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.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

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

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

Type of entity (trade union, corporation, government etc.): Corporation

2. **Contact person for applicant**

Full name: Mr. Feng Xiaoyi

Position: Manager – Export Division

Email address: fengxy@shagangintl.com

Telephone number: +86-512-58568261

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

Shagang is a producer and exporter of steel reinforcing bars from the Peoples Republic of China.

4. **Is the applicant represented?**

Yes ~~**No**~~

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. **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

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

The description of steel reinforcing bar 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.

7. **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)
- 7227.90.10 (statistical code 69)
- 7227.90.90 (statistical code 01, 02, 04)
- 7228.30.10 (statistical code 70)
- 7228.60.10 (statistical code 72)

8. **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 2018/49 is attached at **Attachment A**.

9. **Provide the date the notice of the reviewable decision was published**

The attached ADN 2018/49 was published on 20 April 2018.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

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: ☐

10. **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**.

11. **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**.

12. **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**.

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* 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: 20 May 2018

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

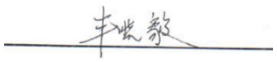
Email address: john@jbracic.com.au

Telephone number: +61 (0)499056729

Representative's authority to act

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

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: 

Name: Mr. Feng Xiaoyi

Position: Manager – Export Division

Organisation: Jiangsu Shagang Group Co., Ltd

Date: 19 / 05 / 2018

J.BRACIC & ASSOCIATES
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20 May 2018

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 – Review of measures applying to steel reinforcing bars exported from China by Jiangsu Shagang Group Co. Ltd.

1. INTRODUCTION

On 19 May 2017, following an application for review of measures lodged by Shagang, the Anti-Dumping Commission (the Commission) initiated a review into steel reinforcing bars exported from China by Shagang.

On 17 October 2017 and again on 27 October 2017, the Commission requested extensions to the deadline for publishing the preliminary findings in Statement of Essential Facts Report No. 411 (SEF 411).

On 21 December 2017, the Commission published its preliminary findings in SEF 411, and on 20 April 2018, the final report containing the basis and reasons for the Assistant Minister's decision was published.

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

Shagang seeks a review of a following findings and conclusions which led to the decision by the Assistant Minister to ascertain variable factors:

Ground 1: The Assistant Minister erred in retrospectively applying new legislative amendments to the review of measures.

Ground 2: The Assistant Minister made incorrect assessments and determinations with respect to Shagang's exports, pursuant to subsection 269TAB(2A).

Ground 3: The Assistant Minister erred by determining an external billet benchmark price which does properly compare with Shagang's integrated production and manufacturing costs.

Ground 4: The Assistant Minister erred by incorrectly calculating the timing adjustment in determining Shagang's export prices.

2.1 Ground 1: The Assistant Minister erred in retrospectively applying new legislative amendments to the review of measures.

Shagang submits that the Commission and the Assistant Minister erred in retrospectively applying newly legislation which was not relevant at the time of Shagang's application for review or the Commissioner's decision to initiate the review. Instead, the newly introduced legislation only became effective many months after the scope of the review had been announced.

By way of background, Shagang lodged its application for review of the measures applicable to steel reinforcing bar on 19 April 2017. The Commission then initiated the review on 19 May 2017. At the time of initiation, subsection 269TAB(3) of the *Customs Act 1901* (the Act) provided that:

> *(3) Where the Minister is satisfied that sufficient information has not been furnished, or is not available, to enable the export price of goods to be ascertained under the preceding subsections, the export price of those goods shall be such amount as is determined by the Minister having regard to all relevant information.*

It was the Commission's practice in circumstances where no exports were made during the review period, to ascertain the export price equal to the ascertained normal value to ensure that future exports were being sold at least equivalent to the established non-dumped price.

On 13 September 2017, the Government introduced the *Customs Amendment (Anti-Dumping Measures) Bill 2017* ("the Bill"), which passed both Houses of Parliament on 19 October 2017 and received royal assent on 30 October 2017.

Therefore, the legislative amendments from the Bill too effect more than six months after Shagang had applied for its review and more than five months after the Commission had initiated the review. This period of time between initiation and introduction of the bill to Parliament is considered directly relevant given that the Bill included a retrospective provision. Item 4 of the Bill provided that the legislative amendments would apply to:

> *(a) a review under Division 5 of Part XVB of the Customs Act 1901 for which an application is lodged, or request is made, on or after the commencement of this Schedule;*
> *(b) such a review that was being undertaken **immediately** before the commencement of this Schedule but for which a declaration in accordance with subsection 269ZDB(1) of that Act had not been made at that time;*
> *(c) an application for such a review that was lodged, or a request for such a review that was made, before the commencement of this item but for which a notice of a review under subsection 269ZC(4), (5) or (6) of that Act had not been made at that commencement.*
> [Emphasis added]

Parts (a) and (c) are not relevant to Shagang's circumstances given that its application and the initiation of the review commenced prior to commencement of the Schedule. In

considering then whether to retrospectively apply the new legislative amendments, the Commission was required to determine whether the circumstances of Shagang's review complied with part (b) – that is, whether the review was being undertaken immediately before the commencement of the Schedule and whether a declaration pursuant to ss.269ZDB(1) of the Act had yet been made.

It is clear to Shagang that the introduced amendments outlined in the Bill should only be applied to those reviews that were 'undertaken **immediately** before the commencement of this schedule'. Had the Government intended for the amendments to apply to all reviews underway at the commencement of the schedule, there would have been no need to include the word 'immediately' in defining the retrospective application of the amendments.

The use of the term 'immediately' also ensures that the retrospective application of the legislative amendments observe the rule of law principal that the law should be capable of being known in order to comply. Limiting the retrospective application of the legislative amendments to only reviews commenced immediately prior to the commencement of the schedule, mitigates any adverse impact. In so doing, it allows for the legitimate and reasonable expectations of interested parties to be observed by ensuring that the retrospective amendments only applied to those reviews where the amendments were capable of being known and complied with.

To that end, '*immediately*' should be defined consistent with the Oxford dictionary definition as "*At once; instantly.*" and *"Without any intervening time or space."* Interpreted this way, the retrospective application of the legislative amendments would only be relevant to reviews initiated after the Government had announced its intention to amend the Act, by introducing the bill to Parliament on 13 September 2017. Support for this view is found in the practices of the Australian Tax Office (ATO) which has relied on announcements and published draft legislation to observe the rule of law principal that the law should be capable of being known in order to comply[3].

The *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013*[4] also provides a recent example of legislation that highlights the preferred date for retrospective legislation to take effect. That bill was announced on 1 March 2012 and first read in parliament on 13 February 2013. However, the ATO gave retrospective effect to the bill on 16 November 2012 (the day on which draft legislation was released for public comment).

In its final report, the Commission outlines its interpretation of the intent of the term immediately in *'…item 4(b) of the amending legislation distinguishes between any review undertaken and completed prior to the commencement of the amendment, and those reviews that had been initiated, were underway and not yet completed prior to commencement. The Commission's view is that the amendments were intended to apply to the latter reviews.*' The Commission's view cannot be accepted as the second condition of part (b) automatically excludes any reviews which were completed prior to the commencement of the amendment, irrespective of whether they were undertaken immediately prior to the amendments or not.

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[3] http://law.ato.gov.au/atolaw/view.htm?docid=PSR/PS200711/NAT/ATO/00001

[4] http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4965_ems_b7b5685c-d33d-4c8c-8d95-24a621d41342%22

The distinction between reviews which had been completed and those still underway is clearly reflected in that second condition of part (b) and not by the use of the term 'immediately'. This is confirmed by a reading of part (b) without the inclusion of 'immediately', which would have the exact same effect of limiting the retrospective application of the amendments to only reviews underway prior to the amendments and had not yet been completed.

Therefore, it is not correct to interpret the term 'immediately' as a way of distinguishing between those reviews which had been completed and those that had not yet been completed at the time of the amendments becoming effective. By doing so, the Commission has removed the effect and relevance of the term 'immediately' in assessing whether the newly introduced legislative amendments should be retrospectively applied to Shagang's review.

Instead, Shagang contends that item 4 is aimed at ensuring that the amendments are retrospectively applied only to reviews which were underway immediately prior to the commencement. Consistent with the retrospective application of other legislative amendments, and ensuring that parties are not adversely disadvantaged, Shagang submits that immediately should be interpreted as applying to reviews where the date of lodgement of the application was made after the date of the bill being introduced into parliament, being 13 September 2017. As Shagang lodged its application for review nearly five months prior to the bill being introduced to Parliament, the legislative amendments should not have been applied retrospectively to Review 411.

2.2 Ground 2: The Assistant Minister made incorrect assessments and determinations with respect to Shagang's exports, pursuant to subsection 269TAB(2A).

In accordance with the newly introduced subsection 269TAB(2A), the Minister must have regard to (i) previous volumes of exports by that exporter, (ii) patterns of trade for like goods, and (iii) factors affecting patterns of trade for like goods that are not within the control of the exporter. Notwithstanding its contention that the new legislative provisions ought not to have been applied retrospectively, Shagang nevertheless considers that the Commission erred in each of its assessments and the determination that Shagang's circumstances met the conditions for be considered a 'low volume exporter'.

2.2.1 Previous volumes of exports by that exporter

Shagang has never exported steel reinforcing bars to Australia. This is confirmed by the Commission in REP 411:

> *Shagang has not previously exported the goods prior to the review period. The Commission notes that the explanatory memorandum for the Customs Amendment (Anti-Dumping Measures) Act 2017 states:*
>
> *[…] where an Exporter has never exported the goods subject to measures to Australia. In a review of measures in relation to that Exporter, if there have still been no exports, it may be appropriate to determine that Exporter's export price under subsection 269TAB(3) despite the methods in new subsection 269TAB(2B).*

The explanatory memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2017 highlight that an assessment or consideration be undertaken into current volumes relative to previous volumes:

> *14. New paragraph 269TAB(2A)(b)(i) requires consideration of the previous volumes of exports (if any) of the goods that are the subject of the review to Australia by that Exporter. If the previous volumes of exports are **much higher** than the volume of exports during the period being examined by the review, this may indicate that the Exporter has adopted a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may be relevant in the Minister's determination that the information (if any) provided by the Exporter is insufficient or unreliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should be applied.* [emphasis added]

This the new legislation requires a consideration of whether the previous volumes of exports were '*much higher than the volumes of exports during the period being examined by the review*' in order to understand and determine whether the exporter had '*adopted a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty*'. As Shagang has never exported like goods to Australia, it cannot be concluded that previous volumes were much higher.

2.2.2 Patterns of trade for like goods

In assessing the patterns of trade for like goods, the totality of the Commission's conclusion in REP 411 states:

> *As shown above in Figure 1, while exports from China to Australia declined markedly around the time securities were implemented on exports of the goods from China, exports from all other countries increased substantially. The Commission interprets these results as the general market for the goods remaining persistent and that Shagang's lack of exports during the review period does not pertain to a general lack of exports or low volumes of exports to Australia.*

Shagang contends that the Commission's assessment and consideration of the patterns of trade for like goods to be fundamentally flawed and missing objective examination of the evidence. Apart from merely noting the marked decline in export volumes of like goods from China, the Commission's assessment focuses wholly on and gives entire weight to the export volumes of like goods from other exporting countries.

This is in direct contrast to the example and guidance contained in the explanatory memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2017.

> *15. New paragraph 269TAB(2A)(b)(ii) requires consideration of the patterns of trade for those goods. For example, some goods are specialty or custom products that are consistently exported in low volumes. Considering patterns of trade may involve an examination of the previous patterns of trade for the Exporter in question, or the pattern of trade generally among Exporters of goods from the country of export. The Minister may also consider the pattern of trade in other ways. For example, if a decline in the pattern of trade from the Exporter reflects a similar decline in the pattern of trade*

> *from the country of export generally, during the period being examined by the review, this may demonstrate that low volumes are indicative of broader market trends, rather than a strategy of low volume exports in an attempt to exploit the unintended consequence of the review of measures to obtain a more favourable rate of duty. This may weigh in favour of the Minister determining that the information (if any) provided by the Exporter is sufficient and/or reliable for the purpose of determining an appropriate export price and that the specific methods prescribed under new subsection 269TAB(2B) should not be applied.*

It is clear from the explanatory memorandum that the assessment of patterns of trade is to be undertaken in the context of the '*exporter in question*' or '*the pattern of trade generally among Exporters of goods from the country of export*'. As highlighted by example, a similar pattern of decline or trend between that of the exporter's volumes and from the country of export more broadly, suggests a broader market trend rather than an attempt by the export to reduce its export volumes to obtain a more favourable measure.

As noted by the Commission and highlighted in Figure 1 of REP 411, exports from China have been almost non-existent during the review period. This pattern of trade to Australia by Shagang and Chinese exporters more broadly reflects a contrast in market dynamics between the Australian and Chinese domestic markets. This also demonstrates and supports a conclusion that the patterns of trade to Australia are similar between Shagang's exports and exports more broadly from China, and as such, the Commission ought to have given weight to these facts and determined that Shagang is not a low volume exporter as defined, and recommend that the new subsection 269TAB(2B) of the Act should not be applied.

2.2.3 Factors affecting patterns of trade for like goods that are not within the control of the exporter.

The Commission has correctly noted that Shagang has not previously exported the goods to Australia. It should also be noted that Shagang submitted an application for accelerated review of its measures in regard to steel reinforcing bar but was rejected by the Commission on the basis of a loose interpretation of related party under the relevant provisions.

With regard to factors affecting patterns of trade, Shagang submitted that there was relevant information available to the Commission from the concurrent dumping investigation into steel reinforcing bars exported from Greece, Indonesia, Spain, Taiwan and Thailand, and its findings in that investigation with regards to dumping (REP 418). The period of investigation for that investigation mirrored that of review 411 and therefore the Commission's findings are directly relevant and pertinent to understanding the factors affecting the Australian market and the consequential impact on Shagang's pattern of trade.

The Commission found in REP 418 that exports of steel reinforcing bar from the countries subject to investigation ranged in the margins of dumping from 4.4% to 42.1% during the same review period as review 411. These dumped export prices from exporters that were not subject to interim dumping duties during the period of review for REP 411, prevented from Shagang from reasonably achieving export sales to Australia. The decisions of exporters from other countries to export at dumped prices is a factor that is not within Shagang's control.

The Commission has dismissed Shagang's view by stating:

> *The explanatory memorandum to the amending legislation defines factors outside the exporter's control as supply disruptions or natural events that reduce production levels (e.g. a flood, drought or fire).*
>
> *In their submissions in response to the SEF, the applicants, including Hunan Valin, stated that dumping from other countries, as well as the anti-dumping measures placed on the applicants' exports have prevented them from exporting to Australia.*
>
> *The Commission considers that the anti-dumping measures in place in relation to the applicants' exports to Australia are not a result of factors outside their control. In fact the measures directly resulted from the behaviour of the applicants during the original investigation period, in the sense that the goods were priced and sold by the exporters willingly at that time, and were found to have been dumping.*
>
> *In terms of dumping occurring from countries other than China preventing the applicants from exporting, the Commission considers that the behaviour of other exporters in no way prevents the applicants from exporting rebar to Australia.*

Shagang considers the Commission's assessment to be incorrect.

Firstly, it is discriminatory for the Commission to selectively reference sections of the explanatory memorandum to support its view, whilst ignoring other sections highlighted earlier that provide clear guidance on the assessments to be undertaken.

Second, the Commission provides a loose and misleading reproduction of the relevant text of the explanatory memorandum that it presents as supporting its position. The explanatory memorandum does not define 'factors outside the exporter's control'. It simply provides two examples that may be considered such factors and does not in any way limit or provide an exhaustive list of such factors that may considered.

Third, the Commission dismisses Shagang's claim as it considers that '*the measures directly resulted from the behaviour of the applicants during the original investigation period, in the sense that the goods were priced and sold by the exporters willingly at that time, and were found to have been dumping.*' However, this statement is completely false and incorrect with regards to Shagang given that the Commission has already confirmed that it has never exported steel reinforcing bar to Australia. Shagang was not investigated in the original investigation as it had not exported during the investigation period and therefore the Commission has made no previous findings of fact that Shagang exported steel reinforcing bar at dumped prices.

Finally, it is plainly incorrect for the Commission to conclude '*that the behaviour of other exporters in no way prevents the applicants from exporting rebar to Australia.*' In its application for dumping duties on exports of steel reinforcing bars subject or REP 418, the applicant highlights that steel reinforcing bars are '*a commodity product which, when having similar grade and dimension, are interchangeable regardless of origin*' and '*competes primarily on the basis of price*'[5].

Similarly, the Commission has found that the commodity nature of steel reinforcing bar indicated a willingness by parties to switch between import sources '*due to the degree of price sensitivity in the rebar market, price competition is a major condition of competition between the*

[5] EPR 418, Record no. 001, page 15.

imported goods.'[6] Given these confirmed market dynamics, the high price sensitive competition and substitutability between imports, the price of steel reinforcing bar imports from the countries subject to investigation in case 418 clearly must have impacted Shagang's pattern of trade to Australia.

As there is no doubt that Shagang does not and cannot control the pricing of its competitors in either China or other countries, the pricing behaviour of other exporters and price sensitivity and interchangeability of sources of supply prevented Shagang from commencing exports to Australia.

Based on the above, Shagang submits that the Commission erred in finding that it is a 'low volume exporter'. The relevant and available evidence confirms that Shagang's circumstances did not meet the terms of the matters to be considered in establishing whether it was a low volume exporter.

2.3 Ground 3: The Assistant Minister erred by determining an external billet benchmark price which does properly compare with Shagang's integrated production and manufacturing costs.

Shagang submits that the Commission erred in determining the billet benchmark price as it does not provide for a reasonable or proper comparison with its actual production circumstances.

As verified and noted by the Commission, Shagang is an integrated steel producer which produces the raw steel billet inputs used in the production of steel reinforcing bar, using a purchased iron ore, coal, coking coal and other raw material inputs. In SEF 411, the Commission advised:

> *Given that the applicants are fully-integrated manufacturers of the goods, and given the availability of verified and relevant information from Investigations 416 and 418, the Commission considers that it is appropriate to use verified costs of steel billet manufacturers (at comparable terms) in Indonesia, Korea, Spain, Taiwan, Thailand, and Vietnam for the purpose of replacing the applicants' steel billet costs.*

Inexplicably, REP 411 concludes:

> *Given that the applicants are fully-integrated manufacturers of the goods, and given the availability of verified and relevant information from Investigations 416 and 418, the Commission considers that it is appropriate to use verified costs of steel billet manufacturers (at comparable terms) in Indonesia, Spain, and Taiwan for the purpose of replacing the applicants' steel billet costs.*

Without any explanation or reasoning, the Commission altered its view and position with regard to the countries relevant to the determination of the billet benchmark price, by excluding verified costs of steel billet by cooperating exporters from Korea, Thailand and Vietnam. This change in cost data used to calculate market benchmark prices is considered flawed given the available evidence about the production differences and similarities between the various cooperating exporters.

[6] EPR 418, Record no. 041, page 55.

In particular, Shagang contends that it was incorrect for the Commission to exclude verified costs of steel billet by the cooperating Vietnamese and Thai exporters as both relevant exporters are understood to be integrated exporters with operations comparable to that of Shagang's integrated operations. Apart from PT Ispat Indo from Indonesia, each of the other cooperating exporters from the nominated countries did not produce billet but instead purchased billet as confirmed in the respective visit reports on the public records including:

- PT Putra Baja Deli – Indonesian re-roller;
- PT Ispat Indo – Integrated Indonesian billet producer.
- PT Ispat Panca Putera – Indonesian re-roller;
- Millcon Steel – Integrated Thai billet producer;
- Nervacero S.A. - Spanish re-roller;
- Power Steel – Taiwanese re-roller;
- Hoa Phat Group –Integrated Vietnamese billet producer;

Whilst the Commission does not confirm which particular cooperating exporters were included in its benchmark calculations, it is apparent that the Commission agrees with Shagang's position that the benchmark should be based on costs of the integrated exporters only:

> *The Commission agrees with the premise of the applicants' submission, but has instead removed non-integrated producers from the calculation of the competitive benchmark for billet, to ensure that the billet costs are more comparable to the applicants'.*

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

Shagang submits that the Commission is under an obligation to ensure that the determined benchmark prices reflect a comparable cost to that being substituted, and that to the extent possible, adjustments may be required to ensure proper comparison. To that end, the correct benchmark prices should rely only on the verified billet costs of the known integrated exporters, which would include the Hoa Phat Group from Vietnam.

The questionnaire response of the Hoa Phat Group[7] confirms its integrated operations:

> *The major input is sourced as part of an integrated production process (Please refer to Attachment No. G-61). PRODUCER will provide detailed information on the full costs of production of that input as Attachment No.G-6.2.*

It appears then that the Commission has incorrectly excluded verified billet costs of Hoa Phat Group from Vietnam from the benchmark price.

[7] EPR 416, Record no. 006, page 43.

2.4 Ground 4: The Assistant Minister erred by incorrectly calculating the timing adjustment in determining Shagang's export prices.

Subsection 269TAB(2G)(a) of the Act requires that where the export price of goods exported to Australia has been ascertained under subsection (2B), adjustment is necessary due to those exports (on which the export price is based) relating to earlier times. As Shagang has never exported steel reinforcing bars to Australia, the Commission ascertained its export price using the average of the export prices ascertained for the other two cooperating Chinese exporters, Hunan Valin and Yonggang .

Shagang notes that both of these exporters raised concerns about the Commission's method for calculating the timing adjustment to the original export prices to determine contemporary export prices during the current review period. Whilst it does not have access to the confidential timing calculations, it has reviewed the submissions of the two exporters and considers Yonggang's position to be the correct and preferable approach to the timing calculation.

That is, in calculating the timing adjustment, the Commission has incorrectly compared the **simple** average of steel reinforcing bar prices over the original investigation period (1 July 2014 – 30 June 2015) to the **simple** average of the current review period (1 April 2016 – 31 March 2017). In doing so, export prices from the original investigation period have been adjusted downwards taking account of the calculation decrease in steel reinforcing bar prices between the two specified periods.

However, this proposed approach by the Commission disregards and ignores the actual timing and volume of the exports during the original investigation period in estimating an adjustment which accurately reflects the movement in prices between the date of export of the original exports and the contemporary export prices for the current review period.

To highlight by way of a simple example below, for those periods of the original investigation period where Yonggang and/or Hunan Valin did not make exports to Australia, the SBB Billet prices for those periods are totally irrelevant. For example, had Yonggang not exported in the quarter 1 July 2014 to 30 September 2014, when billet prices were at their highest at $[redacted] per tonne, it makes no sense that billet prices in that period would be used to calculate the movement in Yonggang's exports which may have occurred six or nine months later in the March or June quarters of 2015.

[Confidential table removed]

Shagang disagrees with the Commission's view that '*the aim of the timing adjustment factor is to discern the general price movement of rebar exported from China, which has little bearing on any individual exporter or the particular quarters within the respective period that a particular exporter exported the goods.'*. The new subsection 269TAB(2G)(a) requires:

> *(a) adjustments due to exports (on which the export price is based) relating to earlier times; or*

The Act therefore proposes that the actual exports upon which the export prices are based, be adjusted to ensure they reflect contemporary export prices corresponding to the current review period. In that circumstance, it would be unreasonable and inappropriate to adjust

the original export prices taking into account general prices from periods earlier than when the original exports were made.

It appears that the Commission has relied on text from the explanatory memorandum to justify and support is its preferred methodology '*to discern the general price movement of rebar exported from China*'. Para 50 of the explanatory memorandum states:

> *New paragraph 269TAB(2G)(a) anticipates situations where the export price is based on information from an earlier period. An adjustment to reflect market changes since that time may be appropriate. For example, if the export price is determined under the method set out in new paragraph 269TAB(2B)(a) and the only prior determination of an export price for that Exporter was in the original investigation, a long period of time may have passed since the time the Minister made that earlier determination. In that case, an adjustment to the export price to reflect the general movement in prices in the market may be appropriate. Such an adjustment might be performed on the basis of movements of a benchmark or index selected by the Minister.*

The explanatory memorandum provides that an adjustment to reflect the general price movement may be appropriate where '*a long period of time may have passed since the time the Minister made that earlier determination*'. That circumstance does not apply in this review, as the period between the original investigation period and the current review is the minimum 12 months allowed under the Act for reviews.

More relevant in this case is the overlooked statement by the Commission in that paragraph that the adjustment reflect market changes '*since that time*', being the earlier period of the export prices determined under the new subsection 269TAB(2B)(a). Market prices prior to the time of the original exports would not be relevant to calculating a timing adjustment to reflect contemporary export prices.

Shagang also disagrees with the Commission's rejection of Yonggang's proposal for the timing adjustment to be calculated on the basis of weighted averages, instead of the Commission's simple averages. The Act references the weighted averaging method in numerous occasions throughout the dumping legislation such as the definitions, ordinary course of trade test, determination of dumping, determination of residual exporter rates, cumulation of injury, termination of investigations, determination of administrative, selling and general costs and determination of profit. Nowhere does it refer to simple averaging and no examples or guidance can be found in the Commission's Dumping and Subsidy Manual referencing simple averaging in its calculation.

More importantly, the preferred use of weighted averaging in the Act and the Commission's calculations ensure that the calculated figures adequately eliminate or gives less weight to data in those less representative periods, and as a consequence the final weighted average price reflects the relative importance of prices in each period. This is precisely what the Commission's simple average calculation does not achieve and instead creates an unrepresentative distortion of export prices by Yonggang and Hunan Valin.

Shagang therefore contends that the Commission's timing calculation is not correct or preferable as it does not account for the actual and relative volumes in the actual quarters in which they were exported during the original investigation.

3. THE CORRECT AND PREFERABLE DECISIONS

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

Ground 1: Shagang considers that the Assistant Minister should not have retrospectively applied the new legislative provisions to Shagang's review as the review was not undertaken immediately before the commencement of the relevant schedule. Instead, the correct and preferable decision was for the Assistant Minister to ascertain Shagang's export price in accordance with 269TAB(3) of the Act, based on the determined normal value which would ensure its future exports to Australia are not dumped.

Ground 2: Shagang disputes the Commission's assessment and determination that its circumstances match that of a 'low volume exporter'. Instead, given that it has never been found to have exported dumped steel reinforcing bar to Australia, the correct and preferable decision is to ascertain Shagang's export price in accordance with 269TAB(3) of the Act, based on the determined normal value which would ensure its future exports to Australia are not dumped.

The explanatory memorandum envisages this possible outcome by noting:

> *… the Bill makes allowance for the fact that some Exporters may have exported low volumes or made no exportations, but applying subsections 269TAB(1) or (3) will not lead to a less effective rate of duty.*

Ground 3: The correct and preferable decision is to ensure that the billet benchmark price includes the verified costs of the cooperating integrated steel producer, Hoa Phat Group from Vietnam.

Ground 4: The correct and preferable decision was to calculate the timing adjustment to be applied to export prices by comparing the weighted average price of rebar during the original investigation period using the verified actual export volumes of Yonggang and Hunan Valin, to the average price of rebar during the current review period.

4. REASONS WHY THE PROPOSED DECISIONS ARE MATERIALLY DIFFERENT FROM THE REVIEWABLE DECISION.

Ground 1: The proposed decision is materially different to the reviewable decision as the new provisions would not have been applied, and Shagang's export price would have been ascertained under subsection 269TAB(3) of the Act, which would have allowed the Commission to ascertain an export price equal to the ascertained normal value, and impose a 0% rate of duty and a floor price measure.

Ground 2: The proposed decision is materially different to the reviewable decision as a finding that Shagang was not a low volume exporter would have allowed the Assistant Minister to ascertain Shagang's export price under subsection 269TAB(3) of the Act, which would have provided for the export price to be ascertained equal to the ascertained normal value, resulting in a 0% rate of duty and a floor price measure.

Ground 3: The proposed decision to include the verified costs of the cooperating integrated steel producer, Hoa Phat Group from Vietnam, would have reduced the billet benchmark

prices and resulted in a significantly lower ascertained normal value, and as a consequence lower dumping duty rate.

Ground 4: The proposed decision would have calculated a positive timing adjustment that would have resulted in the original export prices increasing and the corresponding dumping margin reducing. This would have resulted in a substantially lower imposed dumping duty rate.