PUBLIC FILE VERSION

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15 July 2016

Ms Jaclyne Fisher
Member
Anti-Dumping Review Panel

BY EMAIL adrp@industry.gov.au

Dear Member,

Submission concerning review of a decision by the Parliamentary Secretary in respect of STEEL REINFORCING BAR exported from the People's Republic of China

The Australian industry notes the applications for review of the exporters of the goods from China, specifically, Hunan Valin Xiangtan Iron & Steel Co., Ltd. (**Hunan Valin**), Jiangsu Yonggang Group Co., Ltd (**Yonggang**) and Shandong Shiheng Special Steel Group Co., Ltd (**Shandong Shiheng**).

For the assistance of the Panel in conducting this *Review of a decision by the Parliamentary Secretary* under subsections 269TG(1) and 269TG(2) of the *Customs Act 1901*[1], the Australian industry provides the following observations in response to the matters raised by the various exporter applicants for review, by way of submission.

A. Hunan Valin's first ground for review - *"the steel billet costs substituted in... [the] costs of production were not in the country of export"*

The first ground for review set out in the Hunan Valin's application, is also reflected in the third ground for review in the applications of Yonggang and Shandong Shiheng, [2] there expressed as an error in the Commissioner's *"interpretation of Regulation 43 of the Customs (International Obligation) Regulations 2015… by focusing on the costs themselves, rather than the records of… [respectively, Yonggang or Shandong Shiheng], in rejecting its steel billet production costs".*

Central to this ground for review, is the alleged requirement that the Minister *must* determine the costs of production or manufacture of the goods in the country of export. The argument is put in its most simple form in the application of Hunan Valin, where the author states that *"a Latin American export billet price is not a cost of production in the*

[1] All references to statutory provisions are references to provisions of the *Customs Act 1901*, unless otherwise specifically stated.
[2] Referred to as *"Finding 3".*

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country of export of Hunan Valin's rebar. The country of export of Hunan Valin's rebar is China"[3].

To assist you in your interpretation of the relevant statutory provisions cited by the applicants for review, the Australian industry has obtained an external legal opinion on those grounds, which is attached to this submission[4].

In response to Hunan Valin's view that subparagraph 269TAC(2)(c)(i) requires that the Parliamentary Secretary ascertain the normal value of the goods as *"such amount as the Minister determines to be the costs of production… of the goods in the country of export"*, the Australian industry has received legal advice that the arguments of exporter applicants for review, (a) misconstrue the legislative provisions, (b) ignore the history of the current regulatory provisions (specifically section 43 of the *Customs (International Obligations) Regulation 2015*) (***the Regulations***), and (c) overlook the binding legal precedent established in the two recent matters before the Federal Court.[5]

> *"The approach adopted by the Assistant Minister in this case, and by her predecessors in PanAsia and Dalian, was to identify the cost of production method as the 'appropriate proxy'[6] for the gold standard and to determine the total cost of production in the country of export using benchmark cost elements as substitutes for actual cost elements in China that had been identified as being 'artificially low' as a result of market distortions driven by the government policies. In constructing a normal value in this manner we see no implied restrictions in the legislation concerning the choice of substitute cost elements other than that the substitute elements should reasonably reflect the competitive market costs that would apply in China in the absence of the identified market distortions. In particular we cannot find any justification in the statutory language to suggest that only Chinese cost elements can be used as surrogates.*
>
> *"In summary we consider that s.269TAC(2)(c) requires the Assistant Minister in the circumstances of this case to determine what the total cost of production of the goods would be in the country of export if the 'situation in the market' of that*

[3] This argument appeared as the first ground for review stated in the application of Hunan Valin (13 May 2016)

[4] Attached as NON-CONFIDENTIAL ATTACHMENT A.

[5] *PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 and *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885

[6] *US Softwood Lumber V*: para 7.278; *EU – Biodiesel*: para 7.233

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> *country did not exist. In doing precisely that the Assistant Minister, in our view, has made the correct and preferable decision."*[7]

Therefore, Hunan Valin is in error to assert that the Assistant Minister is unable to identify costs of production of the goods that are *not* "in the country of export".

Hunan Valin further seeks to misdirect the Review Panel by asserting that the recently published WTO Disputes Settlement Panel decision in *European Union – Anti-Dumping Measures on biodiesel from Argentina* somehow supports its contention that the Parliamentary Secretary must use costs for constructing normal value "on the cost of production in the country of origin".[8]

Again, the Australian industry's external legal advice considers this proposition, and advises as follows:

> *"Claims in the other applications that the Assistant Minister's determination of a constructed normal value contravened the requirement to arrive at a cost of production in the country of export are based primarily on the recent decision of a WTO panel in European Union – Anti-Dumping Measures on Biodiesel from Argentina*[9] *(EU – Biodiesel).*
>
> *"While we have already made the point that Australian legal authority requires some ambiguity to be identified in the relevant provisions of the Act and Regulation to justify reference to external jurisprudence, we make the following additional observations in relation to that decision:*
>
> *"1. It is under appeal to the Appellate Body*[10]*.*
>
> *"2. Argentina's claims were that certain provisions of EU legislation were inconsistent with the Anti-Dumping Agreement and certain decisions made by EU authorities pursuant to that domestic legislation were also contrary to the Anti-Dumping Agreement. The Panel rejected the first of those claims.*
>
> *"3. The EU domestic legislation considered by the Panel has no parallel in Australian domestic law.*

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[7] NON-CONFIDENTIAL ATTACHMENT A at p. 5.

[8] Hunan Valin, Application for Review (13 May 2016), p. 9.

[9] WT/DS473/R (29 March 2016)

[10] http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154577.pdf

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> *"4. The Panel's decision relates to an interpretation of the word 'costs' in Article 2.2.1.1 and not to the phrase 'competitive market costs' in Australian domestic law.*
>
> *"5. Whether the Australian regulation is consistent with the Anti-Dumping Agreement is not an issue before the Review Panel and, in any event, we consider that it is not a matter falling within the jurisdiction of the Review Panel.*
>
> *"6. We believe that there is a very strong case to argue that the Panel erred in concluding that the use of an external benchmark as a surrogate cost element resulted in the determination of a cost of production that was not 'in the country of origin'.*
>
> *"7. We also consider that in circumstances where government induced distortions in a domestic market have resulted in certain artificially low cost elements prevailing throughout that market that the Panel's interpretation of Article 2.2.1.1 proscribing the provision the use of external benchmarks renders the provision inutile."*[11]

B. Hunan Valin's second ground for review - *"no evidence and improper consideration of whether Hunan Valin's costs reasonably reflected competitive market costs"*

As to its second ground for review, Hunan Valin asserts the separate but related claim, that the Parliamentary Secretary improperly considered whether the exporter's costs reasonably reflected competitive market costs. Again, put most simply, the author states in the exporter's application for review that *"Hunan Valin did not purchase steel billet"* and therefore that *"Hunan Valin disagrees with the substitution of the benchmark cost for steel billet in the determination of its normal value"*.
Again, the assertion of the exporter applicant ignores the settled legal position in support of the Parliamentary Secretary's approach in this matter. For the sake of clarity, the Australian industry recites its advice received on this point:

> *"In 2005, at the same time as Australia acknowledged the market economy status of China and added that country to the list of those to which the economy in transition provisions of s.269TAC(5D) did not apply, the Parliament passed Customs Amendment Regulation 2005 (No.8) [SLI 265]. Item 1 of Schedule 1 to*

[11] NON-CONFIDENTIAL ATTACHMENT A, pp. 5 - 6.

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that regulation provided for the introduction of the following substituted wording for subparagraph 180(2)(b)(ii):

> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods.*

"The reason for the amendment is provided in the Explanatory Statement by the then Minister for Justice and Customs:

> *'… mandating that the Minister use only the costs associated with the production or manufacture of the like goods narrowed the scope of goods that may be examined in assessing the cost of production or manufacture.*
>
> *'The amending Regulations substitute paragraph 180(2)(b)(ii) to prescribe that the Minister only has to use the records relating to the like goods if they reasonably reflect competitive market costs associated with the production or manufacture of like goods. This ensures that the relevant records are only taken into account if they reasonably reflect competitive market costs and not just actual costs.'*

"With the repeal of Customs Regulations 1926 in 2015, the regulation as amended in 2005 was incorporated as section 43 in the Regulation.

"The application of the regulation was considered in PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870 at [91] by Nicholas J when reviewing a finding by the Minister that the cost in China of primary aluminium, the major raw material used in the production of aluminium extrusions, was not a competitive market cost.

> *'In the present case the question is not whether any particular market participant exercises a particular degree of market power, nor whether there is competition in any market for primary aluminium in China. Rather, the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs"…'*

"This view was affirmed by Nicholas J himself in Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs [2015] FCA 885 at [42]

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> *"In the current matter before the Review Panel the Commission observed that*[12]*:*
>
> > *'As discussed in Appendix 1, the Commission considers that the significant influence of the GOC has distorted prices in the steel industry and rebar 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 considers 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 rebar production. In particular, GOC-driven market distortions have resulted in artificially low prices for the key raw materials, as well as the other inputs associated with the production of the steel billets.*
>
> *"The Commission considers that direct and indirect influences of the GOC affect Chinese manufacturers' costs to produce steel billet and therefore that Chinese exporters' records do not reflect competitive market costs. The Commission has found that steel billet costs comprise 80 to 85 per cent of rebar CTMS.*
>
> *"Based on these observations and the further considerations set out in section 5.7.1 of REP 300 we consider that it was open to the Assistant Secretary to conclude that the records of exporters of Rebar from China do not reflect competitive market costs and that the decision not to use the actual costs in the records is the correct and preferable decision."*

Yonggang's and Shandong Shiheng's related claims

Hunan Valin's second ground for review is reflected in the second, third and fourth grounds for review set out in the applications of the exporters, Yonggang and Shandong Shiheng[13]. Again, the position upon which all the applicant exporters appear to be basing their criticism of the Parliamentary Secretary is an unsupported statutory construction of the language of the provisions. There is nothing within the language of Australian domestic legislation requiring the Parliamentary Secretary to determine the normal value based on the construction of the individual costs of production. When authorised by subparagraph 269TAC(2)(a)(ii) to depart from the determination of normal values under subsection 269TAC(1), then the Parliamentary Secretary may have regard to such costs as are reflective of competitive market costs of production. One such cost is the cost of steel billet, the most immediate upstream input cost to the production of the goods exported to Australia. There is nothing in the legislation requiring the Parliamentary

[12] *Final Report No. 300* (EPR Folio No. 300/063), p. 15.

[13] Therein identified as "Finding 2", "Finding 3" and "Finding 4".

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Secretary to substitute each individual cost incurred in the production of the goods in the country of export. The correct and preferable decision to be made by the Parliamentary Secretary in this case, is as it was for her predecessors in *PanAsia* and *Dalian*:

> *"to identify the cost of production method as the 'appropriate proxy'*[14] *for the gold standard and to determine the total cost of production in the country of export using benchmark cost elements as substitutes for actual cost elements in China that had been identified as being 'artificially low' as a result of market distortions driven by the government policies. In constructing a normal value in this manner we see no implied restrictions in the legislation concerning the choice of substitute cost elements other than that the substitute elements should reasonably reflect the competitive market costs that would apply in China in the absence of the identified market distortions. In particular we cannot find any justification in the statutory language to suggest that only Chinese cost elements can be used as surrogates."*[15]

C. Yonggang and Shandong Shiheng's first ground for review – *"The Commission erred in finding that a particular market situation existed and that as a consequence, domestic sales of rebar were unsuitable for determining normal values"* (Finding 1)

In terms of the applications for review of both Yonggang and Shandong Shiheng, the Australian industry notes their separate, but similar, initial ground for review, specifically, their allegation of error on the part of the Parliamentary Secretary in finding the existence of a particular market situation.

The Australian industry is concerned by Yonggang and Shandong Shiheng attempts to suggest that the Parliamentary Secretary has not respected Australia's decision to grant market economy status to China. The Parliamentary Secretary's determination of a particular market situation finding is lawfully drawn alongside that decision. The Commissioner's recommendation to the Parliamentary Secretary is based on matters relevant to a finding under subparagraph 269TAC(2)(a)(ii). Such a finding may be informed by satisfactory findings in alternate jurisdictions.

To the extent that Yonggang and Shandong Shiheng, assert that their status as integrated steel producers precludes them from a particular market situation finding, it is important to observe that the particular market situation finding made by the Parliamentary Secretary relates to the 'like goods' to the goods exported to Australia, in this case rebar. As such, the Commissioner's recommendation to the Parliamentary Secretary is factually

[14] *US Softwood Lumber V*: para 7.278; *EU – Biodiesel*: para 7.233
[15] NON-CONFIDENTIAL ATTACHMENT A, p. 5.

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and legally sound to the extent that it has assessed the findings of Chinese government policies and interventions in upstream input markets resulting in price and market distortions in the downstream market for the finished 'like goods'.

D. Determination of an amount of profit

The third, and final, ground for review sought by Hunan Valin, and the fifth ground for review sought by Yonggang relates to the determination of amount of profit relevant to the calculation of the constructed normal value under subparagraph 269TAC(2)(c)(ii).

Claims by Hunan Valin

In relation to the contention of Hunan Valin that the incorrect methodology was applied, this is a matter of fact and evidence, that the Commissioner is best placed to resolve.

Claims by Yonggang

Yonggang makes a number of claims pertinent to the issue of the determination of an amount of profit to be added to the constructed normal value. The Australian industry responds by reference to Yonggang's paragraphs:

*(a) Error in the calculation of unit cost to make and sell (**CTMS**)*

Yonggang here appears to refer to an error in the Commission's pivot table for calculating the quarterly weighted average unit CTMS, whereby it used the total billet quantity as the denominator rather than total rebar quantity. In its application for review, Yonggang fails or refuses to disclose the Commissioner's reasons for adopting this approach – specifically, the grave concerns the Commissioner held for the accuracy and reliability of Yonggang's financial information:

> *"The Commission notes that, prior to publication of the PAD, the Commission identified discrepancies between the reported finished product weights and steel billet weights consumed in production of the corresponding products. Yonggang was asked a number of supplementary questions in relation to the figures in its exporter questionnaire response with one of the questions being the production figures being higher than some of the steel billet quantities used in production. On 25 November 2015, Yonggang responded to the questions and explained that it is Yonggang's normal business practice to record the production quantity of rebar on a theoretical weight basis, while the input of the billet is recorded on an actual weight basis. Based on this response, the Commission used Yonggang's*

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> *actual steel billet weights for the purposes of calculating Yonggang's unit CTMS figures."*[16]

In other words, the Commissioner was more than generous to Yonggang in even accepting their financial information, given that in effect, their own data was presenting a physically impossible scenario where the mass of rebar output **exceeded** the mass of steel billet inputs.

In such circumstances, the Commissioner's treatment of Yonggang's data was reasonable, if not generous, and indeed, should in the submission of the Australian industry been wholly disregarded on the grounds that it was unreliable. Notwithstanding this, the Australian industry considers Yonggang's disaffection with this result a bit disingenuous and this ground for review should be rejected.

(b) *Error in the calculation of profitable sales*, and
(c) *Error in the calculation of the rate of profit*

The above two grounds for review are related to Yonggang's allegation under paragraph (a), specifically *Error in the calculation of unit cost to make and sell*, and as such should be rejected.

(d) *Inconsistent approach to performing the ordinary course of trade (**OCOT**) test*

The Australian industry is concerned that Yonggang is attempting to conflate the *profitability* and *recoverability* limbs within the OCOT test. The Commission's response cited by Yonggang is not "puzzling" as Yonggang seeks to colour it:

> *"regardless of the comparison base, the weighted average cost to make and sell in the investigation period does not change. It follows that the recoverability test will be based on the same figures irrespective of the comparison period. It is the Commission's policy to consider sales that are recoverable as made in the ordinary course of trade. Hence, the basis of assessment, whether it is monthly or quarterly, does not change the outcome of the ordinary course of trade test. The Commission therefore considers that its method for the ordinary course of trade test is correct and accurate."*[17]

Again, what Yonggang has again failed or refused to acknowledge is that the Commission is here attempting to explain that regardless of whether a quarterly or monthly comparison of domestic sales to the exporter's cost to make and sell is performed, when the second limb of the OCOT test is performed to test for the recoverability of unprofitable sales within a reasonable period, it does not matter whether or not a monthly or quarterly base is initially used, as recoverability is assessed across the

[16] *Final Report No. 300* (Public File Folio No. 300/063), p. 35
[17] Yonggang, Application for review (13 May 2016), Attachment B

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investigation period, typically a minimum of twelve months.[18] Therefore, the Commissioner's approach is again considered to be reasonable, if not generous, in the circumstances, and Yonggang's grounds for review should be rejected.

(e) Determination of profit on a limited subset of domestic sales in the ordinary course of trade

The Australian industry is further concerned that Yonggang is attempting to challenge the identification of 'like goods' through the prism of the OCOT test. If Yonggang challenges the Commission's determination of 500 Mpa grade rebar as being 'like goods' sold on the domestic market to the exported goods then that should properly have been raised as a separate ground for review, an issue it has not otherwise taken exception to. In fact, Yonggang confirms that it was aware of this issue since 22 March 2016, when the Commission informed it of their intended 'like goods' treatment:

> *"As 335 and 400 grades not being considered like goods to rebar exported to Australia, I consider that the correct way of calculating profit should be based on domestic OCOT sales of 500MPa grade rebar only."*

Accordingly, the Commission was correct to assess the OCOT of the like goods, as identified in the investigation, and this ground for review should be rejected.

E. Due allowance – adjustments to the normal value

Both Yonggang and Shandong Shiheng make a number of claims in relation to adjustments to the determination of their respective normal value calculations. These are explored in turn.

Yonggang's claims

- ***"The Parliamentary Secretary erred by not making necessary due allowance for domestic bank charges that affected price comparability" - finding 6***

Yonggang claims that "Included in the SG&A amount were bank charges incurred on domestic sales", the implication being that the Commissioner has double counted export bank charges.

This issue was expressly addressed by the Commissioner:

> "A careful examination of Yonggang's records suggest that in calculation and allocation of SG&A to its domestic sales and Australian sales, Yonggang identified and deducted all the expenses that are directly related to its Australian sales and did not include these in its SG&A calculations. The Commission notes that in its

[18] Anti-dumping Commission, *Dumping and Subsidy Manual* (November 2015 edn.), p. 32.

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> SG&A calculation workbook, Yonggang identified the expenses directly related to its Australian sales and did not include these in its domestic SG&A calculation."[19]

The Australian industry is satisfied that the Commissioner has reasonably addressed the issue by removing expenses relating to export sales from the domestic SG&A calculation i.e. domestic bank charges were included in domestic SG&A calculation and a separate adjustment had to be made for export bank charges.

- ***"The Parliamentary Secretary erred by making due allowance for export credit terms that did not affect price comparability" (finding 7)***

This claim appears to relate to the Commissioner's upward export credit adjustment to Yonggang's normal value in order to take account of the *"weighted average cost of capital for the duration between the shipment of goods and receipt of funds by Yonggang for its export sales"*. Yonggang has taken exception to this adjustment on the basis that it *"does not extend credit to its Australian customers"*.

However, Yonggang has again completely ignored the Commissioner's defence of his position on the making of this adjustment:

> *"In calculating adjustments to normal value, the Commission examines the details of the transactions rather than accepting them at face value. Notwithstanding the agreed sales terms with the export customers,* ***the Commission considers that it is evident that there is a period between the time of sale and the time Yonggang received payments****.* ***The periods between the time of sale and time of receipt of payment are identified by Yonggang in its exporter questionnaire response****. Consequently, the Commission adjusted Yonggang's normal values with respect to the weighted average cost of capital for the duration between the shipment of goods and receipt of funds by Yonggang for its export sales."*[20]
> [**emphasis added**]

Therefore, on the evidence before the Commissioner, the Australian industry considers the final decision of the Assistant Minister the correct and preferable one, and that this ground for review should be rejected.

Shandong Shiheng's claims

- ***"The Commission erred in making an adjustment to constructed normal values for the gross margin incurred by Shiheng's trading intermediary" (finding 5)***

The Commissioner identified adjustment to be made to the constructed normal values pursuant to subsection 269TAC(9), for the involvement of Shandong Shiheng's trading intermediary, HK Lutai. The adjustment was calculated as the difference between HK

[19] *Final Report No. 300* (EPR Folio No. 300/063), pp. 33 – 34.
[20] *Final Report No. 300* (EPR Folio No. 300/063), p. 34.

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Lutai's purchase price of rebar from Shiheng and its selling price of rebar to the Australian importer. The adjustment represented the full gross margin by HK Lutai on its sales to Australia, being all selling, general and administrative expenses plus profit.

The Australian industry considers that given the close ownership and commercial relationship between Shandong Shiheng and HK Lutai, it was appropriate for the Commission (including the visit verification team) to treat the two companies as a single entity for the purpose of calculating a dumping margin. In its ground for review currently before the Review Panel, Shandong Shiheng argues that the internal profits achieved on transfer prices between the related entities is not a relevant factor for adjustment given those transactions have already been disregarded through the process of collapsing the entities for normal value calculation.

The Australian industry considers that the Commissioner's recommendation to apply an upward adjustment to the normal value for the involvement of Shandong Shiheng's trading intermediary, HK Lutai was both correct and preferable and entirely appropriate given the nature of the sales circumstances identified in Shandong Shiheng's verification visit report[21]:

> *"4.1… from 2015 onwards, almost all the goods manufactured by Shiheng Steel are sold to Australia customers via an affiliated trader, HK Lutai"*[22]
>
> *"4.1.2… Shiheng submitted that export selling prices did not vary according to the distribution channel. However, the Commission observed that for sales made via HK Lutai, REDACTED [Pricing arrangements between Shiheng and HK Lutai]"*[23]
>
> *"In relation to HK Lutai, limited upwards verification was undertaken (refer to Confidential Attachment EXP SALES 9) due to the paper-based nature of HK Lutai's accounting records (no management reports were delivered), and the fact that HK Lutai essentially acted as a shell company and did not have a genuine role in the export of the goods."*[24]
>
> "8.4… The visit team assessed that HK Lutai's SG&A over the investigation period was less than the trading margin (Confidential Attachment ADJ 1). As HK Lutai's trading margin was sufficient to cover its SG&A expenses, the visit team considers that an upwards adjustment based on the HK Lutai's margin for each export transaction is appropriate."[25]

[21] EPR Folio No. 300/041
[22] EPR Folio No. 300/041, p. 14.
[23] EPR Folio No. 300/041, p. 14.
[24] EPR Folio No. 300/041, p. 16.
[25] EPR Folio No. 300/041, p. 29.

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The Commission's finding that "*HK Lutai essentially acted as a shell company*" is a damning one. In common commercial parlance a "shell company" is understood to be a non-trading company used as a vehicle for various financial manoeuvres or kept dormant for future use in some other capacity. In such circumstances, given this finding on the evidence before the Commissioner, it is entirely appropriate that the necessary adjustments have been made to ensure correct price comparability.

- ***"The Commission erred by making double counting an upward adjustment to constructed normal values for export bank charges" (finding 6)***

This ground for review considers that separate adjustment for bank charges incurred by Shandong Shiheng and HK Lutai are not warranted as the Commission has already included these charges in Shandong Shiheng's selling, general and administration expenses and HK Lutai's full gross margin.

In support of this position Shanding Shiheng asserts that *"it appears that the Commission has misunderstood the actual circumstances relating to the reported bank charges. The bank charges shown and used to calculate domestic SG&A did not separately identify whether the charges were relevant to domestic or export sales as the reported figure simply represent the total figure for the relevant ledger account."*

The Australian industry submits ***that to the contrary*** the Commissioner appears to have paid careful consideration to the determination of the appropriate adjustments to be made for export bank charges as expressed in Shandong Shiheng's *Exporter Verification Visit Report*[26]:

> *"Bank charges applicable to both Shiheng and HK Lutai were also verified, in accordance with the following approaches:*
>
> • *For sales made directly from Shiheng to Australian customers:*
>
> > *bank charges were incurred due to the use of letters of credit as a form of payment. The visit team verified these costs by comparing the invoice price with the payment received (as shown in credit advices, and which accounted for numerous invoices), and allocating the difference (i.e. the bank charge) to the relevant transaction, by weight.*
>
> • *For sales made via HK Lutai:*
>
> > *bank charges applied to both the costs of using letters of credit as a means of payment, and the cost of transferring payments from HK Lutai's account to Shiheng. The visit team verified these charges by:*

[26] EPR Folio No. 300/041

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- *matching the invoice price to the credit advice and letters of credit provided by the Australian customer's bank to HK Lutai (comprising deposits where applicable, as well as any other payments towards the full invoice price);*

- *comparing the invoice price to the amount received by HK Lutai; and*

- *allocating the gap between the two values to the transaction, by weight."*[27]

Therefore, the Australian industry submits that the Commissioner had express regard to this matter, and that his recommendation to the Assistant Minister resulted in the correct and preferable decision. This ground for review should be rejected.

F. Due allowance – adjustment to the steel billet benchmark price

The Australian industry observes that Yonggang's eighth ground for review, and Shandong Shiheng's seventh ground for review relates to a further due allowance claim under subsection 269TAC(9). The exporter applicants have referred to the decision of the Commissioner to make adjustment to the benchmark steel billet cost by reference to an "average rate of profit", and in their grounds for review seek to extend such an adjustment to the recovery of so-called "by-products" from the steel billet making process.

As a matter of record, the Australian industry has objected in its third ground of appeal to the making of any such adjustments. In relevant part, the Australian industry reminds the Review Panel of its reason for objecting to the making of any such adjustments as unsound in law:

> *"OneSteel fails to understand why the Commissioner has reduced the non-Chinese (Latin American FOB export) benchmark competitive billet cost by an amount of profit relevant to Chinese producers of billet sold into the Chinese domestic market. With respect, the rate of profit earned by Chinese producers of billet that is not the subject of the competitive benchmark is not the question. If a downward adjustment to the competitive benchmark billet cost is to be made, then it should be the verified profit of the non-Chinese seller of the billet the subject of the competitive benchmark. Otherwise, to follow the Commission's approach would be to apply a wholly irrelevant rate of profit applicable in one market (i.e. Chinese domestic market subject to a particular market situation) to a sale into a wholly*

[27] EPR Folio No. 300/041, pp. 17 – 18.

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unrelated market (i.e. domestic competitive markets, or the Commission's selected Latin American export market).

"The requirement of a verified profit margin relevant to the underlying goods the subject of the sale is necessary as a result of the WTO jurisprudence concerning the related question of determination of an amount for profit under Article 2.2.2 of the Anti-Dumping Agreement. In that case, the WTO Disputes Settlements bodies have consistently interpreted the requirement of determining an amount for profit based on "actual data pertaining to production and sales of the like product when determining amounts for SG&A and profits"[28]. Applied here, the Commission's approach fails the most basic precept of this rule, insofar it seeks to apply completely irrelevant amount for profit to non-Chinese sales of steel billet.

"Separately, even if it is accepted that the Commission's approach to calculating the amount for profit earned on Chinese sales of billet is a sound one (which is not accepted, but expressly refuted), then it has all but overlooked the concerns expressed by the Commission in relation to the accuracy of the so-called, "verified" cost to make information of the exporters in Investigation No. 300.

…

"In the case of the other cooperating exporter for whom an in-country verification visit was conducted ie. Shandong Shiheng Special Steel Group:

> *'Shiheng's cost of steel billet was found to not reasonably reflect a competitive market cost and a benchmark steel billet cost was used in the constructed normal value.'*

"Importantly, although Report 300 references a benchmark billet profit adjustment based on 'verified average profit rate realised by Chinese exporters from sales of steel billets', neither of the verification visit reports published for Laiwu or Shiheng ***contain any mention of verification being undertaken on billet sales for either of the exporters****. This is a fundamentally critical point to understanding the extent of the factual error to which the Commissioner's recommendation has been subjected – indeed, at best, the Commissioner has had regard to unreliable information, at worst (in a judicial review sense), the Commissioner has had regard to irrelevant information. The only OCOT tests and profit determinations referred to are in relation to sales of 'like goods' ie. rebar. In light of this it is unclear whether profit levels determined from sales from rebar in the Chinese market have been assumed to be equivalent to profit realised on Chinese billet sales."[29]*

[28] Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil,* WT/DS219/AB/R, adopted on 22 July 2003 at [97], [98] and [101]
[29] OneSteel Manufacturing Pty Ltd, Application for Review (13 May 2016) at [10.3]

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Similarly, the Australian industry's objections to the making of such adjustments to the normal value on account of alleged "by-products" is equally applicable. The exporter applicants' grounds for review ought to be rejected.

G. Commissioner's determination of material injury

The final grounds for review of Yonggang and Shandong Shiheng[30] relate to the suggestion that the Commissioner did not rely on "facts" and "positive evidence" by reason of his regard to "but for" causative analysis.

The Australian industry is sufficiently confident that the confidential materials to which the Commissioner had regard in making his recommendation to the Parliamentary Secretary set out the "facts" and "evidence" to which he had regard. Having said that, the Australian industry is surprised that the exporter applicants have overlooked the *Ministerial Direction on Material Injury*,[31] which provides in relevant part:

> *"I direct that you consider an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped or subsidised products in the market, could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping and subsidisation. I note that anti-dumping or countervailing action is possible in cases where an industry has been expanding its market rapidly, and dumping or subsidisation has merely slowed the rate of the industry's growth, without causing it to contract.* ***In cases where it is asserted that an Australian industry would have been more prosperous if not for the presence of dumped or subsidised imports, I direct that you be mindful that a decline in the industry's rate of growth may be just as relevant as the movement of an industry from growth to decline****."* [**emphasis added**]

Further, for the sake of completeness, the Australian industry refers the Review Panel to the Commissioner's Final Report No. 300, specifically section 7.11.1, where the application of the "but-for" or "if-not" causative analysis permitted under the Ministerial Direction has been applied to the verified facts in this investigation.

The Australian industry considers the Parliamentary Secretary's decision on this issue to have been the correct and preferable one. These grounds for review should be rejected.

H. Conclusion

For the reasons states above, the grounds for review sought by the exporter applicants are unsound and should be rejected. Should you require any clarification on the above

[30] Identified as "Finding 9" and "Finding 8" respectively
[31] *Minister for Home Affairs*, 27 April 2012.

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matters, or to discuss any aspects of the external legal opinion attached to this submission, please do not hesitate to contact the undersigned.

Yours sincerely,

[redacted]

[redacted]

MinterEllison

14 July 2016

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[redacted]

Dear [redacted]

Review by the Anti-Dumping Review Panel - Steel Reinforcing Bar (Rebar) exported from the People's Republic of China

Introduction

We refer to your letter of 20 June 2016 requesting our opinion on claims made in some current applications to the Anti-Dumping Review Panel (**Review Panel**) in respect of the above matter. Before detailing your request you have drawn our attention to the determination by the Assistant Minister for Science (**Assistant Minister**) that she is satisfied that domestic sales of Rebar in China are not suitable for use in determining a normal value. You have then asked whether, following that determination, there is evidence of any legal error in the acceptance by the Assistant Minister of the finding of the Commissioner in Report 300 that the accounting records of Chinese exporters to Australia of Rebar did not reasonably reflect competitive market costs of production or in the determination by the Assistant Minister that the cost of production of Rebar in the country of export should include a surrogate cost element for steel billet based on a price prevailing in a market other than that in the country of export – namely *Platts Latin American FOB export price* [**surrogate cost**].

In our opinion, for the reasons set out below, there is no evidence of legal error in either of the two decisions made by the Assistant Minister.

In formulating that opinion we had regard to relevant material in Electronic Public Record 300, Final Report 300 (**REP 300**), ADN 2016/39, applications to the Review Panel by all parties other than OneSteel Manufacturing Pty Ltd (**other applications**), Australian case law and World Trade Organisation (**WTO**) jurisprudence.

Competitive Market Costs

The other applications to the Review Panel do not engage with the history of s.43 of the *Customs (International Obligations) Regulation 2015* [**Regulation**] which specifies, inter alia, how the cost of production in a country of export is to be worked out for the purposes of Part XVB of the *Customs Act 1901* (Cth) (**Act**). The *Customs Regulations (Amendment) 1994* [No. 435] introduced a new Regulation 180 which read, in relevant part, as follows:

> (1) In determining an amount to be:
>
> (a) the cost of production or manufacture of goods in a country of export for the purposes of paragraph 269TAAD(4)(a) of the Act; or
>
> (b) the administrative, selling and general costs associated with the sale of goods for the purposes of paragraph 269TAAD(4)(b) of the Act; the Minister must take into account the matters, and use the methods of calculation, set out in this regulation.
>
> (2) If:
>
> (a) an exporter or other seller of like goods keeps records relating to like goods; and
>
> (b) the records:
>
> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect the costs associated with the production, or manufacture, and sale of like goods;
>
> the Minister must calculate the costs using the information set out in the records.

Article 2.2.1.1 of the WTO *Anti-Dumping Agreement*, also introduced in 1994, provides that for the purposes of ascertaining the ... *cost of production in the country of origin* under Article 2.2:

> *.... costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.*

In 2005, at the same time as Australia acknowledged the market economy status of China and added that country to the list of those to which the economy in transition provisions of s.269TAC(5D) did not apply, the Parliament passed *Customs Amendment Regulation 2005 (No.8)* [SLI 265]. Item 1 of Schedule 1 to that regulation provided for the introduction of the following substituted wording for subparagraph 180(2)(b)(ii):

> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods.*

The reason for the amendment is provided in the Explanatory Statement by the then Minister for Justice and Customs:

> *... mandating that the Minister use only the costs associated with the production or manufacture of the like goods narrowed the scope of goods that may be examined in assessing the cost of production or manufacture.*
>
> *The amending Regulations substitute paragraph 180(2)(b)(ii) to prescribe that the Minister only has to use the records relating to the like goods if they reasonably reflect competitive market costs associated with the production or manufacture of like goods. This ensures that the relevant records are only taken into account if they reasonably reflect competitive market costs and not just actual costs.*

With the repeal of Customs Regulations 1926 in 2015, the regulation as amended in 2005 was incorporated as section 43 in the Regulation.

The application of the regulation was considered in *PanAsia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 at [91] by Nicholas J when reviewing a finding by the Minister that the cost in China of primary aluminium, the major raw material used in the production of aluminium extrusions, was not a competitive market cost.

> *In the present case the question is not whether any particular market participant exercises a particular degree of market power, nor whether there is competition in any market for primary aluminium in China. Rather, the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs"...*

This view was affirmed by Nicholas J himself in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 at [42]

In the current matter before the Review Panel the Commission observed that[1]:

> *As discussed in Appendix 1, the Commission considers that the significant influence of the GOC has distorted prices in the steel industry and rebar 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 considers 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 rebar production. In particular, GOC-driven market distortions have resulted in artificially low prices for the key raw materials, as well as the other inputs associated with the production of the steel billets.*
>
> *The Commission considers that direct and indirect influences of the GOC affect Chinese manufacturers' costs to produce steel billet and therefore that Chinese exporters' records do not reflect competitive market costs. The Commission has found that steel billet costs comprise 80 to 85 per cent of rebar CTMS.*

Based on these observations and the further considerations set out in section 5.7.1 of REP 300 we consider that it was open to the Assistant Secretary to conclude that the records of exporters of Rebar from China do not reflect competitive market costs and that the decision not to use the actual costs in the records is the correct and preferable decision.

Submissions in other applications attacking this decision focus primarily on the terms of Article 2.2.1.1 and some WTO jurisprudence relating to that provision. This approach requires the identification of some ambiguity in the relevant provision of Australia's domestic law as Nicholas J pointed out in PanAsia at [9]:

> *The provisions of Pt XVB of the Act are technical and complex. They must be interpreted in accordance with the settled principles of statutory construction. As always, the interpretative task begins with a consideration of the terms of the relevant legislation (Australian Finance Direct*

[1] REP 300: p.15

> *Limited v Director of Consumer Affairs Victoria (2007) 234 CLR 96 at [34] per Kirby J). Recourse to the international agreements will only be of assistance in resolving the questions of construction in this case where the relevant provisions are ambiguous, and where the international agreements may assist in resolving the ambiguity (see, for example, Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J).*

In the passage cited above dealing with the subject of competitive market costs and its application to the circumstances of *PanAsia*, his Honour makes no suggestion of the presence of ambiguity and we also note the absence of any such suggestion in the other applications. In these circumstances precedence must be given to the application of unambiguous Australian domestic law informed by the explanatory statement of the responsible Minister.

Cost… in the country of export

In the event that a cost of production is found not to be a 'competitive market cost' the administering authority must identify an alternative or surrogate cost to be used in the calculation of … *the cost of production or manufacture of the goods in the country of export* …under s.269TAC(2)(c)(i). In the present case the other applications have argued that the use of the surrogate cost is unlawful because it is not a cost in the country of export under Australian law or a cost in the country of origin for the purposes of Article 2.2 of the Anti-Dumping Agreement.

Although we concede, of course, that a price in Latin America is not literally a cost in China, we submit, with respect, that the arguments advanced in the other applications are based on a misconstruction of s.269TAC of the Customs Act and, while unnecessary for the purpose of formulating a recommendation of the Review Panel affirming the reviewable decision in this matter, the arguments are also based on a misconstruction of the relevant provisions of Article 2 of the *Anti-Dumping Agreement*.

The gold standard for ascertaining normal value is set out in s.269TAC(1) of the Act and is stated to be the price paid for like goods sold, in certain defined circumstances, by the exporter in the country of export. That price is a matter of fact and it is not 'determined' by the Minister. By contrast when the Minister is satisfied that because of the low volume of relevant sales, the unsuitability of such sales or the absence of sales complying with the defined circumstances, that the normal value cannot be ascertained under s.269TAC(1) the Act requires him to proceed by way of determinations[2] taking account of such factors as the regulations provide for[3]. Having decided, in the present matter, that the market situation in China precluded the ascertainment of a price based normal value, the Assistant Minister decided to calculate normal value by reference to the sum of three amounts which s.269TAC(2)(c) requires her to determine. In relation to the first of those amounts – the cost of production – the Act does not say that it is the

[2] *Customs Act 1901*: s.269TAC(2)(c)
[3] ibid., s.269TAC(5A)

exporter's cost of production in the country of export but the amount determined by the Minister to be that amount.

In making such a determination the Minister must apply any of the relevant adjustment provisions of section 43 of the Regulation but the section does not direct, or otherwise provide guidance to, the Assistant Minister on how to work out an amount to be the cost of production in the country of export when the exporter's records … *do not reasonably reflect competitive market costs associated with the production or manufacture of like goods.*

The approach adopted by the Assistant Minister in this case, and by her predecessors in *PanAsia* and *Dalian*, was to identify the cost of production method as the 'appropriate proxy'[4] for the gold standard and to determine the total cost of production in the country of export using benchmark cost elements as substitutes for actual cost elements in China that had been identified as being 'artificially low' as a result of market distortions driven by the government policies. In constructing a normal value in this manner we see no implied restrictions in the legislation concerning the choice of substitute cost elements other than that the substitute elements should reasonably reflect the competitive market costs that would apply in China in the absence of the identified market distortions. In particular we cannot find any justification in the statutory language to suggest that only Chinese cost elements can be used as surrogates.

In summary we consider that s.269TAC(2)(c) requires the Assistant Minister in the circumstances of this case to determine what the total cost of production of the goods would be in the country of export if the *'situation in the market'* of that country did not exist. In doing precisely that the Assistant Minister, in our view, has made the correct and preferable decision.

EU - Biodiesel

Claims in the other applications that the Assistant Minister's determination of a constructed normal value contravened the requirement to arrive at a cost of production in the country of export are based primarily on the recent decision of a WTO panel in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*[5] (**EU – Biodiesel**).

While we have already made the point that Australian legal authority requires some ambiguity to be identified in the relevant provisions of the Act and Regulation to justify reference to external jurisprudence, we make the following additional observations in relation to that decision:

1. It is under appeal to the Appellate Body[6].

2. Argentina's claims were that certain provisions of EU legislation were inconsistent with the Anti-Dumping Agreement and certain decisions made by EU authorities

[4] *US Softwood Lumber V*: para 7.278; *EU – Biodiesel*: para 7.233
[5] WT/DS473/R (29 March 2016)
[6] http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154577.pdf

pursuant to that domestic legislation were also contrary to the Anti-Dumping Agreement. The Panel rejected the first of those claims.

3. The EU domestic legislation considered by the Panel has no parallel in Australian domestic law.

4. The Panel's decision relates to an interpretation of the word 'costs' in Article 2.2.1.1 and not to the phrase 'competitive market costs' in Australian domestic law.

5. Whether the Australian regulation is consistent with the Anti-Dumping Agreement is not an issue before the Review Panel and, in any event, we consider that it is not a matter falling within the jurisdiction of the Review Panel.

6. We believe that there is a very strong case to argue that the Panel erred in concluding that the use of an external benchmark as a surrogate cost element resulted in the determination of a cost of production that was not 'in the country of origin'.

7. We also consider that in circumstances where government induced distortions in a domestic market have resulted in certain artificially low cost elements prevailing throughout that market that the Panel's conclusion that Article 2.2.1.1 proscribes the use of external benchmarks renders the provision inutile.

Please contact the undersigned if you require clarification or further information in relation to the above issues.

Yours faithfully
MinterEllison

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