of Chinese imports of rod in coil into the Australian market in quarter 4 of 2014, are in some way responsible for declining prices, when the applicant's prices have been, consistent with trends observed in various other markets, in decline since 2011.

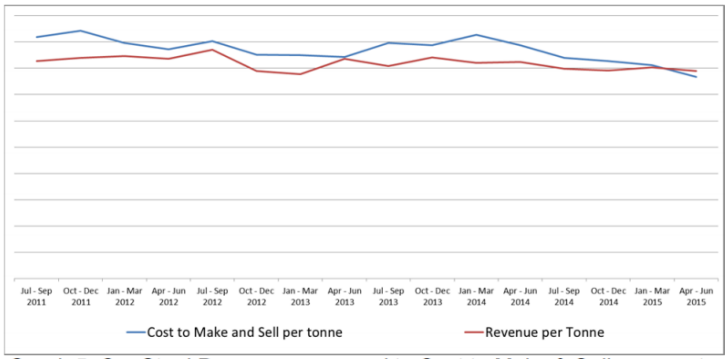
It is therefore incumbent on the Commission to examine and explain any differences and similarities between the actual trend in the applicant's selling prices and those observed trends for rod in coil prices evident in other markets around the world. This is critical to understanding whether the applicant's prices simply reflect the normal ebb and flow of rod in coil, "*[g]iven that rod in coils is a commodity product freely traded on the world market.*"[29]

Price suppression

It is noted that SEF 301 contains no graphical representation and accompanying analysis of the applicant's actual and observed comparison of prices and costs to explain whether price suppression is evident. It is however noted that PAD 301 did contain such a graph. Graph 5 of PAD 301 shown below, shows that since July 2011, applicant's average unit net selling prices have consistently been below the corresponding average unit cost to make and sell through to March quarter 2015.

It would appear that in March quarter 2015, the applicant's prices were at least on par with costs, before exceeding costs in June quarter 2015. It is also important to note that import volumes of rod in coil from China prior to the March quarter 2015, were negligible as they had only just entered the Australian market.

Therefore, it is clear that any observed price suppression during the investigation period by the applicant, occurred prior to the subject imports entering the Australian market. During the second half of the investigation period when the subject imports had established themselves in the Australian market, the applicant experienced no further price suppression.



Graph 5: OneSteel Revenue compared to Cost to Make & Sell per quarter

Volume effects

It is noted that the Commission has concluded that there is not sufficient evidence to support the applicant's claim that it has suffered injury in the form of lost sales volumes or reduced market share. Shagang supports this finding and considers the following facts strengthen the Commission's view:

1. Shagang notes that the other major importer of rod in coils from China, Vicmesh Pty Ltd (Vicmesh), does not appear to have previously sourced the subject goods locally.

[29] EPR 301, Record no. 003, OneSteel Manufacturing Pty Ltd Application, page 69.

Instead, as noted in the Vicmesh importer visit report, "*Vicmesh has traditionally imported a significant portion of its requirements from New Zealand but subsequent to changes in ownership of Pacific Steel during first half 2014 (now Bluescope) and facing abrupt cut off in supply, began sourcing from alternative suppliers such as Taiwan, Indonesia and China etc*". Therefore, it is simply an assertion for the applicant to suggest that its volumes would likely have increased if not for the subject imports from China.

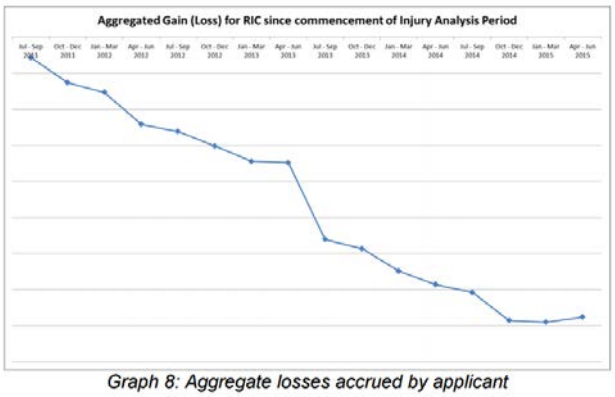
2. It is also noted that Stemcor Australia's sales of rod in coil during the investigation period, are to the same processing customers as those made by Stemcor Australia during the investigation period of REP 240. Therefore, it is clear that import substitution has occurred and that in a market without the subject imports, Stemcor Australia would have supplied rod in coil to those customers from other import sources.

These points are supported by Graph 2 in PAD 301 which confirms that import substitution has occurred.

Profits

As stated by the Commission in REP 301, the applicant's *"Steel division has not reported a positive sales margin or EBIT for the segment"* over the entire injury period. Given that subject imports had not entered the Australian market prior to the December quarter of 2014, all losses incurred by the applicant during these prior years cannot be attributed to the subject imports.

It is noted that during the investigation period, the applicant's earnings and sales margin improved when compared to the performance in the previous two financial years. This is further supported by Graph 8 of PAD 301 shown below, which depicts the aggregated losses incurred by the applicant since the start of the injury analysis period in this investigation. It shows that the aggregated losses have continued to grow until the December quarter of 2014, when those losses stabilised and for the first time over the five-year analysis period, the applicant's aggregated losses showed a reduction in the June quarter of 2015.



Graph 8: Aggregate losses accrued by applicant

Finally, Shagang wishes to highlight that the applicant's aggregated losses are even greater than those show in Graph 8 of SEF 301. When including the applicant's losses during 2010 and the first half of 2011, which as shown in the chart below from REP 240 were the periods when the applicant's losses were at their greatest, the recent improvement in the applicant's profit performance is even further magnified. Again, the primary issue that the Commission should have examined and explained is why the applicant's sales of rod in coil have historically and consistently been unprofitable.

Separation and isolation of other known factors

Non-subject imports

Shagang is particularly disappointed with the Commission's consideration of other known factors in ensuring that the subject imports are separated and distinguished from the injurious effects of the other known factors. Shagang submits that the Commission's analysis is inadequate for isolating the impact from non-dumped sources and properly identifying the price effects attributable to the subject imports.

Subsection 269TAE(2A) of the Act requires that the Minister must consider whether any injury *'is being caused or threatened by a factor other than the exportation of those goods such as:*

(a) the volume and prices of imported like goods that are not dumped;'

This important element of causation is reflected in the *Ministerial Direction on Material Injury*[30] which makes clear that injury caused by other factors must not be attributed to dumping or subsidisation. The obligation to ensure non-attribution is found in Article 3.5 of the ADA and has been interpreted by the Appellate Body in US – Hot rolled steel[31], 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 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[32]:

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[30] Australian Customs Dumping Notice No.2012/24

[31] Appellate Body Report, US – Anti-Dumping Measures on Hot-Rolled Steel products from Japan, WT/DS184/AB/R, para 223; pages 74-75.

32 Ibid., para 228, page 76.

> *[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.*

Therefore, it is abundantly clear that before concluding that the subject imports have caused injury found to be material, the Commission is required to isolate the effects of other known factors. For this reason, Shagang contends that the Commission's material injury finding is defective as there has been consideration of the effects of non-dumped imports, let alone any attempt to isolate those effects.

In fact, the Commission's brief discussion of non-dumped imports in SEF 301 is both misleading and a distortion of the facts accepted by the Parliamentary Secretary in REP 240. The Commission highlights that prior to the commencement of the subject imports in December quarter 2014, "*imports were primarily sourced from Indonesia, Taiwan and Turkey (Investigation 240 refers) and findings were made that these imports included dumped goods. As such, the Commission considers that there is a limited period when the Australian market was not affected by dumping.*"

Firstly, non-dumped imports from New Zealand were the largest source of imports across the injury analysis period of REP 240. During the 2013 investigation period, Indonesian imports became the largest source of imports, followed next by non-dumped imports from New Zealand and then non-dumped and non-injurious imports from Turkey. Of the Indonesian imports during that period, approximately 85% were supplied by PT Ispat and found to be non-dumped. The remaining volume of Indonesian imports found to be dumped during the investigation period, accounted for approximately 1.1% of the total Australian market. Likewise, dumped imports from Taiwan accounted for 1% of the Australian market.

Therefore, during the period prior to the commencement of the subject imports, the Australian market was supplied by the following sources and their respective shares:

1. OneSteel Manufacturing Pty Ltd accounting for 82.7% of the market;
2. non-dumped imports by PT Ispat from Indonesia accounting for 6.6% of the market;
3. non-dumped imports from New Zealand accounting for 6.2% of the market;
4. non-dumped imports from Turkey accounting for 2.3% of the market;
5. dumped imports by PT. Gunung Rajapaksi from Indonesia accounting for 1.1% of the market;
6. dumped imports by Quintain Steel Co Ltd from Taiwan accounting for 1% of the market; and
7. non-dumped imports from all other countries accounting for 0.1% of the market.

Therefore, it is incorrect for the Commission to consider *"that there is a limited period when the Australian market was not affected by dumping"* when imports from only two exporters accounting for only 2.1% of the entire Australian market were found to be dumped and causing material injury during 2013. The reported import volumes also show that non-

dumped imports accounted for 88% of all imports during 2013 and were found to have undercut the applicant's prices by margins ranging from 4% to 10%.

For these reasons, Shagang considers that the Commission has not properly isolated the effects of non-dumped imports.

Causal link between subject imports and injury

The entire basis of the Commission's finding that the subject imports caused material injury to the applicant centres on the assumption that in the absence of the subject imports, prices of non-subject imports would have been higher and as such, the applicant would have been able to achieve higher prices.

In summary then, it is apparent to Shagang that the Commission's injury findings are founded upon the mere possibility that the applicant's prices and profits may have attained notional and undefined levels. For the reasons outlined below, Shagang contends that this 'but-for' injury analysis employed by the Commission in this case is fundamentally flawed and insufficiently rigorous to comply with the requirements of section 269TAE of the *Customs Act 1901* (the Act) and Article 3 of the Anti-Dumping Agreement (ADA).

Section 269TG of the Act sets out the matters upon which the Minister must be satisfied in order to exercise his or her power to impose dumping duties. The conditions are that the amount of the export price of the goods is less than the amount of the normal value and, because of that, material injury to an Australian industry producing like goods is caused or threatened.

Subsection 269TAE(1) of the Act 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 being caused by dumped exports. Determinations under subsection 269TAE(1) of the Act 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 not be attributed to the dumped 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*". [emphasis added]

This provision is reflected in Article 3.1 of the WTO Anti-Dumping Agreement (ADA) which states:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. [emphasis added]

Therefore it is without doubt that to reach the necessary level of satisfaction required by ss.269TG(2), the Minister's determination is required to be based on positive evidence and an objective examination.

Within that framework, Shagang notes the Commission's view in SEF 301 that it "*considers that without the dumped prices from exporters in China, the leverage point would be other importers of the goods at a higher price point, being the minimum non-Chinese import offer. The non-Chinese import offer would also be higher without the influence of the Chinese product at dumped prices.*"

This statement highlights the lack of actual and positive evidence to demonstrate that the applicant experienced material injury caused by the subject imports. Instead and at best, it reflects a lower evidentiary standard of mere possibility that future event may occur. By any measure, this does not meet the evidentiary standard required for the Minister to be satisfied. This imprecise assessment is also clearly contrary to the Commission's own stated practice outlined in its Manual in basing findings on a 'but-for' assessment which states that '*[i]t is not sufficient to simply assert such an effect as this will not meet the evidentiary requirements.*'

This is further supported by the finding in *US — Hot-Rolled Steel*[33], where the Appellate Body ruled that "*the term 'positive evidence' relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination.*" It went on to explain that "*[t]he word 'positive' means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.*"

In *Mexico – Anti-Dumping Duties on Rice*[34], the Appellate Body observed that assumptions by an investigating authority should be based on positive evidence:

> *An investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on 'positive evidence'. Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.*

The Appellate Body went further in that dispute and concluded that an examination on positive evidence is not fulfilled when the assumptions on which the investigating authority's methodology relies are not properly substantiated and explained:

> *An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis … In the Final Determination, Economía did not explain why [its] assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture of the volume and price effects of the dumped imports … We would expect an investigating authority to substantiate the reasonableness and credibility of particular assumptions.*[35]

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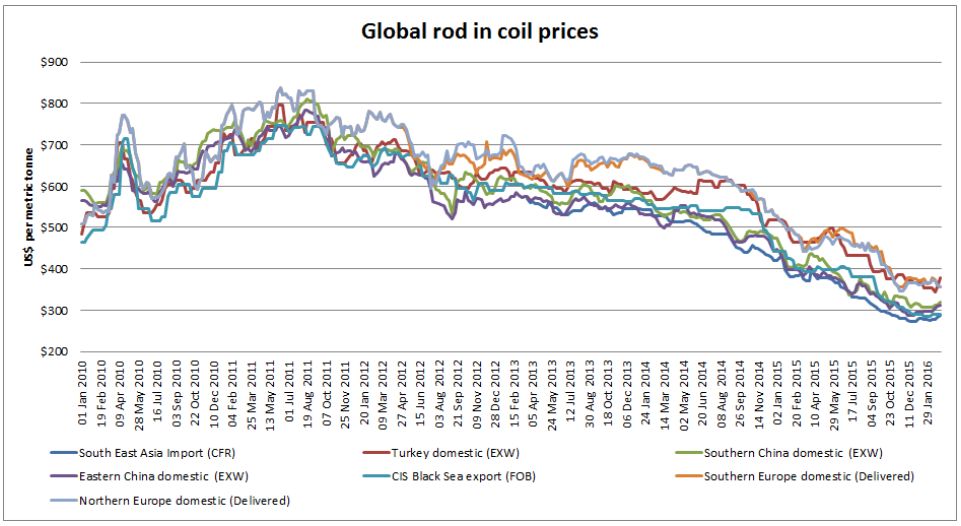
[33] Appellate Body Report, US – Anti-dumping measures on certain hot-rolled steel products from Japan, WT/DS184/AB/R, para 192; Page 65.

[34] Appellate Body Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, WT/DS295/AB/R, para 204; Page 69.

[35] Ibid., para 205, page 69.

Shagang contends the SEF 301 provides no reasoning or basis for the assumption that the Australian industry's selling prices would have been higher during the investigation period in the absence of dumping.

The assumption that prices of non-subject imports and the applicant would have been higher in a market unaffected by the subject imports seems to stem from the Commission's understanding that the Australian market for rod in coil is price sensitive and "*highly substitutable, and commodity like in nature*". Yet this assumption is flawed when contrasted against the global price trend for rod in coil shown below which has experienced similar declines to that evident in the Australian market. Therefore, it is highly inconsistent for the Commission to suggest that for a product such as rod in coil, which is *"a commodity product freely traded on the world market*", that rod in coil in the Australian market would have experienced price trends opposite to that experienced globally.



This type of assumption can only be supported if the Commission is able to identify some particular characteristics or factors evident in the Australian market, that distinguish and shield it from global import competition. As the applicant and the Commission have emphasised on numerous occasions in relevant submissions and reports, rod in coil is highly price sensitive and freely traded.

Materiality of injury

It is noted that REP 301 contains no assessment of the materiality of the applicant's injury that is attributable to the subject imports from China. It appears that the Commission has simply assessed whether the hypothetical injury that it believes may have occurred, can be linked to the subject imports. Yet this is insufficient to be satisfied that the injury caused by the subject imports is 'material'.

Given the Commission's reliance on the but-for analysis and its speculative assessment of the applicant's prices and profits, Shagang questions the reliability of any such assessment of the materiality of the injury attributable to the subject imports. For example, to understand the materiality of the injury caused by the subject imports in the context of the but-for argument presented by the Commission, it requires hypothesising on the extent to which prices of the applicant and non-subject imports would have been higher in the absence of imports from China.

For example, if in the absence of the subject imports the Commission considers that prices would have been A$5/mt higher, then it is not possible to find that the subject imports cause 'material' injury. In a scenario where the Commission considered that prices would have been A$50/mt higher, then it is obviously more likely that the injury caused by the subject imports is material.

In Shagang's view, it is insufficient for the Commission to simply assume that the applicant's sales would have replaced the subject imports in its entirety, and that other import sources would not have replaced a major portion of the subject imports. A finding of materiality on that basis is clearly one not founded on facts or positive evidence but simply based on conjecture.

THE CORRECT AND PREFERABLE DECISIONS

Shagang contends that the correct and preferable decisions for the challenged findings are:

Finding 1: The correct and preferable decision was to conclude that there was insufficient evidence to be satisfied that a market situation existed in the domestic rod in coil market in China. As such, the Commission ought to have determined, where possible, normal values on the basis on domestic selling prices pursuant to subsection 269TAC(1) of the Act.
Finding 2: The correct and preferable decision in the event that normal values could not be established under subsection 269TAC(1) of the Act, was to construct normal values pursuant to subsection 269TAC(2)(c) of the Act on the basis of the costs of production reasonably reflected in Shagang's records.
Finding 3: The correct and preferable decision was to interpret Regulation 43 of the IO Regulations as requiring the Minister to determine the costs of production on the basis of the exporter's records, where those records reasonably reflect the costs associated with production. That consideration of the records does not involve an assessment and comparison of the actual costs against some hypothetical external market cost.
Finding 4: The correct and preferable decision was to properly examine and assess each of Shagang's cost elements in determining whether its records reasonably reflected competitive market costs. On that basis, the Commission would have established that Shagang's costs were reasonable and as shown in the case of its iron ore purchases, costs reflected global spot prices and therefore clearly established according to competitive market principles.
Finding 5: The correct and preferable decision was to determine that an adjustment for VAT was not required to ensure proper comparison as the VAT expenses incurred by Shagang did not result in export prices being modified.
Finding 6: The correct and preferable decision was to assess whether a causal link was present during the investigation period using a 'coincidence' analysis rather than the 'but-for' methodology adopted by the Commission. Based on a coincidence analysis, it is apparent that the applicant did not suffer material injury attributable to the subject goods during the investigation period.

Reasons why the proposed decisions are materially different from the reviewable decision.

The proposed decisions are different from the reviewable decisions for the following reasons:

Finding 1: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision, as a consequence would have resulted in a negative dumping margin. This contrasts to the determined dumping margin for Shagang of 37.4%. On this basis, the proposed decision would have resulted in the investigation being terminated against Shagang as the dumping margin is found to be negligible and provided no grounds for the imposition of the dumping duty notice.
Finding 2: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision, as a consequence would have resulted in a negative dumping margin. This contrasts to the determined dumping margin for Shagang of 37.4%. On this basis, the proposed decision would have resulted in the investigation being terminated against Shagang as the dumping margin is found to be negligible and provided no grounds for the imposition of the dumping duty notice.
Finding 3: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision, as a consequence would have resulted in a negative dumping margin. This contrasts to the determined dumping margin for Shagang of 37.4%. On this basis, the proposed decision would have resulted in the investigation being terminated against Shagang as the dumping margin is found to be negligible and provided no grounds for the imposition of the dumping duty notice.
Finding 4: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision. Given that iron ore costs alone represent 40% of the total cost of production of rod in coil, it is estimated that the resulting dumping margin would have been de minimis. This contrasts to the determined dumping margin for Shagang of 37.4%. On this basis, the proposed decision would have resulted in the investigation being terminated against Shagang as the dumping margin is found to be negligible and provided no grounds for the imposition of the dumping duty notice.
Finding 5: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision, and when compared with findings 1 to 4, results in the dumping margin being de minimis.
Finding 6: The proposed decision would have resulted in a finding that the applicant did not suffer material injury caused by the subject imports. This would have resulted in the investigation being terminated and provided no grounds for the imposition of the dumping duty notice.