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 Yonggang Group Co., Ltd

Address: Yonglian, Zhangjiagang City, Jiangsu, China, 215628

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

Contact person for applicant

Full name: Mr Simon Yu

Position: Assistant President

Email address: simon@yong-gang.com

Telephone number: +86-512-58619872

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

Jiangsu Yonggang Group Co., Ltd, (herein referred to as "Yonggang") is a producer and exporter of steel reinforcing bars 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

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

The description of steel reinforcing bars (rebar) exported from China that are subject of the reviewable decision are:

Hot-rolled deformed steel reinforcing bar whether or not in coil form, commonly identified as rebar or debar, in various diameters up to and including 50 millimetres, containing indentations, ribs, grooves or other deformations produced during the rolling process.

The goods include all steel reinforcing bar meeting the above description of the goods regardless of the particular grade or alloy content or coating.

Goods excluded are plain round bar, stainless steel and reinforcing mesh.

Provide the tariff classifications/statistical codes of the imported goods

The relevant tariff classification for the subject goods are:

- 7214.20.00 (statistical code 47)
- 7228.30.90 (statistical code 40)
- 7213.10.00 (statistical code 42)
- 7227.90.90 (statistical code 02 and 04)
- 7227.90.10 (statistical code 69)

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 2016/39 is at attachment A.

Provide the date the notice of the reviewable decision was published

The attached ADN 2016/39 was published on 13 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: 13TH MARCH 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

13 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 – Steel reinforcing bars exported from the Peoples Republic of China by Jiangsu Yonggang Group Co., Ltd.

INTRODUCTION

On 14 April 2015, OneSteel Manufacturing Pty Ltd lodged an application for the imposition of interim dumping duties on exports of rebar from China. The Anti-Dumping Commission (the Commission) notified on 1 July 2015 of its decision to not reject the application.

On 21 December 2015, the Commissioner of the Anti-Dumping Commission (Commissioner) made a preliminary affirmative determination (PAD) and imposed provisional measures on imports of rebar from China entered for home consumption on or after 21 December 2015. PAD Report 300 (PAD 300) sets out the grounds and reasons for the Commissioner's decision.

On 8 February 2016, the Commission published its preliminary findings of the dumping investigation in Statement of Essential Facts Report No. 300 (SEF 300). At the same time, the Commissioner made the decision to amend the level of the provisional measures applicable to exports of rebar from China.

On 12 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 Yonggang. Notification of the Parliamentary Secretary's decision was made on 13 April 2016.

Final Report No. 300 (Report 300) 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.

Yonggang 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 rebar:

Finding 1: 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 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 Yonggang, in rejecting its steel billet production costs.
Finding 4: The Commission failed to undertake a proper examination and assessment of whether Yonggang's records reasonably reflected competitive market costs.
Finding 5: The Commission erred in calculating the profit relevant to the calculation of constructed normal values.
Finding 6: The Commission erred by not making necessary due allowance for domestic bank charges that affected price comparability.
Finding 7: The Commission erred by making due allowance for export credit terms that did not affect price comparability.
Finding 8: The Commission erred by not making adjustment to the steel billet benchmark price to ensure normal values are properly compared to export price, for factors unrelated to the GOC's policies and plans which were the basis for domestic sales and costs being rejected.
Finding 9: 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 rebar were unsuitable for determining normal values.

REP 300 Finding

REP 300 found that a particular market situation existed in China and as such considered that domestic selling prices of rebar were not suitable for establishing normal values pursuant to subsection 269TAC(1) of the Act. Appendix 1 to REP 300 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 rebar 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 and deep drawn stainless steel sinks. Those assessments all reference the same GOC planning documents and directives from as early as 2005.

In this current rebar 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 Yonggang'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 rebar 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

[3] Report 300, page 94.
[4] TMRO Report – Hollow Structural Sections exported from China, Korea, Malaysia, Taiwan, and Thailand, December 2012.

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 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 rebar investigation, Yonggang 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 rebar 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 rebar 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 Yonggang or other Chinese rebar exporters had received benefits from such subsidy programs.

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

In the case of its steel inputs, Yonggang is a fully integrated steel producer which produces its own molten iron and steel billet. As such, it did not purchase steel billet or coking coal during the investigation period and therefore cannot be considered to have benefited from the provision of these materials at less than adequate remuneration. Of its coke purchases which were all purchased locally in China, none of the suppliers were state-owned or state-invested enterprises and therefore cannot be found to be provided by the government and subsidised.

So even though the evidence shows that Yonggang and possibly other Chinese exporters of rebar 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 rebar 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, Yonggang 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 300, 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 Yonggang's view, the applicant has understated the critical differences in the assessment of Chinese domestic market sales within the two dumping systems. Yonggang 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

[5] Report 300, page 88.

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

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 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 Yonggang'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

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[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.

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

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

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 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 rebar investigation period, and the report's conclusions are general observations about the broader Chinese steel industry based on a limited and select few enterprises. Yonggang contends that the conclusions of this report does not provide any reasonable understanding of the dynamics and characteristics of the Chinese domestic rebar 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 rebar 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 rebar market during the investigation period.

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

REP 300 Finding

Following its finding that domestic sales of rebar 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 rebar 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 rebar prices and the prices of production inputs in the Chinese

[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

domestic market as outlined in Appendix 1 to REP 300, the records of Yonggang 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.

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

Grounds for appeal

In deciding to reject Yonggang's steel billet costs, the Commission appeared to rely solely on its market situation findings. In REP 300[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 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.*

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 Customs (International Obligations) Regulations 2015 (the Regulations).*

[12] Report 300, page 15.
[13] Ibid, page 87.

Yonggang 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 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.

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

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:

> *… 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, Yonggang 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 Yonggang'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 Yonggang, 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

[15] Panel report, WT/DS473/R, footnote 391, page 82.
[16] Ibid., para 7.241, page 83.

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 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.

Yonggang strongly disagrees. In its submission of 28 February 2016, Yonggang highlighted the views of key WTO members in the current 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] summarised Australia's third party position on this issue:

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

> *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, 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*

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

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

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

> *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 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 Yonggang's circumstances in the rebar 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 rebar, 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 Yonggang's records reasonably reflected competitive market costs.

Notwithstanding the view that the Commission failed to properly examine whether Yonggang's 'records', and not its actual costs, reasonably reflected costs of production, Yonggang 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*, Yonggang 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 – Rebar (Turkey), where the Panel considered that it must …reach a conclusion as to whether…there was evidence in the record that the short-term interest income was "reasonably" related to the cost of producing and selling*

[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.

rebar, and that the IA thus should have included it in the cost of production calculation.

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

In Australia's view then, the 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. Yonggang 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.

Yonggang 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 - Rebar*[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*

[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 rebar from Turkey, WT/DS211/R, para 7.393, p 97.

> *whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question in that case.* [emphasis added]

The United States summarises its position by stating:

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

The United States seems to hold the same view as Australia, which allows for the adjustment or replacement of a particular cost, where that particular cost 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 Yonggang'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 300, 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 Yonggang in the production of steel reinforcing bars.

The Commission identified in REP 300 the numerous direct input materials used in the production of rebar including those listed below:

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

The Commission then explains that '*[n]one of the exporters' CTMS or raw material purchases information contains sufficient details of these items for the Commission to be able to undertake a comprehensive analysis of all these inputs*.' The Commission adds that '*[a]part from the difficulties in identifying a reliable competitive market cost basis for all these different sub-groups of products, as the certain amount or proportion of all these sub-groups of raw materials are not known, an accurate substitution of these costs with competitive market costs is not possible.*'

This confirms that the Commission itself identified that it was unable to undertake a comprehensive analysis of the relevant costs or establish an accurate substitution. 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 Yonggang 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.*

Again, Yonggang considers that the Commission's explanation for not assessing the reasonableness of such costs is unconvincing. Firstly, as reported in Yonggang's questionnaire response, it purchases [redacted]. The difficulties encountered by the Commission associated with the different types of coal outlined above do not apply in Yonggang's case.

Second, in the concurrent subsidy investigation into rebar exported from China, the Commission has requested that Yonggang 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 Yonggang 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 300 '*that certain raw materials were being sourced in semi-finished or further processed forms from the Chinese domestic market. For example, the Commission verified that Chinese exporters were purchasing further processed iron pellets from their domestic market but record these purchases as iron ore in their accounting systems. This causes similar types of complexities in determination of competitive market costs and substitution of distorted costs with competitive market costs in a precise manner.*'

Yonggang is particularly disappointed by this aspect of the Commission's reasoning, given the numerous submissions by Yonggang presented to the Commission highlighting that iron ore is the single largest cost input into the production of steel billet and rebar, and its iron ore material costs undoubtedly reflect reasonable competitive market costs. On numerous occasions in PAD 300, SEF 300 and REP 300, the Commission has highlighted that '*steel billet costs comprise 80 to 85 per cent of rebar 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 Yonggang's case, iron ore material costs represent approximately [redacted]% of the total cost of production.

Yonggang has on numerous occasions throughout the investigation brought to the Commission's attention that Yonggang sources 100% of its iron ore requirements from imports external to China, with approximately [redacted] % 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 Yonggang's iron ore costs do not reflect competitive market costs.

Yonggang'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 Yonggang'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 Yonggang's iron ore costs. Also relevant is that the applicant has not identified iron ore

[24] Dumping and Subsidy Manual, page 44.

purchases by Chinese exporters of steel reinforcing bars as conferring a benefit within its application for the imposition of countervailing duties[25].

As further support for its position, Yonggang 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 Yonggang's corresponding iron ore purchase prices. It reveals that Yonggang'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 GRAPH DELETED]

Source: Metal Bulletin Iron Ore Index (MBIOI)

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.

Yonggang 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 Yonggang's records. Given that iron ore is the single largest cost item in the production of rebar, 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 300, 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 Yonggang'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 rebar 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.

[25] EPR 322, Record No. 003.

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

Finding 5: The Parliamentary Secretary erred in calculating the appropriate profit relevant to the calculation of constructed normal values

REP 300 Finding

In calculating the rate of profit, the Commission assessed whether domestic sales were profitable by comparing the quarterly cost to make and sell information for each model sold domestically, with domestic sales transactions in the corresponding quarter. The quarterly comparison of sales and costs to determine whether sales were profitable was undertaken even though the Commission found that there was a significant variation of costs and prices across the investigation period.

After identifying those sales of like goods that were sold in the ordinary course of trade, the Commission constructed normal values and included a rate of profit based on a limited subset of those domestic like goods sold in the ordinary course of trade.

Grounds for appeal

We submit that the Commission's determination of profit includes a number of calculation errors and an incorrect interpretation of the method for determining profit pursuant to Regulation 45 of the IO Regulations.

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

In its final calculations, the Commission has calculated the unit cost to make and sell for each model category of like goods by dividing the total cost to make and sell for each quarter, with the corresponding total quarterly volume of steel billet. This reference to the volume of steel billet as the denominator in calculating the unit cost to make and sell is plainly incorrect.

Steel billet is the raw material used in the production of rebar and is not appropriate for calculating the unit cost of the finished rebar products. As is clearly evident from Confidential Appendix 2 of the Commission's dumping calculations, the relevant and appropriate quantity for calculating the unit cost of rebar is the total production volume of rebar shown in Column I.

It is worth noting that the Commission's own calculation of the respective monthly unit cost to make and sell for rebar correctly references rebar production volume as the denominator in the detailed costing worksheet. However, the identified error is created when the Commission creates an excel pivot table for the purposes of calculating the quarterly weighted average unit cost to make and sell. As is evident from the formula for the calculated field, 'Unit CTMS' in the excel pivot table, the denominator references the steel billet quantity and not the rebar production quantity.

b) Error in the calculation of profitable sales

The above error in the calculation of the quarterly unit cost to make and sell results in each individual domestic transaction being compared to an incorrect quarterly cost and therefore the determination of whether individual domestic sales are profitable or not is also incorrect. This is evident by comparing the volume of unprofitable domestic sales from the Commission's original calculations and the revised calculations after correct the quarterly cost to make and sell.

This error also results in the magnitude of corresponding profits and losses on individual domestic transactions being incorrect in the Commission's final calculations.

c) Error in the calculation of the rate of profit

Finally, the rate of profit applied to the constructed normal value is also a calculated error as it is calculated with representing total profits from domestic sales in the ordinary course of trade as a percentage of the corresponding total cost to make and sell. Given that both the total cost to make and sell figure and the total profit figure have been incorrectly calculated, it is obvious that the calculated rate of profit is also incorrect.

d) Inconsistent approach to performing the ordinary course of trade test.

Following the publication of PAD 300, it was noted that the Commission's calculation of preliminary dumping margins included a weighted comparison of quarterly periods. In response to PAD 300 in its submission of 15 January 2016, Yonggang queried the use of quarterly comparisons given the significant month on month fluctuations in costs and prices across the investigation period.

It demonstrated that significant and erratic movements in its actual billet costs and the Commission's preferred billet benchmark cost occurred during the investigation period by reference to the table below.

[CONFIDENTIAL TABLE DELETED]

The data showed that Yonggang's billet cost fell across the December quarter 2014 by approximately [redacted]%, [redacted] % across the March quarter 2015 and [redacted] % across the June quarter 2015.

In SEF 300, the Commission responded to the issue and acknowledged and accepted '*the significant fluctuation of steel billet prices during the investigation period and agrees with Yonggang's trend analysis in its submission. Consequently, the Commission considered that the comparison of normal values with export prices on monthly basis would give more accurate results. Consequently, all dumping margin calculations are revised and comparisons were made on monthly basis.*'

However, on review of the revised preliminary dumping calculations from SEF 300, it was apparent that the Commission applied monthly comparisons to all parts of the dumping margin calculations except the relevant comparisons performed in the ordinary course of trade test. Instead the Commission continued to compare individual domestic selling prices with the quarterly cost to make and sell, and not the actual monthly cost of the corresponding sale. So whilst the Commission acknowledged in SEF 300 that the significant fluctuations in costs would have distorted weighted average comparisons, it chose not to address the distortion evident in the weighted average comparisons undertake in the ordinary course of trade test.

In its submission of 28 February 2016 in response to SEF 300, Yonggang explained to the Commission that it had properly addressed the distorting effect of the significant fluctuation in steel billet costs on the ordinary course of trade test. As highlighted, this issue of monthly

and quarterly comparisons for performing the ordinary course of trade test is addressed in detail in the Commission's Dumping and Subsidy Manual[27].

> *Ordinary course of trade*
>
> *One of the circumstances where sales may not be in the ordinary course of trade is when sales have been made at a loss. Section 269TAAD concerns the treatment of sales at a loss. In order to test whether loss making sales are in the ordinary course of trade, all of the exporter's domestic sales of like models (transaction by transaction) and the unit cost to make and sell those domestic models are required.*
>
> *The steps when examining sales at a loss are:*
>
> *Step 1 – quantify the volume of sales at a loss over the investigation period - s.269TAAD (1)(a) & (b) and (2).*
>
> *- Determination of the domestic costs to make and sell (CTMS) for each model: The costs to make and sell (CTMS) the domestic sales are verified for each model. The CTMS is generally calculated for each quarter of the investigation period. In some circumstances a monthly, or an annual, domestic CTMS may be used. A monthly CTMS may be appropriate where there are significant variations in raw material costs, or a highly inflationary market.*

It is apparent then that the Commission's own guidelines provide that where there are significant fluctuations in raw material costs, it is more appropriate to compare domestic selling prices with corresponding monthly costs.

In REP 300, the Commission correctly summarised Yonggang's concerns and disagreement with the approach adopted in SEF 300. However, its response in REP 300 to this specific issue is confusing as it appears that the Commission has misunderstood the particular issue.

The Commission's response noted that:

> *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.*

As explained, this response is puzzling as it does not in any way address the particular issue which the Commission correctly summarised on page 32 of REP 300. The Commission's response seems to be focused on the recoverability test and presenting its view that irrespective of the comparison period, the recoverable cost to make and sell is the same amount as it is calculated for the whole of the investigation period.

Whilst the Commission's view of the recoverability test is correct, that issue is not being disputed by Yonggang. Instead Yonggang submits that the calculation of whether domestic sales are profitable or not is distorted when prices are compared

[27] Dumping and Subsidy Manual, p 31.

with quarterly costs which have experienced significant monthly variations across the investigation period.

To further clarify and ensure the issue is properly understood, the table below provides a simple illustration of the distorting effect of basing profit calculations on quarterly costs when monthly variations within the quarter are shown to be significant. It shows that unit monthly costs have decline over the quarter from $130 in October to $117 in December. The weighted average quarterly cost is $124.

As is evident, when the corresponding selling prices in each month are compared with the quarterly cost, it reveals that only the sale in October 2014 is profitable, with November and December sales being sold below cost. However, the selling prices in each month correspond to the costs in that same month. Therefore the costs from October aren't relevant to a sale made in December. This misalignment in periods between costs and prices is not normally an issue when monthly costs across the quarter are relatively constant and stable.

However, when costs and/or prices exhibit substantial monthly variations within the quarter, the period of comparison is likely to have a greater distorting effect on the determination of profitable sales. To further highlight in the example below, when the monthly selling prices are compared with their corresponding month costs, it reveals the opposite of the quarterly comparison – with the sales in October 2014 being the only sale at a loss and sales in November 2014 and December 2014 both being profitable.

	Volume	Total CTMS	Unit cost	Unit selling price	Profit test based on quarterly costs	Profit test based on monthly costs
Oct-14	40	$5,200	$130	128	$3.56	-$2.00
Nov-14	30	$3,660	$122	123	-$1.44	$1.00
Dec-14	20	$2,340	$117	122	-$2.44	$5.00
	90	$11,200	$124			
December quarterly CTMS						

It's for this reason that the Commission's own practice provides for a monthly comparison where significant fluctuations are found to have occurred across the investigation period. As explained earlier, this was acknowledged by the Commission but was not reflected in its calculations and ordinary course of trade test.

In these circumstances, it is illogical to not perform the ordinary course of trade test by comparing selling prices with corresponding monthly costs given that:

1. all of Yonggang's costs involving steel billet production and rebar production were provided on a monthly basis;
2. the Commission's steel billet benchmarks were based on monthly average prices;
3. normal values were constructed for each month of the investigation period;
4. export prices were referenced to the month in which the goods were exported; and
5. the determination of dumping was performed by comparing the export price in each month of the investigation period with the corresponding monthly normal value to derive a weighted average normal value.

Therefore, Yonggang submits then that the Commission erred by undertaking the ordinary course of trade test on a quarterly basis, when the correct and preferable approach according

to the Commission's own findings and practice is to test profitability of domestic sales by comparison to month costs where significant fluctuations in raw materials are found to exist during the investigation period.

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

In calculating Yonggang's preliminary dumping margin in SEF 300, the Commission's constructed normal value included an amount for profit based on all domestic sales of like goods sold in the ordinary course of trade during the investigation period. Following publication of SEF 300, Yonggang brought to the Commission's attention a number of errors in its preliminary calculations, including a formula error which resulted in profit being double-counted.

After confirming the identified error, the Commission informed Yonggang by email correspondence that it would be revising the profit rate to apply only to domestic sales of like goods (i.e. 500 grade products). Yonggang in its reply explained to the Commission that limiting the calculation of profit to a subset of domestic sales in the ordinary course of trade was both inconsistent with the Commission's practice and interpretation of 'like goods' in Regulation 45(2).

In its response of 22 March 2016, the Commission advised:

> *Regulation 45(2) clearly explains that the profit should be calculated by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade. 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 500 Mpa grade rebar only. The Commission's approaches in other cases are irrelevant for this matter as each case should be considered on its own merits.*

Yonggang is perplexed by the Commission's interpretation of Regulation 45(2) and its view that like goods are limited only to grade 500 rebar. In addition, Yonggang is concerned by the arbitrary nature of the decision and the apparent disregard for case precedence and consistency with stated policy. Yonggang disagrees with the Commission's position and submits that the exclusion of domestic sales in the ordinary course of trade from the determination of profit is prohibited by Regulation 45(2) of the IO Regulations and the corresponding Article 2.2.2 of the WTO Anti-Dumping Agreement.

This issue was considered by the Appellate Body in *EC — Tube or Pipe Fittings*, where it examined whether data from low-volume sales was able to be excluded when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2. The Appellate Body reasoned[28]:

> *"Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation ('shall') on an investigating authority to use 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for SG&A and profits. Only '[w]hen such amounts cannot be determined on this basis' may an investigating authority proceed to employ one of the other three methods provided in subparagraphs (i)–(iii). In our view, the language of the chapeau*

[28] Appellate Body Report, EC — Tube or Pipe Fittings, WT/DS219/AB/R, para 97, page 38.

> *indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the 'actual data pertaining to production and sales in the ordinary course of trade'. If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.*
>
> *As the Panel correctly observed, it is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales in addition to sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2."* [emphasis added]

Therefore, it is clear that the only grounds for excluding sales in determining profit pursuant to Regulation 45(2), is that the sales are not like goods or the sales are not made in the ordinary course of trade. Yonggang notes that this similar issue is currently being considered by the ADRP in its review of aluminium road wheels exported from China. In seeking to have the determination of profit reinvestigated by the Commission, the ADRP emphasised[29]:

> *In the reinvestigation, the ADC is requested to take careful cognisance of s.45(2) of the IO Regulation, which unlike s.269TAC(2)(a) of the Customs Act, does not refer to a "low volume" of sales (in addition to sales outside the ordinary course of trade) as a reason for rejecting the exporter's own data in the relevant calculation. The ADC should also take into consideration WTO jurisprudence on Article 2.2.2 of the Anti-Dumping Agreement, which is the relevant WTO provision that is enacted into Australian legislation by s.269TAC(2)(c)(ii), s.269TAC(5B) and s.45 of the IO Regulation.*

The ADRP adds[30]:

> *If, the ADC finds that sales below cost (that do not allow for the recovery of costs in a reasonable period of time) amount to 20% or more, it should still calculate the average profit for those sales that are not below cost (or are below cost but allow for recovery in a reasonable period of time).*

Yonggang submits that the WTO jurisprudence highlighted above supports the view that sales of like goods made in the ordinary course of trade must be used to determine the profit to be used in constructed normal values established under subsection 269TAC(2)(c) of the Act. Yonggang also notes that the Commission has confirmed this interpretation in its previous investigation into preserved or prepared tomatoes[31]:

> *Regulation 181A sets out the manner in which the Minister must determine an amount of profit to be included in a constructed normal value. Pursuant to reg. 181A(2), "the Minister must, if reasonably possible, work out the amount [for profit] by using data*

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[29] Letter from ADRP to ADC - Request for Reinvestigation (PDF 210KB)- 22 February 2016, page 2.
[30] Ibid.,
[31] Final Report 217, page 39.

> *relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade".*
>
> *As each of the cooperating exporters of prepared or preserved tomatoes had domestic sales of like goods in the ordinary course of trade, the Commission was able to use this verified data to determine a profit pursuant to reg. 181A(2). The Commission considers that the correct or preferable interpretation of reg. 181A(2) is that the actual profit achieved on all domestic sales of like goods sold in the ordinary course of trade be used.* [original emphasis]

It would also appear from REP 300 that the Commission calculated profit for other cooperating exporters on the basis of '*data related to the production and arm's length sales of like goods in the ordinary course of trade.*' This suggests that the Commission applied a different methodology to determining profit for the purposes of establishing Yonggang's constructed normal values. There is no legitimate reason for the Commission to depart from calculating profit on the basis of all like good sales made in the ordinary course of trade.

Yonggang also disputes the view from the Commission that like goods in the investigation were limited to rebar products of 500 grade. The description of goods subject to application and investigation was not limited to rebar products of certain grades. In fact, the application and REP 300 make clear that the '*goods covered by this application include all steel reinforcing bar meeting the above description of the goods regardless of the particular grade or alloy content or coating.*'

Further, it is noted that the Section 8 notice signed by the Parliamentary Secretary states that interim dumping duties apply to like goods described in the 269TG(2) notice. That notice again makes clear that the goods covered include all rebar regardless of grade, alloy content or coating. Therefore, there is no basis upon which the Commission was able to exclude domestic sales of like goods sold in the ordinary course of trade, from the determination of profit pursuant to Regulation 45(3) of the IO Regulation.

Finding 6: The Parliamentary Secretary erred by not making necessary due allowance for domestic bank charges that affected price comparability

REP 300 Finding

In constructing normal values which could be properly compared with corresponding export prices, the Commission made upward adjustments for bank charges incurred on export sales. The Commission chose not to make downward adjustments for the parallel bank charges incurred by Yonggang on its domestic sales.

Grounds for appeal

Yonggang submits that the Commission erred by not making the required adjustment to constructed normal values pursuant to subsection 269TAC(9) of the Act, to ensure that they could be properly compared to corresponding export prices. The item to be adjusted relates to bank charges incurred on its domestic sales transactions.

As highlighted in REP 300, the Commission had already made an upward adjustment to constructed normal values for bank charges incurred on export sales. However, the Commission appears to have overlooked the fact that the constructed normal values included an amount for domestic selling, general and administrative (SG&A) expenses

incurred by Yonggang. Included in the SG&A amount were bank charges incurred on domestic sales.

Therefore, Yonggang it is clear that the Commission has double counted export bank charges as the SG&A costs included in the constructed normal value already include relevant bank charges for both domestic sales and export sales. As is clear from the Commission's SG&A calculation worksheet, financial expenses have been equally apportioned across total sales. Within financial expenses, there is a separate ledger account clearly referred to as 'bank charges'.

Therefore, Yonggang submits that to have properly adjusted for bank charges, the Commission ought to have either adjusted the SG&A expenses in constructing the normal value by not including bank charges in the SG&A allocation, or make a corresponding downward adjustment for domestic bank charges reported in the SG&A calculations.

Finding 7: The Parliamentary Secretary erred by making due allowance for export credit terms that did not affect price comparability

In its determination of Yonggang's normal value, the Commission made an upward export credit adjustment 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*.' The basis for this adjustment is flawed as Yonggang does not extend credit to its Australian customers.

In its exporter questionnaire response, Yonggang identified in its export sales listing that payments terms to the importer in Australia were 100% payment by letter of credit at sight. This is supported by the terms and conditions of the counter-signed sales contract between the parties and provided to the Commission.

In response, the Commission stated:

> '*[n]otwithstanding 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.*'

It is important to note that the period reported in the export listing identified by the Commission simply reflects the number of days between invoicing and receipt of payment. This period accords with the agreed terms of the letter of credit for funds to be cleared by the buyer's financial institution upon presentation of the corresponding commercial documents. In addition to the period allowed by the buyer's financial institution, the seller's financial institution allows up to an additional [redacted] working days for funds to be deposited into the seller's account.

Therefore, the period between invoice and receipt of payment by Yonggang does not reflect the period of credit extended to the customer. As noted by the Commission in REP 300, the agreed sales terms and as a consequence the export selling prices, are reflective of zero credit days.

Given then that Yonggang's export prices are not inclusive of extended credit terms, Yonggang submits that the Commission has erred by not complying with the requirements of the Act and its own stated policy interpretation and practice to ensure that due allowance is made only 'for differences which affect price comparability'. The Commission's Dumping

and Subsidy Manual[32] clearly states that '*[a]djustments will be made if there is evidence that a particular difference affects price comparability.*' It adds 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]

In this particular case, the Commission has made due allowance for what it refers to as the 'cost of capital'. Such costs do not relate to actual costs incurred by Yonggang, but instead simply refer to a notional opportunity cost of receiving the funds some number days after exportation. Therefore, in direct conflict with its own stated policy, the adjustment made by the Commission is based neither on actual costs incurred or selling prices achieved.

Further, as the actual export selling prices are based on zero-day credit terms agreed between the buyer and seller, there can be no finding that the notional cost of capital has affected export prices and as a consequence price comparability, which would warrant adjustment to the corresponding normal values.

Finding 8: The Commission erred by not making adjustment to the steel billet benchmark price to ensure normal values are properly compared to export price, for factors unrelated to the GOC's policies and plans which were the basis for domestic sales and costs being rejected.

REP 300 Finding

In replacing Yonggang's actual production costs of steel billet with a surrogate external benchmark price, the Commission made adjustment to the benchmark price by reference to a 'verified average rate of profit realised by Chinese exporters of sales of steel billets in order to calculate the competitive market costs of steel billets.'

No further adjustments were made to address other factors that would affect price comparability and cannot be considered to be relevant to the Commission's assessment of GOC influence in the steel sector in China.

Grounds for appeal

Yonggang requested that the Commission make adjustments to the steel billet benchmark price to take account of revenue achieved on the sale of by-products generated by the production process of molten iron and steel billet. These recovered items and the associated revenue (negative costs) are clearly identified in the detailed costs submitted to the Commission in Yonggang's questionnaire response.

These by-products and the revenue derived from them are directly the result of the specific production processes undertaken by Yonggang and have no relevance or linkages to the Commission's assessment of the GOC influence in the steel sector.

In its response in REP 300, the Commission dismissed the claim for adjustment as it considered '*that the recovery of such costs that the exporters from the Latin America region should also have similar amount and value of by-products and any by-products that are the result of steel billet manufacturing process should already have been priced in the selected benchmark prices.*'

[32] Dumping and Subsidy Manual, p 59.

Yonggang disagrees and contends that the Commission has not fulfilled its obligations to ensure that factors affecting price comparability are adjusted pursuant to subsection 269TAC(9) of the Act. Yonggang finds support in its position in the findings of the Appellate Body in *EC – Steel fasteners*[33]. In that dispute, the EU applied its analogue country methodology for the purposes of determining normal values in accordance with Section 15 of China's accession protocols. It subsequently dismissed the adjustment claims of the Chinese exporters as its practice is to 'not adjust the prices or costs of the analogue country producers to take into account the difference in production methodologies, production factors or efficiencies between the analogue country producers and the producers of the exporting country.'

The Appellate Body concluded:

> *In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted. Based on the foregoing, an investigating authority can reject a request for an adjustment if such adjustment would effectively reflect a cost or price that was found to be distorted in the exporting country in the normal value component of the comparison that is contemplated under Article 2.4 of the Anti-Dumping Agreement. Accordingly, an investigating authority has to "take steps to achieve clarity as to the adjustment claimed" and determine whether, on its merits, the adjustment is warranted because it reflects a difference affecting price comparability or whether it would lead to adjusting back to costs or prices that were found to be distorted in the exporting country*

In Yonggang's view, the revenue associated with recovery of certain by-products from its production process would not result in costs or prices being adjusted back to distorted levels. As explained, these by-products are particular and unique to Yonggang as they stem directly from its production operations. They do not stem from any of the GOC policies or plans relied on by the Commission for finding that steel rebar prices and steel billet costs are distorted.

Further, it is not sufficient for the Commission to simply state that the recovery of by-products 'should' also be evident in the benchmark price. Each production facility will be different and result in different efficiencies and yield ratios. Hence the Commission cannot simply derogate from its obligations to ensure proper price comparisons by dismissing the claimed adjustment on the basis of mere conjecture.

Finding 9: 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 300 Finding

REP 300 concludes that the Australian industry would have achieved higher prices, profits and sales volumes in the absence of dumped imports of rebar from China. As such, the Australian industry suffered material injury in the form of:

[33] Appellate Body Report, EC – Steel fasteners, WT/DS397/AB/RW para 5.207, page 66.

- loss of sales volumes;
- less than achievable market share;
- price suppression;
- less than achievable profits and profitability;
- reduced employment;
- reduced value of assets employed in the production of rebar; and
- reduced value of capital investment in the production of rebar

and that this material injury was caused by sales of rebar exported from China at dumped prices.

Grounds for appeal

Yonggang notes that the material injury assessment in REP 300 is founded upon whether injury has been caused by subject imports using a "but-for" analytical method. As outlined in its submission to SEF 300, the Commission continues to overlook its own policy clearly referenced in its Dumping and Subsidy that makes clear that 'coincidence analysis' is the preferred and primary method for assessing whether a causal link exists between subject imports and injury to the applicant.

Further the Commission continues to ignore its obligation to ensure a 'compelling explanation' for the use of an alternative method, and in applying the but-for method, the need for findings to not be premised on assertions or unsupported assumptions but to ensure they are based on positive evidence. In Yonggang's view, REP 300 does not comply with these critical elements.

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, Yonggang notes the particularly nebulous language used by the Commission in SEF 300 and REP 300 to make findings that the applicant has suffered material injury caused by the subject goods during the investigation period. The Commission's reliance on 'may' and 'could' 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. By any measure, this does not meet the evidentiary standard required for the Minister to be satisfied.

Further, the Commission's conclusions that the applicant 'may' have achieved increased sales volumes, 'may' have achieved greater market share and 'could' have achieved higher prices, appear to all rely upon the solitary mistaken assumption that in the absence of dumping, the applicant's sales of steel reinforcing bars during the investigation period would have replaced the imports of the subject goods. This is 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.*'

Of particular concern, is the response in REP 300 that the '*Commission does not consider that it is necessary to speculate how much of the volume of rebar imports from China the Australian industry would have replaced had these imports not been dumped.*' Yonggang is puzzled then how the Commission is able to confidently make findings based on facts and positive evidence that the applicant's sales volume and market share would have been greater in the absence of the subject goods.

Yonggang's concerns with the but-for approach adopted by the Commission is further supported by the finding in *US — Hot-Rolled Steel*[34], 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*[35], 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.*

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

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

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.*[36]

Yonggang contends the REP 300 provides no reasoning or basis for the assumption that the Australian industry's sales would have replaced sales made by the subject goods during the investigation period in the absence of dumping.

Injury indicators

Price depression

Unit selling prices have increased marginally over the injury analysis period and increased steadily over the investigation period. The Commission has correctly found that the applicant did not suffer price depression during the investigation period.

Price suppression

As noted in PAD 300, '*[p]rice suppression occurs when price increases, which otherwise would have occurred, have been prevented. An indicator of price suppression may be the margin between revenues and costs.*' Therefore, the actual injury experienced by the applicant shows that costs substantially exceeded prices in the three years prior to the investigation period, with average prices rising marginally in the investigation period to be higher than average costs which experienced a sharp fall.

On that basis, it is evident that the applicant did not experience actual injury during the investigation period. Instead, price suppression that was evident in the years prior to the investigation period disappeared in the investigation period.

Sales volumes

Figure 6 in REP 300 shows that over the injury analysis period, the applicant's sales volumes remained relatively steady over the three years prior to the investigation period, followed by a sharp rise in volumes sold during the 2014/15 investigation period. It is again apparent that the applicant has not suffered actual injury in the form of lost sales.

Market share

Figure 9 of REP 300 shows the change in market share of individual market participants and countries of export and demonstrates that the applicant's share of the market has increased in the investigation period. It also shows the following actual trends across the investigation period:

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

- the applicant holds the greatest share of the Australian market for steel reinforcing bars, with its market share steadily declining over the three years prior to the investigation period before a pronounced increase in the investigation period.
- the combined market shares of the countries subject to Investigation No. 264 represents the next largest share of the Australian market. The market share of these countries appears to have increased steadily over the three years prior to the investigation period before being reduced in the investigation period.
- the next largest share of the Australian market is held by imports from countries other than China or countries previously investigated. The market share of these imports remained steady in the years prior to the investigation period before reducing in the investigation period.
- Chinese imports did not exist prior to the investigation period and only commenced during the investigation period, although the market share held by these imports represents the smallest share of the groups represented in the chart.
- during the investigation period, the combined reduction in market share held by imports other than China were predominantly captured by the applicant with a smaller portion captured by Chinese imports.

Profits

Figure 10 of REP 300 shows that the applicant's profit performance experienced a reversal from actual losses in the first half of the investigation period to actual profits in the second half of the investigation period. Neither PAD 300, SEF 300 or REP 300 contain a graph showing the applicant's profit performance across the injury analysis period but it is assumed that these prior year's show losses consistent with the price suppression graph for these periods.

It would appear from Figure 10 that the applicant generated overall profits during the investigation period on the sale of its steel reinforcing bars. Therefore, the applicant has experienced a marked improvement in its actual overall profit levels and actual profitability during the investigation period, relative to the previous loss-making years.

In summary the actual performance of the applicant has improved noticeably during the investigation period with the following significant milestones:

- average prices exceed average costs for the first time during the investigation period;
- volume of steel reinforcing bars reaching their highest levels during the investigation period;
- market share reaching its highest levels during the investigation period;
- overall net profits and profitability achieved for the first time during the investigation period.

It is therefore evident that the facts presented by the Commission in REP 300 shows that no actual injury occurred during the investigation period.

Reliability of undercutting assessment

It is apparent that the Commission's but-for analysis relies heavily, if not solely on the price undercutting analysis contained in REP 300. For example, the Commission's pricing analysis focuses greatly on the comparison of 'undumped' or 'dumping duty inclusive' prices of Chinese imports with the applicant's corresponding prices to demonstrate that in the

absence of dumping, the applicant may or could have achieved increased sales and/or increased prices. It is clear then that the Commission's price undercutting analysis is critical to sustaining its preliminary finding that but-for dumping, the applicant's economic indicators would have displayed even greater improvement than that actually shown. Therefore, any weaknesses in the Commission's price undercutting analysis has the potential to invalidate its preliminary findings.

The calculation of undumped and dumping duty inclusive prices in REP 300 is based on the Commission's final determined dumping margins outlined in the report. However, Yonggang notes that each of the cooperating exporters identified arithmetic errors in the Commission's preliminary dumping calculations. Yonggang continues to highlight calculation errors in this application which are expected to impact on the final dumping margin. Therefore, Yonggang questions the reliability of the price undercutting analysis and as a consequence, the but-for material injury findings, given that they are based on duty-inclusive pricing analysis which contains errors.

Materiality of injury

It is noted that REP 300 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, volumes, market share and profits, Yonggang 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 the applicant and other export sources would have benefited from increased volumes in the absence of imports from China.

In doing so, the Commission would naturally be required to ask itself the following questions:

1. What share of the subject imports would the applicant's volumes have been expected to replace in light of the presence of non-dumped imports from countries subject to Investigation No 264 and other import source?
2. To what extent could the applicant have been expected to achieve any increase in sales volumes given the low prices of steel reinforcing bars in the first half of 2015 from countries subject to Investigation No. 264?
3. What level of import substitution is evident in the Australian market given the price sensitivities and ease with which customers are able to switch supply?
4. Given the Commission's view that price is the major factor in purchasing decisions, to what extent would the applicant have been able to increase its prices relative to other import sources?

In Yonggang'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

Yonggang 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 rebar 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 Yonggang'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 Yonggang's cost elements in determining whether its records reasonably reflected competitive market costs. On that basis, the Commission would have established that Yonggang'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 comply with the Commission's stated policy and assess whether domestic sales were profitable by reference to monthly costs. Also the correct and preferable decision was to base the determination of profit pursuant to Regulation 45 of the IO Regulations, on all domestic sales of like goods found to be sold in the ordinary course of trade. In addition, there are calculation errors that require correcting to ensure the correct amount of profit is calculated.
Finding 6: The correct and preferable decision was to adjust the domestic selling, general and administrative expense to remove the inclusion of bank charges and as such, avoid the double counting of bank charges in the normal values.
Finding 7: The correct and preferable decision was to not adjust normal values for export credit terms as no such terms are offered on Yonggang's exports.
Finding 8: The correct and preferable decision was to have adjust the steel billet benchmark prices to take account of the revenue associated with the recovery of by-products from the production process, as the revenue from these recovered by-products are considered to affect price comparability.
Finding 9: 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 an approximate dumping margin of [redacted]%. This contrasts to the determined dumping margin for Yonggang of 11.7%. On this basis, the proposed decision would have resulted in the investigation being terminated against Yonggang 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 an approximate dumping margin of [redacted] %. This contrasts to the determined dumping margin for Yonggang of 11.7%. On this basis, the proposed decision would have resulted in the investigation being terminated against Yonggang 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 an approximate dumping margin of [redacted] %. This contrasts to the determined dumping margin for Yonggang of 11.7%. On this basis, the proposed decision would have resulted in the investigation being terminated against Yonggang 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 rebar, it is estimated that the resulting dumping margin would have been approximately [redacted] %. This contrasts to the determined dumping margin for Yonggang of 11.7%. On this basis, the proposed decision would have resulted in the investigation being terminated against Yonggang 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 by approximately [redacted] %. When combined with the additional adjustment corrections outlined in the application, the dumping margin is estimated to be approximately [redacted] % lower than that determined in REP 300. This in turn would have added further support to doubt the reliability of the Commission's but-for material injury assessment given their reliance on duty-inclusive delivered price comparisons.

Finding 6: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision by approximately [redacted] %. When combined with the additional adjustment corrections outlined in the application, the dumping margin is estimated to be approximately [redacted] % lower than that determined in REP 300. This in turn would have added further support to doubt the reliability of the

Commission's but-for material injury assessment given their reliance on duty-inclusive delivered price comparisons.

Finding 7: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision by approximately [redacted] %. When combined with the additional adjustment corrections outlined in the application, the dumping margin is estimated to be approximately [redacted] % lower than that determined in REP 300. This in turn would have added further support to doubt the reliability of the Commission's but-for material injury assessment given their reliance on duty-inclusive delivered price comparisons.

Finding 8: The proposed decision would have resulted in normal values being substantially lower than that determined in the reviewable decision by approximately [redacted] %. When combined with the additional adjustment corrections outlined in the application, the dumping margin is estimated to be approximately [redacted] % lower than that determined in REP 300. This in turn would have added further support to doubt the reliability of the Commission's but-for material injury assessment given their reliance on duty-inclusive delivered price comparisons.

Finding 9: 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.