



# Application for review of a Commissioner's decision

## *Customs Act 1901 s 269ZZQ*

This is the approved<sup>1</sup> form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 June 2021 for a review of a reviewable decision of the Commissioner of the Anti-Dumping Commission.

Section 269ZZO of the *Customs Act 1901* sets out who may make an application to the ADRP for a review of a decision of the Commissioner.

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 the applicant was notified of the reviewable decision.

### **Conferences**

The ADRP may request that you or your representative attend a conference for the purpose of obtaining further information in relation to your application or the review. The conference may be requested any time after the ADRP receives the application for review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. See the ADRP website for more information.

### **Further application information**

You or your representative may be asked by the Member to provide further information in relation to your answers provided to questions 10, 0, 12 and/or 13 of this application form (s269ZZQA(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.

### **Contact**

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](mailto:adrp@industry.gov.au).

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<sup>1</sup> By the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

**PART A: APPLICANT INFORMATION**

**1. Applicant's details**

Applicant's name: <b>InfraBuild NSW Pty Ltd</b>
Address: <b>Level 27, 8 Chifley Square, Sydney NSW 2000</b>
Type of entity (trade union, corporation, government etc.): <b>Corporation</b>

**2. Contact person for applicant**

Full name: [REDACTED]
Position: <b>Senior Trade Manager, InfraBuild</b>
Email address: [REDACTED]
Telephone number: [REDACTED]

**3. Set out the basis on which the applicant considers it is entitled to apply for review to the ADRP under section 269ZZO**

The applicant is the person who made the application for the dumping duty notice.
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**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 269TC(1) or (2) – *a negative prima facie decision*
- Subsection 269TDA(1) – *a termination decision*
- Subsection 269TDA(2) – *a termination decision*
- Subsection 269TDA(3) – *a termination decision*
- Subsection 269TDA(7) – *a termination decision*
- Subsection 269TDA(13) – *a termination decision*
- Subsection 269TDA(13A) – *a termination decision*
- Subsection 269TDA(14) – *a termination decision*
- Subsection 269TDA(14A) – *a termination decision*
- Subsection 269X(6)(b) or (c) – *a negative preliminary decision*
- Subsection 269YA(2), (3), or (4) – *a rejection decision*
- Subsection 269ZDBEA(1) or (2) – *an anti-circumvention inquiry termination decision*

Please only select **one** box. If you intend to select more than one box to seek review of more than one reviewable decision(s), **a separate application must be completed.**

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

The goods are steel bars and sections in the following shapes and sizes, whether or not containing alloys:

- “Flat bars” (Rectangular sections) that have a thickness of 4.75 millimetres (mm) or greater and have a width greater than 17 mm and less than 165 mm;
- “Channels” (U sections and C sections) that have a web thickness greater than 3 mm and are of a height greater than 70 mm and less than or equal to 130 mm; and
- “Equal angles” and “unequal angles” (L sections), that have a thickness greater than 2.5 mm with a combined leg length greater than 40 mm and less than or equal to 200 mm.

“Flat bars” include “modified rectangles”, of which two opposite sides are convex or concave arcs, the other two sides being straight, of equal length and parallel. “Channels” include both parallel and tapered flanges. Steel sections in the dimensions described above, that have minimal processing, such as cutting, drilling or coating (other than coating or plating with zinc or a zinc alloy) do not exclude the goods from the subject of the reviewable decision.

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Goods excluded from the reviewable decision are:

- goods that are formed by welding or are cold-formed or slit from flat-rolled products (as defined in Note 1(m) to Chapter 72 in Schedule 3 to the *Customs Tariff Act 1995*);
- goods that are galvanised;
- goods that are of stainless steel; and
- goods that are in coiled form.

Goods that meet the above description are commonly, but not exclusively, referred to as “merchant bar”.

**7. Provide the tariff classifications/statistical codes of the imported goods:**

The goods are generally, but not exclusively, classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act 1995*:

Tariff sub-heading (**statistical code**)

- 7214.91.00 (**49**)
- 7214.99.00 (**50**)
- 7216.10.00 (**27**)
- 7216.21.00 (**28**)
- 7216.31.00 (**30**)
- 7216.40.00 (**33**)
- 7228.30.10 (**70**)
- 7228.30.90 (**41**)
- 7228.70.00 (**10, 11, 12**)

**8. If applicable, provide the Anti-Dumping Notice (ADN) number of the reviewable decision:**

Anti-Dumping Notice (ADN) number:

**2022/091**

Date ADN was published:

**6 September 2022**

**9. Provide the date the applicant received notice of the reviewable decision:**

7 September 2022

***\*Attach a copy of the notice of the reviewable decision to the application\****

**PART C: GROUNDS FOR YOUR APPLICATION**

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the application 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 highlighted in yellow, and the document 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.

- Personal information contained in a non-confidential application will be published unless otherwise redacted by the applicant/applicant's representative.

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:**

The decision of the Commissioner under subsection 269TDA(13) of the *Customs Act 1901*<sup>2</sup> to terminate Investigation No. 584 in respect of merchant bar exported from Taiwan is not the correct or preferable decision because:

- the Commissioner has employed flawed methodology in claiming he is satisfied that injury caused by goods that have been exported to Australia is negligible;
- the Commissioner has failed to engage with the issue of whether the threat of injury posed by the economic performance of the industry in quarters 3 and 4 of the investigation period is negligible;
- there is insufficient evidence to support the Commissioner's claimed satisfaction that the injury, if any, caused by goods that have been exported to Australia is negligible; and
- there is no evidence to support the Commissioner's claimed satisfaction that the injury, if any, that may be caused by goods that may be exported to Australia is negligible.

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<sup>2</sup> All legislative references in this application are to the *Customs Act 1901*, unless otherwise specified.

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**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:**

The correct or preferable decision ought to be a decision under section 269TEA by the Commissioner to give the Minister a report recommending that:

- the Minister ought to be satisfied that dumped goods already exported to Australia and such goods that may be exported in the future have caused, are causing and are threatening material injury to the Australian industry; and
- a dumping duty notice applying to like goods of a particular kind should be published under subsection 269TG(2).

**12. Set out how the grounds raised in question 10 support the making of the proposed correct or preferable decision:**

Elaboration of the grounds raised in question 10 can be found at [Appendix B](#), attached.

**13. Set out the reasons why the proposed decision provided in response to question 0 is materially different from the reviewable decision:**

*Only answer question 13 if this application is in relation to a reviewable decision made under subsection 269X(6)(b) or (c) of the Customs Act 1901.*

Not applicable.

**14. Please list all attachments provided in support of this application:**

**Appendix A:** Copy of the notice of the reviewable decision.

**Appendix B:** Elaboration of the grounds raised in question 10.

**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* beginning 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; and
- 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: **[sgd]**

Name: 

Position: Senior Trade Manager

Organisation: InfraBuild

Date: 06 / 10 / 2022

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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:
Organisation:
Address:
Email address:
Telephone number:

**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:  
(Applicant's authorised officer)

Name:

Position:

Organisation:

Date:     /     /





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*Customs Act 1901 – Part XVB*

## **ANTI-DUMPING NOTICE NO. 2022/091**

### **Merchant bar**

### **Exported to Australia from Taiwan**

### **Termination of Investigation No 584**

#### ***Public notice under section 269TDA(15) of the Customs Act 1901 (Cth)***

On 31 May 2021, I, Dr Bradley Armstrong PSM, the Commissioner of the Anti-Dumping Commission, initiated an investigation into the alleged dumping of merchant bar (the goods) exported to Australia from Taiwan, following an application lodged by InfraBuild NSW Pty Ltd under section 269TB(1) of the *Customs Act 1901* (Cth) (the Act). The Anti-Dumping Commission (commission) published a public notice of my decision to initiate the investigation on the commission's website on 31 May 2021. The initiation notice and other documents for this investigation are available on the commission's electronic public record (EPR) at [www.adcommission.gov.au](http://www.adcommission.gov.au).

As a result of the commission's investigation, I am satisfied that the injury, if any, to the Australian industry that has been or may be caused as a result of the goods exported from Taiwan at dumped prices is negligible. Therefore, I have terminated the investigation in accordance with section 269TDA(13) of the Act.

In making the decision to terminate, I have had regard to the application, submissions from interested parties, *Statement of Essential Facts No 584* (SEF 584) and submissions in response to SEF 584.

*Termination Report No 584*, which sets out reasons for my decision, including the material findings of fact or law upon which the decision is based, has been placed on the EPR.

The applicant may request a review of this decision to terminate the investigation by lodging an application with the Anti-Dumping Review Panel in the approved form and manner within 30 days of the publication of this notice.

You may enquire about this notice by contacting the case manager by phone on +61 3 8539 2518 or by email at [investigations3@adcommission.gov.au](mailto:investigations3@adcommission.gov.au).

Dr Bradley Armstrong PSM  
Commissioner  
Anti-Dumping Commission

6 September 2022

APPENDIX BElaboration of the grounds raised in question 10**Ground 1: The Commissioner has employed flawed methodology in claiming he is satisfied that injury caused by goods that have been exported to Australia is negligible**

The Commissioner claimed to employ “coincidence analysis” in support of his reason why he is satisfied that injury caused by goods that have been exported to Australia is negligible.

Identification of correlations between import data and the economic performance of a local industry is a necessary component of an injury analysis but is not sufficient in itself to support a conclusion by a decision maker that causation is present. The very term applied to the methodology adopted by the Commission clearly envisages that some correlations may be merely coincidental. A cogent and objective analysis of causation must eschew cherry picking of coincidences and must identify and exclude unconnected factors. The Commissioner, by simply assuming that coincidence equals causation, fails to identify probative evidence sufficient to support a reasonable claim of satisfaction that only negligible injury has been or may be caused by dumped exports.

**Ground 2: The Commissioner has failed to engage with the issue of whether the threat of injury posed by the economic performance of the industry in quarters 3 and 4 of the investigation period is negligible**

In the context of an application for a dumping duty notice under section 269TB,<sup>1</sup> assessment of a threat of injury is to be undertaken by reference to findings of fact prevailing at the end of the investigation period. In the present matter it is the findings relevant to injury in the last two quarters of the investigation period that comply with the following principle enunciated by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31 at [41]:

*When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration ...*

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<sup>1</sup> All legislative references in the appendix are to the *Customs Act 1901* unless otherwise specified.

Applied here, the Commissioner ignored the most current, verified information available, instead relying on its undercutting analysis, which it observed ...*decreased during the final quarter of the investigation period.*<sup>2</sup> The problem with this approach; ignoring verified information demonstrating a trend, in preference for a flawed extrapolation of export price information; is that the Commissioner has ignored the very injury that the Australian industry complained of, i.e. price suppression.

Indeed, it is unremarkable to find after an extended period of dumping (by a weighted average margin of 18.1 per cent for the largest volume exporter) that the margin of price undercutting declines, as industry suppresses its selling prices to compete with dumped imports (necessary to maintain sales volume). This is known as 'parallel price trends', and its consideration was the subject of the WTO Appellate Body Report in *China – GOES*.<sup>3</sup> In that case the Appellate Body reasoned that parallel price trends may support a price depression or suppression analysis:

*We can conceive of ways in which an observation of parallel price trends might support a price depression or suppression analysis. For instance, **the fact that prices of subject imports and domestic products move in tandem might indicate the nature of competition between the products, and may explain the extent to which factors relating to the pricing behaviour of importers have an effect on domestic prices.***<sup>4</sup> (emphasis added)

Applied here, the fact that the industry was found to have seriously suppressed its prices in the final two quarters of the investigation period; as evidenced by the decline in unit profit; in order to compete with undercutting imports sold into the market, would naturally lead to a reduced undercutting margin, and simultaneously a lower unit profit. Sadly for industry, it was unable to increase prices both in line with a rise in raw material costs and an increase in selling prices for the dumped imports.

The Commission's further observation that ...*Feng Hsin's dumping margin also decreases to its lowest point in the final quarter of the investigation period...* is also unremarkable. Firstly, there is no suggestion that Feng Hsin Steel Co., Ltd (**Feng Hsin**)<sup>5</sup> ceased dumping in the final quarter altogether. Secondly, the Commission has already acknowledged that industry was unable to increase its selling prices at the same rate as the rise in CTMS,

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<sup>2</sup> TER 584, p. 65.

<sup>3</sup> Appellate Body Report, *China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012.

<sup>4</sup> *China – GOES* at [210].

<sup>5</sup> The largest exporter of the goods from Taiwan during the investigation period.

notwithstanding an increase in the flawed calculation of *Feng Hsin's selling price into Australia*. To observe a single disconnection between the dumping margin and industry's unit profit and conclude that the ...*dumped imports do not appear to be causing Australian industry to suffer price suppression*, is clearly not the correct or preferable decision.

**Ground 3: There is insufficient evidence to support the Commissioner's claimed satisfaction that the injury, if any, caused by goods that have been exported to Australia is negligible; and**

**Ground 4: There is no evidence to support the Commissioner's claimed satisfaction that the injury, if any, that may be caused by goods that may be exported to Australia is negligible.**

The Commissioner relies significantly upon his observation that:

*Where there is a **coincidence in timing** between the **injury factors** and the volume and **price trends** of dumped imports, this may be taken to mean there is a causal link.*<sup>6</sup>

The Commissioner then concluded:

*The degree of coincidence between the presence of dumped imports during the investigation period and the downward trends in certain indices of the Australian industry's economic condition during the third and fourth quarters is partial and inconsistent.*<sup>7</sup>

The Commissioner reports examining the following evidence in its coincidence analysis:

- *Verified volume, price and profit effects of the Australian industry during the injury analysis and investigation periods*
- *Verified sales data from cooperating exporters and participating importers to determine relevant selling prices and volumes of the goods*

However, the Commissioner's analysis is incomplete as he does not say how it managed to align dates of sale for the exporter and domestic industry in order to compare and assess coincidence. This is important particularly when there is acknowledgement by the exporter that there are extended lead times between date of order (when price is set) and date of invoice/shipment:

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<sup>6</sup> TER 584, p. 48.

<sup>7</sup> TER 584, p. 48.

- Feng Hsin's date of sale: the verification team found that *...the order date should be used as the date of sale for Australian and domestic sales.*<sup>8</sup>
- InfraBuild's date of sale: In Appendix A4 (Aust sales) of the application, InfraBuild included both the 'Invoice date' and the 'Order date'. It is unclear which date the Commission used in their price undercutting analysis and *...volume, price and profit effects...* in its coincidence analysis.

Feng Hsin has referenced the *...inherent long lead time...* between their order date and shipment date as the cause of the *...only transitory...* negative impact on InfraBuild's profitability between November 2020 and February 2021:

*Taking into account the [REDACTED] month average lead time between order and shipment, the data above demonstrates that Feng Hsin's confirmed order prices commenced increasing in [REDACTED] and jumped sharply in [REDACTED], leading the delivery price to move correspondingly in [REDACTED] and [REDACTED]. The alleged negative price effect and **negative impact on profitability** by Infrabuild which it claimed occurred between November 2020 and February 2021 was **only transitory**, and **caused by the inherent long lead time** which is not uncommon in many industries, especially export industries.<sup>9</sup> (emphasis added)*

Feng Hsin appears to have altered or adjusted their sales data to compensate for shipping delays and the subsequent *...lower invoice volumes...* applicable to four months of data by providing a table of *...more appropriate delivery and order dates:*

*Please note that cargo vessels depart from Taiwan to Australia only once or twice per month, mostly close to the end of month. In case of slow loading, the on-board date could very well be postponed to early next month even though the delivery out of Feng Hsin was made in a preceding month. This explains the lower invoice volumes reported in the table above for the months of [REDACTED], [REDACTED], [REDACTED] and [REDACTED].*

*The table below shows the monthly volumes including the **more appropriate delivery and order dates.**<sup>10</sup> (emphasis added)*

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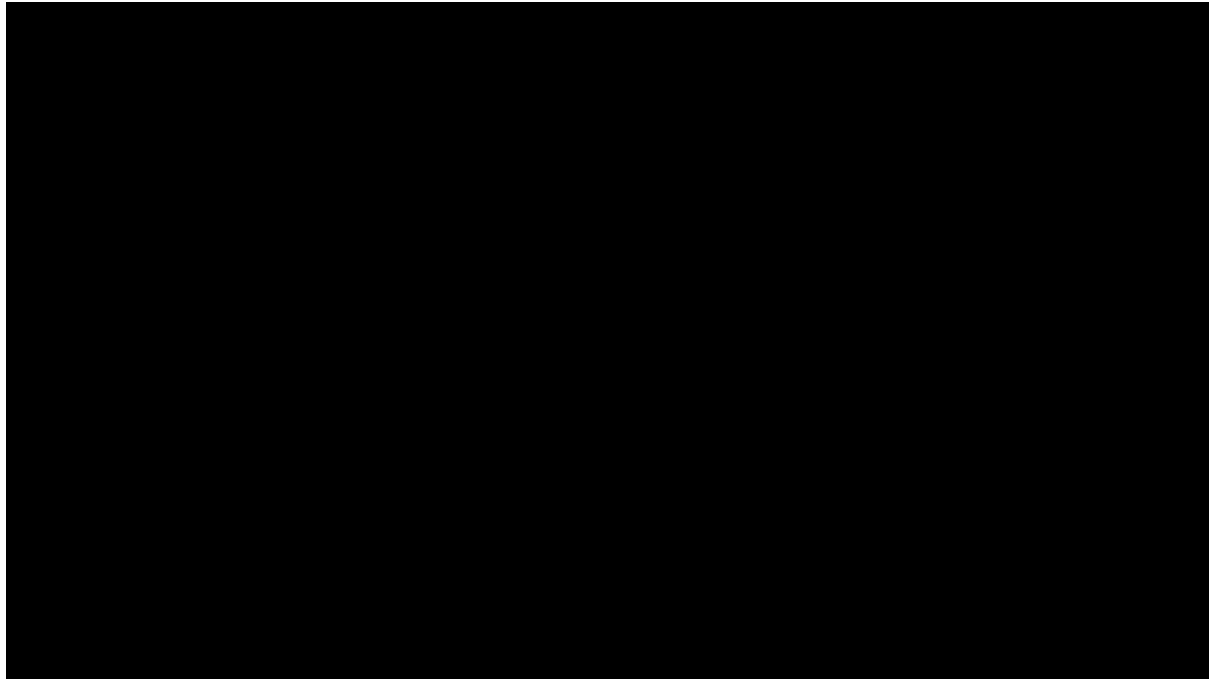
<sup>8</sup> EPR 584/024, p. 15.

<sup>9</sup> EPR 584/011, p. 3.

<sup>10</sup> EPR 584/011, p. 4.

InfraBuild presented the following slide<sup>11</sup> to the Commission during industry verification in Investigation No. 584 highlighting the importance of understanding the timing of price offers in the domestic market (for both import offers and domestic offers):

[The following extract is considered CONFIDENTIAL in its entirety]



InfraBuild's pricing is 'Import Parity Pricing' (**IPP**) based on the import offers for merchant bar delivered into store in a given month, typically █████-months beyond date of offer, taking into account the mill's production schedule and shipping times.

For example, InfraBuild customers ordering on the 'Long Lead Time' option are required to place their orders in █████ for delivery (and invoicing) in █████. The pricing is set at the date of order (█████) based on the import offers received by customers in that month, also for delivery in █████. Customers ordering on the 'Short Lead Time' option can place an order on short notice between █████ and █████ but will have a premium added to their base price (which is also based on the IPP price set back in █████). The pricing date for all customers is set at the time of order confirmation in the system, whether ordering on a long or short lead time. Order date has been provided to the Commission in the Appendix A4 sales file along with Invoice Date.

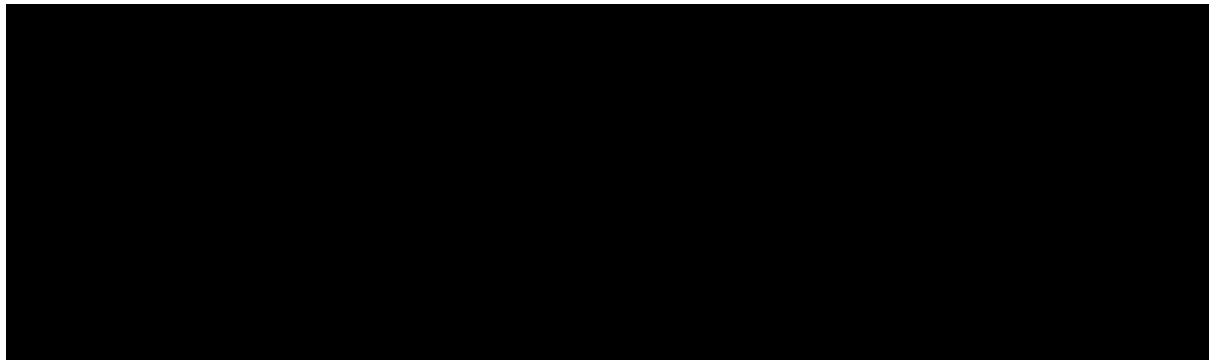
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<sup>11</sup> Refer Slide (p. 11), CONFIDENTIAL presentation pack 'FINAL Infrabuild Mebar AD Injury and Causation (17FEB22)'

InfraBuild also noted in their presentation to the Commission that while the import offers are based on a [REDACTED]-month delivery timeframe, the actual realised import product delivery date could be within [REDACTED] to [REDACTED] months, depending on production and shipping delays. Long delays in shipping times were experienced during 2020 and 2021 with covid-related port and shipping disruptions causing many problems for exporters and importers.

InfraBuild is concerned that the Commission's observed *...partial and inconsistent...* finding in the coincidence analysis may be attributed to the misalignment between date of sale for the exporter and the injury trend assessment period? For some of the export arrivals within the investigation period, the date of sale (when the price was set) may be some months prior to April 2020. Similarly, some of Feng Hsin's sales data having a date of sale (order date) within the investigation period would be for merchant bar arriving beyond the end of the investigation period. It is not clear whether the Commission has included or excluded these sales from its coincidence analysis? In the Commission's price undercutting analysis, it is not clear whether the order date (when the customer price is set) of the InfraBuild sales been compared to the date of sale (order date) of the exporter's export sales? In a practical sense, the following graphic demonstrates the impact of any misalignment in timing and comparison:

[The following graphic is considered CONFIDENTIAL in its entirety]



InfraBuild considers that due to the delays in the investigation period between the date of order (sale date), and the date of delivery/invoicing (revenue recognition), the Commission is not able to align the former with the latter. In other words, the Commission cannot, on the evidence, compare the date of causation (sale date) with the date of injury occurring (revenue recognition). In such circumstances, the *Dumping and Subsidy Manual* is clear:

*Where no coincidence has been found, or a 'coincidence analysis' has not been possible, the Commission may accept an alternate analytical method—such as a*

**'but for' analysis**—when examining causation. Any alternate method will be required to be evidence based.<sup>12</sup>

InfraBuild submits that the Commissioner's attempt to examine causation using 'coincidence analysis' in the circumstances (delivery delays) prevalent throughout the investigation period; as acknowledged by the exporter; does not support the correct or preferable decision, and a 'but for' analysis should be applied when examining causation.

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<sup>12</sup> Anti-dumping Commission, *Dumping and Subsidy Manual* (December 2021), p. 101.