Australian Government
Australian Customs and Border Protection Service

R E P O R T

CUSTOMS ACT 1901 - PART XVB

INTERNATIONAL TRADE REMEDIES BRANCH
REPORT TO THE MINISTER No. 203

REINVESTIGATION OF CERTAIN FINDINGS IN REPORT No. 177

CERTAIN HOLLOW STRUCTURAL SECTIONS

EXPORTED TO AUSTRALIA FROM
THE PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF KOREA, MALAYSIA AND TAIWAN

15 APRIL 2013

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1 SUMMARY AND RECOMMENDATIONS

This report provides the results of the reinvestigation by the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection) of certain findings in Trade Measures Report No. 177 (REP177), which resulted in the imposition of anti-dumping and countervailing measures on certain hollow structural sections (HSS) exported to Australia from the People's Republic of China (China), the Republic of Korea (Korea), Malaysia and Taiwan.

1.1 Recommendation

The delegate of the CEO (the delegate) recommends that, in accordance with s.269ZZM(1)(a), the Minister affirm his decision to publish a dumping duty notice in respect of HSS exported to Australia from China, Korea, Malaysia and Taiwan and a countervailing duty notice in respect of HSS exported from China.

The delegate further recommends that, in accordance with s.269ZZM(3)(b), the Minister vary the dumping duty notice for Dalian Steelforce Hi-tech Co., Ltd (Dalian Steelforce) as a result of a change to the way profit was applied to the constructed normal value.

A Copy of the varied notice, as a result of the above recommendation, is at **Attachment A1**.

A Copy of the confidential table to the varied notice is at **Confidential Attachment A2**.

1.2 Reasons

Division 9 of Part XVB of the Act sets out procedures for review by the Trade Measures Review Officer (TMRO) of certain decisions made by the Minister.

1.2.1 The role of Customs and Border Protection

Where the Minister has accepted a recommendation by the TMRO that a finding or findings should be reinvestigated, the Minister must, in writing, require the CEO of Customs and Border Protection to reinvestigate a finding or findings.[1]

Customs and Border Protection is required to:

- make further investigation of the finding or findings, having regard only to the information and conclusions to which the TMRO was permitted to have regard;
- report the result of the further investigation to the Minister within a specified period; and
- set out any new finding or findings and the evidence or other material on which the new finding or findings are based and the reasons for that decision.

[1] Under s.269ZZL(2)(a)

1.2.2 The role of the Minister

Division 9 empowers the Minister, after receiving Customs and Border Protection's reinvestigation report, to:

- affirm the reviewable decision concerned; or
- revoke that decision and substitute a new decision.

Depending on the Minister's decision[2], the Minister may[3]:

- publish a dumping duty notice or countervailing duty notice; or
- vary a dumping duty notice or countervailing duty notice; or
- revoke a dumping duty notice or countervailing duty notice and substitute another dumping or countervailing duty notice (as the case requires).

1.2.3 The reviewable decision

In the original investigation, REP177, Customs and Border Protection found that dumping of HSS exported to Australia from China, Korea, Malaysia and Taiwan and subsidisation of HSS exported to Australia from China caused material injury to the Australian industry producing like goods. Customs and Border Protection therefore recommended that the Minister publish a dumping duty notice[4] in respect of HSS exported to Australia from China, Korea, Malaysia and Taiwan and a countervailing duty notice[5] in respect of HSS exported to Australia from China.

The Minister accepted the recommendations contained in REP177, including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings. To give effect to these recommendations, a dumping duty notice and a countervailing duty notice were published on 3 July 2012 imposing dumping duties on HSS exported to Australia from China, Korea, Malaysia and Taiwan and countervailing duties on HSS exported to Australia from China.

The Minister's decisions to publish the dumping duty notice and countervailing duty notice are the reviewable decisions.

1.2.4 What must be reinvestigated

On 14 January 2013, the Minister directed the CEO to reinvestigate certain findings[6] made in REP177 and to report the results of the reinvestigation by 14 April 2013.

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[2] Under s.269ZZM(1)

[3] Under s.269ZZM(3)

[4] Under s.269TG(2)

[5] Under s.269TJ(2)

[6] Section 269ZX of the *Customs Act 1901* defines findings as "a finding on a material question of fact or on a conclusion based on that fact in relation to reviewable decisions under Subdivision 3 [Review of Ministerial decisions]"

As a result of the TMRO's recommendations, the CEO has been directed to reinvestigate certain findings in relation to the decision to publish a dumping duty notice:

1) the finding that there was a particular situation in the Chinese iron and steel market such that sales in that market were not suitable for use in determining a normal value under s.2369TAC(1) of the *Customs Act 1901* (the Act);
2) the calculation of the benchmark used to construct a normal value for Chinese HSS producers under s.269TAC(2)(c) of the Act;
3) the calculation of the export price, and, if necessary the dumping margin, for Alpine and all other relevant exporters such as those from whom Stemcor imports HSS; and
4) the calculation of the dumping margin for 'selected non-cooperating exporters'.

In relation to the decision to publish a countervailing duty notice, the CEO has been directed to reinvestigate:

1) the finding that State-invested enterprises (SIEs) providing hot rolled coil steel to HSS producers under Program 20 are 'public bodies'; and
2) the finding that hot rolled coil supplied under Program 20 was provided for less than adequate remuneration.

Customs and Border Protection must therefore limit its reinvestigation to these issues.

1.2.5 Reinvestigation findings and conclusions

Customs and Border Protection has considered all relevant information and conclusions.[7]

Customs and Border Protection is of the view that the reviewable decision to publish a dumping duty notice be affirmed. In reaching this conclusion, Customs and Border Protection made the following findings:

- government influence in the Chinese iron and steel sector has resulted in a situation in the market that renders HSS sales not suitable for use in determining a normal value under s.269TAC(1) of the Act;
- the method used to constructing normal values for HSS producers in China under s.269TAC(2)(c) of the Act was reasonable given that a market situation had been found;
- Dalian Steelforce's constructed normal value should be altered to not include an amount for profit;

[7] Under s.269ZZL(2)(a)(i) the reinvestigation can only have regard to the information and conclusions to which the TMRO was permitted to have regard. Section 269ZZK(4) states that the TMRO 'must only have regard to the relevant information [as defined] and conclusions based on relevant information that are contained in the application for the [TMRO] review, or in any submissions received from interested parties within 30 days' of the publication of the dumping duty notice. Section 269ZZK(6)(a) defines relevant information '…as the information to which the CEO has had regard, or was…required to have regard, when making findings set out in the report…to the Minister in relation to the making of the reviewable decision'. The "conclusions" which the TMRO could consider were set out in the application for review to the TMRO and submissions to the review.

- the calculation of the export price for relevant exporters was reasonable based on the information gathered during the original investigation;
- non-cooperating exporters from China, Korea, Malaysia and Taiwan were investigated and therefore meet the definition of “selected exporter” pursuant to s.269T of the Act, so that export prices and normal values can be determined for the exportations of non-cooperating exporters pursuant to s.269TAB(3) and 269TAC(6) of the Act;
- SIEs are exercising government functions and the government exercises meaningful control over SIEs. They are therefore considered to be public bodies for the purpose of the definition of ‘subsidy’;
- HRC was supplied to HSS producers for less than adequate remuneration and therefore this constitutes a subsidy.

2 BACKGROUND

2.1 Original Investigation – Investigation 177

2.1.1 The application

Following assessment of an application[8] made by OneSteel Australian Tube Mills Pty Ltd (OneSteel ATM), an investigation was initiated into the alleged dumping of certain HSS exported to Australia from China, Korea, Malaysia, the Kingdom of Thailand (Thailand) and Taiwan and the alleged subsidisation of certain HSS exported to Australia from China. Notification[9] of initiation of Investigation 177 was made on 19 September 2011. Australian Customs Dumping Notice (ACDN) 2011/43 was issued on the same day.

2.1.2 The goods under consideration

The goods the subject of the application (the goods) are:

> *certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as HSS (hollow structural sections). Finish types for the goods include in-line galvanised (ILG), pre-galvanised, hot-dipped galvanised (HDG) and non-galvanised HSS.*

Sizes of the goods are, for circular products, those exceeding 21mm up to and including 165.1mm in outside diameter and, for oval, square and rectangular products those with a perimeter up to and including 1277.3mm. Categories of HSS excluded from the goods are conveyor tube; precision RHS with a nominal thickness of less than 1.6mm and air heater tubes to Australian Standard (AS) 2556.

For clarification, the goods subject to the measures include all electric resistance welded pipe and tube made of carbon steel meeting the above description of the goods (and exclusions), regardless of whether or not the pipe or tube meets a specific structural standard or is used in structural applications.

The goods are classified under the following tariff classifications and statistical codes: 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37); 7306.61.00 (statistical codes 21, 22 and 25); and 7306.69.00 (statistical code 10).

The goods exported to Australia from Korea and Taiwan are subject to a 5% rate of duty; from China and Malaysia are subject to a 4% rate of duty; and from Thailand are duty free.

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[8] Lodged under s.269TB(1)

[9] Under s.269TC(4)

2.1.3 Exporters and importers

Customs and Border Protection undertook verification visits to the following nine selected cooperating exporters (which collectively accounted for more than an estimated 70% of the volume of exports of HSS to Australia from the five nominated countries/region in the investigation period), and based dumping margin (and subsidy) calculations upon that verified data.

China:

- Dalian Steelforce
- Huludao City Steel Pipe Industrial Co., Ltd (Huludao)
- Hengshui Jinghua
- Zhejiang Kingland Pipeline and Technologies Co., Ltd

Korea:

- Kukje Steel Co., Ltd (Kukje)

Malaysia:

- Alpine Manufacturing SDN BHD (Alpine)

Taiwan:

- Shin Yang Steel Co., Ltd

Customs and Border Protection received substantially complete exporter questionnaire responses from a number of other exporters. However, verification visits were not conducted in regards to these exporters but Customs and Border Protection calculated dumping margins, and where appropriate subsidy margins, by analysing the submitted data[10]. These exporters are:

China:

- Qingdao Xiangxing Steel Pipe Co., Ltd (Qingdao Xiangxing)
- Jiedong Economic Development Testing Zone Tai Feng Qiao Metal Products Co., Ltd

Taiwan:

- Ta Fong Steel Co., Ltd

Thailand:

- Samchai Steel Industries Public Company Limited

[10] Further details outlining why this approach was applied to these selected exporters is in REP177 in chapter 6.

Customs and Border Protection received Exporter Questionnaires from a number of parties that were considered to be deficient and could not be relied upon for calculating dumping (and subsidy) margins. These exporters are:

China:

- Shandong Fubo Group Co
- Tianjin Jinshengde Steel Tube Product Co., Ltd
- Zibo Fubo Steel Pipes Factory
- Zibo Litong Steel Pipe Co., Ltd

Korea:

- Dae Myung Steel Co., Ltd
- Jinbang Steel Korea Co., Ltd
- Steelpia Co., Ltd
- Yulchon Co., Ltd

Malaysia:

- Southern Steel Pipe Sdn Bhd

In REP177 Customs and Border Protection regarded these entities as selected non-cooperating exporters. It also considers all those entities that exported HSS to Australia from any of the five countries/region subject of the investigation that did not make themselves known to Customs and Border Protection, and did not provide a response to the Exporter Questionnaire to be selected non-cooperating exporters.

Customs and Border Protection undertook visits to the following major importers and prepared reports following the visits:

- CMC Australia Pty Ltd;
- Croft Steel Pty Ltd;
- The Trustee for Pedruco Family Trust (trading as GP Marketing International Pty Ltd);
- Steelforce Trading Pty Ltd;
- Stemcor Australia Pty Ltd (Stemcor);
- Thyssenkrupp Mannex Pty Ltd (Thyssenkrupp); and
- Orrcon Operation Pty Ltd (Orrcon).

Customs and Border Protection estimated the above importers collectively account for more than 60% of the volume of the goods imported from the countries under consideration during the investigation period.

2.1.4 Investigation period

The period 1 July 2010 to 30 June 2011 was used to examine exports from China, Korea, Malaysian, Taiwan and Thailand to determine whether dumping and subsidisation had occurred.

2.1.5 Injury analysis period

Customs and Border Protection examined the Australian market and the economic condition of the industry from 1 July 2007 for the purpose of injury analysis.

2.1.6 Statement of essential facts

On 23 April 2012, Customs and Border Protection published the Statement of Essential Facts No. 177 (SEF177). The report set out the facts on which Customs and Border Protection proposed to base its recommendation to the Minister.

2.1.7 TER 177

Customs and Border Protection terminated part of the investigation so far as it related to:

- the investigation into the alleged dumping of HSS exported to Australia from Thailand as no dumping was found; and
- the investigation into the alleged subsidisation of HSS exported to Australia from China by two Chinese exporters, Qingdao Xiangxing and Huludao as no subsidisation was found or the level of subsidisation was negligible.

Further details regarding these terminations are in Termination Report 177. This termination was dealt with as a separate matter by the Review Officer and is not the subject of the current re-investigation.

2.1.8 Report to the Minister

On 7 June 2012 Customs and Border Protection made its final report (REP177) and recommendations to the Minister. In that report, in relation to dumping, Customs and Border Protection concluded that:

- HSS exported from China to Australia was dumped with margins between 10.1% and 57.1%;
- HSS exported from Korea to Australia was dumped with margins between 3.2% and 8.9%;
- HSS exported from Malaysia to Australia was dumped with margins between 3.0% and 20.0%;
- HSS exported from Taiwan to Australia was dumped with margins between 2.4% and 5.3%;
- the dumped exports caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

In making its findings in relation to dumping, Customs and Border Protection determined that there was a market situation in China due to significant government influence in the domestic iron and steel market.

In relation to countervailing, Customs and Border Protection concluded that there were 26 countervailable subsidies. Subsidy margins of between 2.2% and 54.8% were found

for all HSS exported from China to Australia except for exports by Qingdao Xiangxing and Huludao (see section 2.1.5 above).

2.1.9 The Minster's decision

The Minister accepted the recommendations contained in REP177 including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings.

The Minister published a dumping duty notice[11] imposing dumping duties on the goods exported to Australia from China, Korea, Malaysia and Taiwan and a countervailing duty notice to impose countervailing duties on the goods exported to Australia from China in *The Gazette* and *The Australian* newspaper on 3 July 2012.

2.2 Review of a Ministerial decision by the TMRO

The TMRO may review certain decisions by the Minister, including decisions to publish a dumping duty notice and a countervailing duty notice.[12] These reviews are conducted only as a result of an application from relevant interested parties.[13]

In making a recommendation to the Minister, the TMRO is only to have regard to "relevant information", which is information to which the CEO had had regard or was required to have regard, when making the findings set out in the report to the Minister[14], and any conclusions based on the relevant information that were contained the applications for the review or in any submissions received from interested parties within 30 days of the publication of a notice in relation to the review[15].

2.2.1 Applications to the TMRO

Interested parties had until 2 August 2012 to lodge an application for review of the Minister's decision with the TMRO. The TMRO received an application for review from the following parties:

- Alpine;
- Australian Steel Association (ASA);
- Dalian Steelforce;
- Orrcon;
- Palmer Steel Trading Pty Ltd;
- Qingdao Xiangxing; and
- Stemcor

[11] Under s.269TG(2)
[12] Under s.269TG(2) and s.269TJ(2)
[13] As defined in s.269ZX
[14] Under s.269ZZK(6)
[15] Under s.269ZZK(4)

2.2.2 TMRO review process and decision

On 12 September 2012 the TMRO published a notice in *The Australian* newspaper advising that he would conduct a review and inviting interested parties to make submissions to the review within 30 days from that notification.

The TMRO received supplementary submissions from OneSteel ATM, Dalian and the Ministry of Commerce of China (MOFCOM) within this time.

The TMRO recommended that certain findings in REP177 be reinvestigated.

A finding[16] in relation to a reviewable decision means a finding on a material question of fact or on a conclusion based on that fact.

Copies of the TMRO's report and public applications and submissions to the review are available from the TMRO. The TMRO's report is available on the TMRO's website, www.tmro.gov.au.

On 14 January 2013, the Minister accepted the TMRO's recommendations and directed Customs and Border Protection to reinvestigate certain findings in REP177 and to report by 14 April 2013.

On 18 January 2013 a notice was published in *The Australian* newspaper advising of the Minister's acceptance of the TMRO's recommendations and the reinvestigation requirements.

2.3 Reinvestigation by Customs and Border Protection

ACDN 2013/07 was published on 29 January 2013. The ACDN advised that:

- the reinvestigation could only have regard to the information and conclusions to which the TMRO was permitted to have regard;
- no new information or conclusions could be considered in a reinvestigation;
- all relevant information was in the public domain and available to interested parties through the public record of the original investigation or the public record of the review maintained by the TMRO; and
- the report of the reinvestigation had to be provided to the Minister by 14 April 2013.

2.3.1 The reviewable decision

The reviewable decision is the Minster's decision to publish a dumping duty notice[17] and a countervailing duty notice[18].

[16] As defined under s.269ZX
[17] Under s.269TG(2)
[18] Under s.269TJ(2)

2.4 The reinvestigation report

The following sections of this report set out:

- the reinvestigation methodology;
- further investigation of the information and conclusions to which the TMRO was permitted to have regard;
- reinvestigation of the findings central to the original recommendation to the Minister;
- conclusions on whether the original findings should be affirmed or new findings be made;
- evidence or other material on which the findings of the reinvestigation are based; and
- the reasons for the recommendation to the Minister in relation to the reviewable decision.

2.5 The Reinvestigation Framework

In conducting a reinvestigation, Customs and Border Protection must have regard only to information and conclusions to which the TMRO was permitted to have regard.[19] That is, relevant information and conclusions based on relevant information.

Relevant information is from the original investigation and comprises information such as the original application, submissions to the original investigation, visit reports, SEF177, submissions to SEF177 and REP177.

Conclusions based on relevant information are conclusions based on the relevant information contained in the applications to the TMRO and submissions received by the TMRO within 30 days of notification of the review.

As a result of the TMRO's recommendations, the CEO has been directed to reinvestigate its findings to the limited extent as described in section 1.2.4 (and, if necessary, reconsider the materiality of the injury to the Australian industry).

Customs and Border Protection examined the documents from the original investigation (relevant information) and applications and submissions to the TMRO received within the specified timeframes (conclusions based on relevant information) and submissions received directly by Customs and Border Protection for the purposes of conducting the reinvestigation.

2.5.1 Submissions received

Customs and Border Protection received the following submissions in regards to the reinvestigation:

- OneSteel ATM, dated 8 February 2013 and 8 March 2013;
- Dalian Steelforce, dated 18 February 2013;
- Government of the People's Republic of China, dated 22 February 2013;

[19] s.269ZZL(2)(a)(i)

- Stemcor, two submissions dated 26 February 2013;
- Alpine, dated 26 February 2013;
- ASA, dated 26 February 2013 (an additional submission from the ASA was provided on 26 February but as this contained arguments which related to issues that were not under reinvestigation, this submission was not taken into account); and
- ThyssenKrupp Mannex Pty Ltd (ThyssenKrupp), two submissions dated 28 February 2013.

These submissions were taken into account to the extent that they related to the issues under reinvestigation and referred to information and conclusions that the TMRO had regard to. The relevant issues from these submissions are included in each respective chapter.

3 THE FINDING OF A MARKET SITUATION IN CHINA

3.1 Summary of the reinvestigation findings

The delegate recommends that the Minister affirm the findings of the original investigation in regards to a finding of the market situation that made sales unsuitable for use in determining normal value. The reinvestigation considers that the finding of market situation in relation to the domestic market for HSS in China was made by the CEO on the basis of consideration of all available relevant evidence. The reinvestigation also considers that the totality of evidence gathered by Customs and Border Protection during the investigation, which the CEO had regard to in making his decision, was sufficient to support the CEOs finding of a market situation in the iron and steel sector.

3.2 The original investigation

Having regard to all relevant information, Customs and Border Protection found that there was a situation in the Chinese HSS market during the investigation period such that sales in that market were not suitable for use in determining normal values under s.269TAC(1).

Customs and Border Protection found that the GOC significantly influenced the Chinese iron and steel industry, which included the HSS sector, and this influence was likely to have materially distorted competitive conditions and affected supply in that industry.

The GOC influence in the iron and steel industry were broadly categorised as follows:

1. measures to drive structural adjustment;
2. technological, efficiency and environmental development measures;
3. export restrictions on coke; and
4. subsidisation of encouraged practices and products.

As a result of this government influence in the market, Customs and Border Protection considered that prices for the key raw materials used for HSS production in China were artificially low.

In making these findings, Customs and Border Protection examined the GOC's broad macroeconomic policies including the *National Steel Policy*, the *Blueprint for Steel Industry Adjustment and Revitalisation* and National and Regional Five-Year Plans. The notices and legislation that gave effect to the GOC's policies were also examined. These included measures to eliminate backwards production capacity and to encourage technical and environmental improvement, market entry criteria and industry operating conditions and measures to curb production capacity redundancy. Customs and Border Protection concluded from these policies and regulations that the GOC was influencing the iron and steel market in China to achieve its policies.

Customs and Border Protection also examined the GOC's export measures on coke and coal including tariffs, quotas and licences. It was concluded that as a result of these measures, the volume of coke exported declined and the volume of coal (including coke) imported increased. The original investigation considered that this resulted in lower coke prices in China which had a significant impact of the domestic iron and steel sector as coke was a significant input into the manufacture of these products.

Subsidies to HSS producers was also examined. Customs and Border Protection identified 28 countervailable subsidy programs that some or all HSS producers benefited from.

The original investigation concluded, based on this information, that the GOC's impacts on the iron and steel sector in China would likely have affected the determinants of supply of HSS. Specifically, it considered that government influence resulted in a lowering of the price of HSS. Customs and Border Protection considered that this resulted in a situation in the market that rendered sales of HSS not suitable for determining normal value under s.269TAC(1).

3.3 Issue identified by the TMRO

3.3.1 Application of s269TAC(2)(a)(ii)

In his report, the TMRO provided commentary regarding the difficulties in interpretation of subsection s.269TAC(2)(a)(ii) as a result of ambiguity in the terms of the subsection with respect to the definition of 'a situation in the market' and the limited extraneous materials available to assist in the interpretation of the intention inferred in the drafting of this subsection.

The TMRO's opinion is consistent with Customs and Border Protection's view that investigation of potential situations in the market necessarily involves consideration of specific circumstances on a case-by-case basis.

3.3.2 Customs and Border Protection's consideration of specific evidence in its decision making processes.

Notwithstanding the above, the TMRO provided lengthy discussion regarding the analysis of the evidence available to Customs and Border Protection and questioned the sufficiency of the evidence used in the original decision that a particular situation existed in relation to the domestic market for HSS in China.

The TMRO is of the opinion that policies implemented by the Government of China (GOC), the terms and application of which were ascertained by Customs and Border Protection during the course of the investigation, are expressed in both 'exhortatory and mandatory' terms and there is significant margin for interpretation regarding the overt and implied intentions reflected in the terms of the policies of the GOC.

The TMRO is of the view that consideration of whether a particular situation exists in the relevant market is concerned with the operation of policies and regulations rather than their intention (whether overt or implied). Accordingly, (as the TMRO concisely

summarises) the question to be answered is whether the relevant policies operate in a manner which 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 - that is, that a situation exists in the market for the purposes of the application of s269TAC (2)(a)(ii).

In reviewing Customs and Border Protection's recommendation regarding market situation, the TMRO assessed the evidence that the original investigation had regard to in assessing the impact of policies implemented by the GOC upon the domestic market for HSS in China.

The TMRO is of the opinion that the evidence relied upon by the CEO was not sufficient to support the finding that the policies implemented by the GOC operate in a manner which 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, accordingly, the evidence does not support the finding that a particular market situation exists.

For completeness, the reinvestigation notes that the TMRO's opinions in regard to this issue extend only to the sufficiency of the available evidence and do not discuss the reliability and relevance of the evidence considered. Further, the reinvestigation notes that the TMRO's conclusions do not indicate that the TMRO is of the opinion that a situation does not exist in the domestic HSS market in China that renders domestic sales unsuitable.

3.4 Submissions regarding the issues raised by the TMRO

OneSteel ATM submitted that the evidentiary standard applied by the TMRO was not derived from the Act, the Anti-Dumping Agreement or relevant jurisprudence and was too onerous. OneSteel ATM argues that where requested information was not provided by the GOC, conclusions must be reached on the basis of facts available under s269TAC(6) and (7) of the Act. OneSteel ATM considers that the facts available support the finding of a market situation in China for the iron and steel market. It also argued that two decision makers could examine the same information and legitimately come to different conclusions.

The GOC, Dalian, Stemcor, the ASA and ThyssenKrupp agree with the findings of the TMRO.

Dalian and the GOC argue that Customs and Border Protection has misapplied the test for what a particular market situation meant within the Act and other relevant legislation. The GOC considers that there is no factor in the Chinese market which so distorted the market that arms-length transactions for HSS made in the ordinary course of trade were unsuitable for the purpose of normal value determinations and for comparison with export prices. They consider that a market situation test must examine whether the factors influencing the market have a different effect on domestic and export sales and only if they do can a market situation be found.

The GOC also considers that Customs and Border Protection's assessment of Chinese export tariffs on coke, mergers and acquisitions within the Chinese iron and steel

industry, the alleged supply of HRC to HSS producers at subsidies prices and lower HRC prices in China than in other countries under investigation and comments made by market participants about GOC policies and the actions of other market participants were incorrect.

Stemcor argued that export restrictions on coking coal only benefits HSS manufacturers that use steel produced by a blast furnace and not steel produced using an electric arc furnace. Stemcor asserted that its supplier Qingdao should have its normal value calculations reviewed in the light of the TMRO's recommendation.

The ASA notes that normal values are not calculated under s.269TAC(1) of the Act when the requirements of s.269TAC(2)(a)(i) or (ii) are met. That is, when there is either an 'absence or low volume of sales of like goods in the market' or 'because the situation in the market in the country of export is such that sales in the market are not suitable for using in determining a price under subsection (1)'. Given that the TMRO has concluded that there is insufficient evidence to find that there is a market situation, the ASA requests that a normal value be established using domestic sales under s.269TAC(1) of the Act.

ThyssenKrupp argues that if Customs and Border Protection finds a market situation in China, the CEO should consider recommending to the Minister that a direction under s.269TAC(2)(d) of the Act is possible. This relates to the use of goods sold in the ordinary course of trade in arms-length transactions for exportation from the country of export to a third country.

ThyssenKrupp also argues that if the supply of HRC by public bodies to HSS producers (program 20) resulted in a market situation, the uplift to HRC prices should not exceed the benefit conferred by program 20. ThyssenKrupp argues that as its exporter Hengshui Jinghua Steel Pipe Co. Ltd was found to have benefited by 4.6% under program 20 it should have only received an uplift of HRC prices of 4.6% rather than the 32.9% it received.

3.5 The reinvestigation

3.5.1 Evidentiary limitations of reinvestigation

Pursuant to s.269ZZL(2) of the Act, in its re-investigation of the decision taken by the CEO, Customs and Border Protection must have regard only to information that was before the CEO when the Minister made the reviewable decision.

As discussed above, the opinions of the TMRO relate to the sufficiency of the evidence relied upon by the CEO. As discussed in greater detail below, the issue at hand is whether the evidence available to the CEO at the time the decision was taken was sufficient to satisfy, in the TMRO's view, the evidentiary standard to warrant a finding of market situation being made.

We note that, at paragraph 113 of its report, the TMRO has anticipated the obvious issues associated with Customs and Border Protection's capacity to respond to these assertions due to the evidentiary limitations applicable to reinvestigations. Customs and Border Protection confirms that all available evidence that was before the CEO at the time of the original decision is appropriately referred to in REP177, which outlines the

CEO's analysis of key evidence and decision with respect to the finding of a situation in the HSS market in China, and has been duly provided to the TMRO during the course of his consideration of the matter.

Customs and Border Protection reviewed the relevant sections of REP177 and traced the narrative of the analysis to the relevant source evidence to ensure that the analysis correctly reflects the available evidence. The reinvestigation is satisfied that the report accurately reflects the consideration and analysis of the available evidence. Further, the reinvestigation is also satisfied that the CEO's decision in relation to market situation was made on the basis of consideration of all available evidence.

Given that the TMRO was in possession of all available evidence considered by the CEO and has a comprehensive understanding of the bases for the CEO's decision, as reflected in REP177, Customs and Border Protection does not consider there to be any benefit in reiterating the specific analysis and conclusions with respect to the evidence that form the basis for the CEO's decision.

However, Customs and Border Protection does consider that the TMRO's report highlights significant differences of opinion between the TMRO and the operational views of Customs and Border Protection with respect to the evidentiary standard applicable to the investigation of market situation issues. These issues are discussed below.

3.5.2 Evidentiary standard applicable to market situation enquiries

Customs and Border Protection agrees with the discussion and considered opinion provided by the TMRO regarding the ambiguity in the terms of subsection 269TAC(2)(a)(ii) as it relates to the potential rejection of domestic sales for the purposes of determining normal values on the basis that a situation exists in the particular market such that domestic sales are unsuitable to be used for this purpose[20].

Customs and Border Protection concurs with the TMRO's view that the nature of the consideration at the heart of the market situation analysis involves subjective consideration of all relevant market variables in relation to the subject good in totality and, as such, the term 'a situation' for the purposes of the subsection defies precise definition. To this end, Customs and Border Protection agrees, in principle, with the view that 'a situation' refers to the presence of a factor or composite factors which collectively operate to cause a degree of distortion in the market that renders arm's-length transactions in the ordinary course of trade in that market unsuitable for use in determining normal values.

More specifically, Customs and Border Protection considers that a market situation assessment involves an examination of factors which may affect the interaction of supply and demand in a sector, industry or particular market, to a considerable extent that prices and costs in that market can no longer be viewed as being established under those market principles. To that end, Customs and Border Protection considers

[20] For the purposes of providing this response, we do not consider it necessary to respond to the TMRO's discussion regarding the intended application of this Subsection and specifically, whether the terms of the Subsection do in fact confer the discretionary authority to reject domestic sales.

that governments can directly influence domestic prices through the imposition of restrictions on how prices are charged for a product. This can be in the form of price regulation (floor or ceiling pricing mechanisms) or the dominance of government-owned or controlled enterprises to such an extent that those enterprises are price-leaders in the domestic market.

Governments can also indirectly influence domestic prices through instruments that impact on the supply of the subject goods or the supply or price of inputs used in the production of the subjects goods. For example:

- governments can control import and export levels through licensing, quotas, duties or taxes to maintain domestic prices at certain levels;
- governments can subsidise producers by providing direct financial subsidies or low-price inputs in order to maintain selling prices of a product at certain levels;
- governments can purchase goods in sufficient quantities to raise the domestic price of goods or sell stockpiled goods to put downward pressure on prices;
- through taxation or other policies, governments can regulate the level of profits that a company can achieve which will affect selling prices; and
- the government can regulate or control production levels or the number of producers or sellers permitted in the market in order to affect domestic prices.

As summarised above, the TMRO disagreed with the CEO's finding of market situation in the context of HSS in China on the basis that he is of the view that the evidence relied upon was not sufficient to support such a finding. We consider it relevant to note that the issue in dispute is the sufficiency of the available evidence and not the veracity or reliability of such evidence.

Whilst not specifically addressed by the TMRO, Customs and Border Protection notes that the relevant subsection is silent about the evidentiary standard required to warrant a finding being made that a situation exists in the market for the purposes of s.269TAC(2)(a)(ii). Customs and Border Protection considers that the lack of definitive guidance in this regard is central to the issues raised by the TMRO regarding the sufficiency of the evidence relied upon.

In outlining the view that the evidence relied upon was somehow insufficient, the TMRO does not make clear as to what further evidence would be necessary to warrant the decision made by the CEO. The TMRO has included specific opinions in its report of 14 December 2012 that appear to reflect a view that the CEO must be satisfied that the evidence provides positive evidence of a situation in the market such that tangible distortions in domestic prices can be identified and quantified.[21]

[21] See, for example, paragraph 94 of the TMRO report in relation to the steel policy.

Customs and Border Protection respectfully disagrees with the assertion that the terms of the subsection in some way infer such a high standard of proof for a market situation finding. None of the extraneous material referred to by the TMRO give any indication, either overt or implied, to support the assertion of such a high standard.

Customs and Border Protection considers that the issue as to whether or not a particular market situation exists in the domestic market of an exporting country is a matter for the CEO to decide on the basis of consideration of the totality of all relevant available evidence in so far as that evidence provides a reliable understanding of the prevailing characteristics of the market for the goods in that country.

As the TMRO notes, on the basis of his own experience in relation with consultations with the GOC for the purposes of his review of this issue, the acquisition of specific evidence in relation to the operative application of government policies by the GOC can be difficult.

Customs and Border Protection considers that, when all available avenues of enquiry have been exhausted for the purposes of acquiring relevant evidence, it is reasonable to regard the information provided to be all available evidence upon which the finding as to whether a situation exists in the market is to be made. Customs and Border Protection does not consider that the fact that conclusive evidence cannot be reasonably acquired of itself requires the CEO to find that a market situation does not exist. This is particularly so where parties possessing relevant information refuse to provide necessary information or unsatisfactorily respond to issues raised. Similarly, it does not consider it reasonable to suggest that the absence of conclusive evidence of the quantifiable market distortions precludes the ability of the CEO to be satisfied that a market situation exists.

Upon review of the material evidence considered by the CEO in relation to the market situation enquiries undertaken in relation to investigation 177, and review of the relevant visit reports relating to exporters in China and consultation with the GOC with whom market situation enquiries were undertaken, the reinvestigation is satisfied that all reasonable steps were taken to acquire relevant evidence regarding the administration of policies in China that relate directly or indirectly to the domestic market for HSS.

3.5.3 Factors identified to have contributed to market distortions in the Chinese steel sector

Consideration of export measures on coke

Customs and Border Protection notes that REP177 outlined a number of measures designed to regulate the export and import of coke and coking coal, which are key raw materials in the production of steel. Since 2009 such measures included:

- an increase in export tariffs on coke to 40% and elimination of duty on imported coke;
- the introduction of export quotas and licencing conditions that restricted which enterprises could apply for an export quota of coke, and

- an increase in export tariffs on coking coal to 10% and elimination of duty on imported coking coal.

It is accepted that these measures are intended to discourage exports of coke and to encourage imports of coke and coking coal for conversion to coke, in China for the use in domestic iron production. Such export taxes and quotas on unprocessed primary commodities effectively work as an indirect subsidy to the higher value-added manufacturing or processing industries by lowering domestic prices of inputs compared to world (non-distorted) prices.

In effect, these lower prices for inputs that represent a significant cost of producing hot-rolled coil (HRC) and narrow strip (themselves the predominant costs in the production of HSS) are found to have contributed to reduced production costs of HSS producers in China. As a consequence it is reasonable to expect that domestic prices of HSS are lower than they otherwise would have been in the absence of the export measures imposed by the GOC.

Consideration of subsidies to HSS producers

REP177 identified a number of countervailable subsidies that provided direct benefits to HSS producers in China. The program that contributed the greatest benefit to HSS producers involved the provision of raw material inputs (HRC and narrow strip) by public bodies. The prices for these raw material inputs were found to be at less than adequate remuneration.

Given that HRC and narrow strip reflect the major cost of producing HSS, the reinvestigation considers that it is reasonable to expect that the lower prices for such inputs would have directly resulted in domestic prices for HSS being lower than they otherwise would have been in the absence of subsidies provided by the GOC and/or relevant public bodies.

Consideration of Government of China Policies, Plans, Notices and Guidelines

REP177 presented an array of documents prepared by the GOC the form of major policy statements, industry plans, official notices and guidance affecting the steel industry. These include:

- *Order No. 35 of the National Development and Reform Commission* and the National Steel Policy;
- *Guidelines of the 12th Five-Year (2011-2015) Plan of the People's Republic of China for the National Economic and Social Development* (the 12th National FYP);
- *Eleventh Five Year (2006 – 2010) Plan of the People's Republic of China for the National Economic and Social Development (11th National FYP);*
- *Tenth Five-Year Plan for the National Economic and Social Development of the People's Republic of China (2001 – 2005);*
- *Outline of the Eleventh Five-Year Plan for the Economic and Social Development of Hebei Province;*

- *Outline of the Eleventh Five-Year Plan for the Economic and Social Development of Shandong Province;*
- *Outline of the Eleventh Five-Year Plan for the Economic and Social Development of Jilin Province (2006-2010);*
- *Outline of the Eleventh Five-Year Plan for the Economic and Social Development of Tianjin City;*
- *Blueprint for Steel Industry Adjustment and Revitalization (the Revitalization Plan);*
- *Directory Catalogue on Readjustment of Industrial Structure;*
- *the State Economic and Trade Commission's (SETC) Development Plan for the Metallurgical Industry (2001 - 2005);*
- *Decision of the State Council on Promulgating the "Interim Provisions on Promoting Industrial Structure Adjustment" for Implementation (the Interim Provisions);*
- *Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities (the Backward Capacities Notice);*
- *The Standard Conditions of Production and Operation of the Iron and Steel Industry;*
- *Admittance Conditions for the Coking Industry;*
- *Circular of the State Council on Accelerating the Restructuring of the Sectors with Production Capacity Redundancy;*
- *Circular on Controlling Total (Capacity), Eliminating the Obsolete (Capacity) and Accelerating Structure Adjustment of Iron and Steel Industry; and*
- *2009 Overcapacity Notice*

The GOC has submitted that the broad macroeconomic policies and related measures outlined above and identified in REP177 simply reflect the government's aspirations for the Chinese steel industry and are not enforceable plans that the GOC sets out to achieve. The GOC also stated that some of the documents were intended as environmental measures such as the elimination of old technology.

The reinvestigation considers that the evidence presented in REP177 demonstrates the GOC's endeavour for structural reform to the Chinese iron and steel industry. Whilst it is accepted that the objectives of some of the policies and measures were to address environmental issues within China, there is evidence that those goals conflicted with the commercial interests of producers of HRC, narrow strip and HSS by affecting production volumes, competition and ultimately prices.

Customs and Border Protection considers that there is sufficient evidence to be satisfied that the GOC's policies, plans, notices and guidelines in relation to the Chinese steel industry, have had a considerable impact on supply and demand conditions. Where a government regulates or controls the production levels or capacity of the goods under investigation or the raw material inputs, the reinvestigation considers that the government is exercising influence on the supply of goods and indirectly affecting the price of those goods.

3.5.4 Impact of the market situation on proper comparison

In its submission to the reinvestigation, Dalian Steelforce and the GOC expressed the view that domestic sales are not suitable for establishing normal values only where, because of a market situation, such sales do not allow for a proper comparison of domestic selling prices with the export prices. Whilst the relevant provisions of Australia's domestic legislation do not specifically refer to 'proper comparison' as reflected in Article 2.2 of the Anti-Dumping Agreement, Customs and Border Protection accepts that it is an integral concept in the determination of normal values.

This is endorsed by a WTO Panel's view that:

> 'the wording of Article 2:4 made it clear that the test for having any such recourse was not whether or not a "particular market situation" existed per se. A "particular market situation" was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison. In the Panel's view, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison.'[22]

Customs and Border Protection considers that any assessment of whether a situation in the domestic market has rendered those sales unfit for proper comparison should not be limited to individual analysis of the relevant domestic and export prices. More importantly, and ultimately central to that consideration, is an understanding of the characteristics of the respective markets into which those sales are made.

In this case, the reinvestigation is of the view that Chinese producers and exporters of HSS are making decisions about their domestic selling prices entirely aware of the GOC's policies and measures for the domestic steel industry and the distorting and suppressing impact on competitor's costs and corresponding selling prices. This compares to prices of Chinese exports of HSS into the Australia market, which are set free of such distortions.

As a result, the reinvestigation considers that the situation in the Chinese domestic market for HSS is such that arms-length domestic sales of like goods in the ordinary course of trade are not suitable for use in determining normal values and do not permit a proper comparison with corresponding export sales.

3.5.5 Conclusion

After due consideration of the evidence considered in relation to the investigation of the domestic market for HSS in China, the reinvestigation is of the view that the body of evidence presented in REP177 is sufficient to satisfy the CEO that the GOC has distorted supply and demand conditions in the Chinese steel sector. Further, Customs and Border Protection is also of the view that the distorted market conditions have had a considerable impact on the costs and prices of HSS products sold on the domestic

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[22] ADP/137 – EC Imposition of anti-dumping duties on imports of cotton yarn from Brazil (July 1995)

market, such that it is reasonable to conclude that domestic prices are not set according to normal market forces.

Therefore, the reinvestigation affirms the finding of the original investigation that because of the situation in the iron and steel market, which includes HSS producers, domestic sales in that market are not suitable for use in determining normal value under s.269TAC(1) of the Act.

4 THE CALCULATION OF THE BENCHMARK USED TO CONSTRUCT NORMAL VALUES IN CHINA

4.1 Summary of the reinvestigation findings

Following the delegate's finding that there was a particular market situation in the Chinese iron and steel sector, the delegate recommends that the Minister affirm the findings of the original investigation that there is a requirement to use benchmark prices for the constructed normal values in China.

However, the delegate recommends that the Minister vary the dumping duty notice as it relates to Dalian Steelforce due to a change in the amount of profit applied to its normal value.

4.2 The original investigation

In the original investigation, after Customs and Border Protection concluded that there was a market situation in China in relation to HSS and domestic sales were unsuitable for determining normal value under s.269TAC(1) of the Act, it constructed a normal value for Chinese exporters under s.269TAC(2)(c) of the Act.

In constructing a normal value, Customs and Border Protection concluded that exporter's records did not reasonably reflect competitive market costs associated with the production of like goods under Regulations 180(2). Specifically, Customs and Border Protection found that the input costs of HRC and/or narrow strip were artificially low as a result of government influence.

Therefore, Customs and Border Protection used a benchmark cost for HRC in the constructed normal value, based on prices for HRC from verified selected exporters from Korea, Malaysia and Taiwan[23].

Customs and Border Protection also applied an amount for profit to the constructed normal values under Regulations 181A.

4.3 Issue identified by the TMRO

The TMRO examined several issues raised by interested parties regarding Customs and Border Protection's benchmarking methodology and considered that none of the arguments raised were sufficient to warrant reinvestigation. These issues included:

- the use of weighted average HRC costs from Korea, Malaysia and Taiwan;
- Chinese competitive advantages;
- the use of information from the Steel Business Briefing;
- lack of differentiation to reflect different HRC gauges;
- treatment of Value Added Tax; and

[23] Kukje, Alpine and Shin Yang

- inclusion of profit and the amount of profit included in Dalian Steelforce's normal value.

However, as the TMRO was of the view that there was insufficient evidence to make a market situation finding in the original investigation, Customs and Border Protection must re-examine its need to calculate and use a benchmark HRC price under Regulation 180(2) for HSS producers in China.

4.4 Submissions regarding the issues raised by the TMRO

Dalian Steelforce submits that as the TMRO has put aside the finding of a particular market situation in China, an assessment must therefore be conducted as to whether there are grounds to conclude that the financial records of HSS producers did not reasonably reflect competitive market costs under Regulation180(2)(b)(ii). Only a finding of this nature allows Customs and Border Protection to use benchmark HRC costs instead of actual HRC costs. Dalian Steelforce considers that there are no such grounds to make this finding.

The ASA requests that, subject to the reinvestigation of whether a particular market situation exists, Customs and Border Protection re-investigate the basis of calculations used to construct a normal value.

4.5 The reinvestigation

As outlined at chapter 4 of this report, the reinvestigation has found that it was open to the CEO in the original investigation to be satisfied that there was sufficient information to determine that a market situation existed in the Chinese iron and steel domestic market such that domestic sales of HSS in the ordinary course of trade and at arms-length, were not suitable for determining normal values under s.269TAC(1) of the Act. A primary factor in that finding was the distortion of raw material costs used in the production of HRC, the primary input in the production of HSS. For those reasons, Customs and Border Protection has also found that it was reasonable for the CEO to conclude in the original investigation that the production costs of HSS exporters in China did not reasonably reflect competitive market costs associated with the production of like goods.

As noted above, the TMRO examined and subsequently dismissed the issue of whether it was appropriate for Customs and Border Protection to calculate a benchmark HRC cost using a weighted average HRC costs from a basket of countries including Korea, Malaysia and Taiwan. Therefore the reinvestigation finds that the calculation of the benchmark in the original investigation was reasonable in light of the reinvestigation's affirmation of the market situation finding.

Determination of profit

As noted above, the TMRO dismissed the grounds for appeal by Dalian Steelforce in relation to the inclusion, and amount, of profit in its constructed normal values. However in examining the benchmarking issue referred by the TMRO, the reinvestigation identified a specific issue with the calculation of profit in relation to Dalian Steelforce's normal value determination.

At section 6.5 of REP177, the original investigation stated:

> Customs and Border Protection notes Regulation 181A provides that, where reasonably possible, profit must be worked out 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.
>
> Accordingly, Customs and Border Protection calculated a weighted average net profit, measured as a percentage mark-up on full cost to make and sell, for each Chinese selected cooperating exporter, using the verified cost to make and sell data (i.e. prior to substitute HRC and narrow strip costs) and verified domestic selling prices from sales made in the ordinary course of trade in the investigation period. (emphasis added)

Regulation 181A sets out the manner in which the Minister must determine an amount of profit to be included in a constructed normal value. In the case of all exporters except Dalian Steelforce, Customs and Border Protection correctly constructed normal values using the actual profits achieved on sales of like goods in the ordinary course of trade pursuant to reg.181A(2) which states "the Minister must, if reasonably possible, work out the amount [for profit] 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".

However in the case of Dalian Steelforce, the original investigation found that after having regard to the nature and volume of Dalian Steelforce's remaining profitable domestic sales, Customs and Border Protection considered those sales were not made in the ordinary course of trade. In constructing normal values for Dalian Steelforce, REP177 determined that the appropriate rate of profit was "the average net profit from domestic sales made in the ordinary course of trade by the other selected cooperating exporters from China".

On reinvestigation, Customs and Border Protection considers that the methodology for determining Dalian Steelforce's profit was not consistent with the requirements of Regulation 181A.

Pursuant to reg. 181A(2), Customs and Border Protection is not required to have regard to the "sufficiency" of the volume of domestic sales in the ordinary course of trade when determining a profit to be applied to a constructed normal value pursuant to s. 269TAC(c)(ii). This interpretation of reg. 181A(2) is consistent with findings of the World Trade Organisation (WTO) Panel in relation to Article 2.2.2 of the *Agreement in Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement).

Article 2.2.2 forms the basis of reg. 181A(2) and states:

> The amounts for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

The WTO Panel affirms Customs and Border Protection's interpretation of reg. 181A(2) insofar as it has found "that Article 2.2.2 does not envisage a "low-volume" sales

exception to the rule that SG&A costs and profit used for the purpose of constructing normal value be calculated on the basis of data pertaining to sales made in the ordinary course of trade."[24] Therefore, irrespective of whether the remaining like good sales in the ordinary course of trade are of insufficient volume to determine normal values under s.269TAC(1) of the Act, the profit from those domestic sales in the OCOT must be used for the purposes of constructing a normal value.

As noted above, the low volume of domestic sales by Dalian Steelforce was found to not be in the ordinary course of trade due to the nature of those sales. The reinvestigation is satisfied that there were sufficient grounds for the CEO to conclude that those remaining domestic sales were not in the ordinary course of trade.

Following this Regulation 181A then requires that if the Minister is unable to work out the amount for profit pursuant to reg. 181A(2), reg. 181A(3) sets out the hierarchy in which the Minister must work out profit, as follows:

> (a) by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or
> (b) by identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or
> (c) subject to subregulation (4), by using any other reasonable method and having regard to all relevant information.

In determining which domestic sales to use when calculating an amount for profit pursuant to s.181A(3)(b), Customs and Border Protection is guided by the WTO's interpretation of Article 2.2.2(ii) of the *Anti-Dumping Agreement*, which is mirrored in reg. 181A(3)(b).

The WTO Appellate Body found that the phrase "actual amounts incurred and realised" should be interpreted in the ordinary sense to include *"profits or losses actually realised"* by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin"[25]. The Appellate Body concluded that, when calculating the amount for profit under Article 2.2.2(ii), an authority may not exclude sales by other exporters or producers that are not made in the ordinary course of trade.[26]

The rate of profit calculated for Dalian Steelforce's normal values clearly excluded those sales by other exporters that were not made in the ordinary course of trade. The reinvestigation considers that this was not consistent with the requirements of the regulations. As a result, the reinvestigation sought to calculate the actual profits realised by other exporters and examined the verified domestic sales of relevant cooperating exporters.

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[24] Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway,* WT/DS337/r at para 7.304
[25] Appellate Body Report, *European Communities – Anti-Dumping Duties on imports of Cotton-type Bed Linen from India,* WT/DS141/AB/9 at para 80.
[26] Above, at para 84.

The calculations showed that the weighted average of actual amounts realised by other exporters was an overall net loss. Therefore, in these circumstances Customs and Border Protection considers that it is appropriate to determine normal values for Dalian Steelforce with the inclusion of a zero rate of profit. The impact of this finding is to reduce Dalian Steelforce's overall product dumping margin from 13.6% to 10.4%.

The reinvestigation recommends that the Minister vary the dumping duty notice in relation to Dalian Steelforce to account for the change in profit applied to the normal value.

The recalculation of Dalian Steelforce's normal value and dumping margin is at **confidential appendix 1**.

5 EXPORT PRICE AND DUMPING MARGIN FOR RELEVANT EXPORTERS

5.1 Summary of reinvestigation findings

The delegate recommends that the Minister affirm the finding of the original investigation that:

- the date of sale of currency conversion purposes for relevant exporters be the invoice date;
- the ascertained export price be converted to Australian dollars from the currency of export using an average exchange rate;
- the currency of the ascertained export price by Australian dollars; and
- no adjustment be made to Alpine's export price and dumping margin for the difference between actual and theoretical weight.

5.2 The original investigation

5.2.1 Date of sale for currency conversion

In determining the date at which the material terms of sale were set for exports to Australia, known as the date of sale, the original investigation found that:

- while Alpine Pipe Manufacturing SDN BHD (Alpine) noted that it considered the contract date to be the date of sale, it provided its data using the invoice date as the date of sale for convenience. The original investigation accepted the invoice date as the date of sale; and
- Kukje Steel Co Ltd (Kukje) submitted that the date of sale was the bill of lading date for export sales and the shipping date for domestic sales as this was the date at which it recognised the sale. The original investigation accepted these dates as the date of sale.

Of the remaining cooperative exporters:

- Ta Fong Steel Co., Ltd, Dalian Steelforce Hi-Tech Co., Ltd and Zhejiang Kingland Pipeline and Technologies Co., Ltd submitted that the date of sale was the invoice date. This was accepted by the original investigation.
- The remaining cooperative exporters submitted that either the contract date of the shipping date was the date of sale. After considering the information provided by these exporters the original investigation considered that the invoice date was the date of sale.

Where relevant, exchange rates were applied to export sales using the exchange relevant on the date that Customs and Border Protection found to be the date of sale.

5.2.2 Theoretical and actual weight

In the original investigation it was found that Alpine's domestic and export sales were both made on the basis of theoretical weight. However, costs were calculated on the

basis of actual weight. While this was not raised in the exporter questionnaire response, at the visit Alpine submitted that an adjustment should be made for this given that production costs on an actual basis used by Customs and Border Protection in assessing the sales made in the ordinary course of trade were higher than production costs on a theoretical basis, resulting in higher normal values. The company provided documents to support its claim.

The visit team assessed the documents provided and considered that they did not provide sufficient evidence to make an adjustment. They also considered that Alpine's claim was not made in a timely manner limiting their ability to fully verify the data or seek additional documentation. Therefore, no adjustment was made to Alpine's costs for the difference between actual and theoretical weights.

5.3 Issues identified by the TMRO

5.3.1 Date of sale for currency conversion

The TMRO considered that Customs and Border Protection had erred in considering the invoice date (or bill of lading date) to be the date at which the material terms of sale were set in regards to exports by Alpine and other relevant exporters, such as those that supplied Stemcor. The TMRO considered that this had resulted in the incorrect exchange rate being applied to the export price under section 269TAF(1) of the Act and recommended that Customs and Border Protection reinvestigate this matter.

5.3.2 Theoretical and actual weight

The TMRO is of the view that Customs and Border Protection should have taken into account the difference between the actual weight and the theoretical weight of HSS exports in regards to Alpine. Accordingly, the TMRO has recommended that Customs and Border Protection consider the issue in more detail and verify information to reinvestigate this matter.

5.4 Submissions regarding the issues raised by the TMRO

5.4.1 Date of sale for currency conversion

Stemcor argues that its purchases are made in United States dollars and it hedges the exchange rate on the date of order. Therefore, it considers that the exchange rate on the date of order should be used to calculate the export price under s.269TAF(1). ThyssenKrupp and Alpine also requests that the date of sale for currency conversion purposes be re-examined.

The ASA, Alpine and ThyssenKrupp requests that Customs and Border Protection also re-examine the currency in which the Ascertained Export Price (AEP) be denominated and requested that the AEP be denominated in the currency of export.

5.4.2 Theoretical and actual weight

Alpine argues that Customs and Border Protection should have regard to the information it provided at the verification visit during the original investigation and make a change to account for the difference between actual and theoretical weight. Alpine

argues that this adjustment was made for a number of other exporters in the investigation and that the case management team should have been aware of this issue. It argues that the provision of information during the verification visit does not render the provision of information too late for consideration. In response to the statement that the information provided was unreliable, it argues that operation factors can and do result in over-rollings. Abnormal instances of production tonnes exceeding calculated theoretical tonnes from a particular production line on a particular day does not render the information unreliable. Alpine also argues that if the data it provided is not suitable for the purpose of adjustment, verified data from other producers should be used instead.

OneSteel ATM submitted that Customs and Border Protection was not in possession of the relevant information to assess Alpine's claims that an adjustment should be made for the difference between actual and theoretical weight. It submits that Customs and Border Protection should not accept unverified information for the purpose of adjusting Alpine's normal values.

5.5 The reinvestigation

The TMRO requested that Customs and Border Protection reinvestigate what date the material terms of sale, known as the date of sale, was set for exports to Australia, for the purpose of applying the correct exchange rate to these sales based on an application for review by Stemcor and Alpine.

An examination of the submissions provided to the TMRO indicates that Stemcor's concerns relate to both the relevant exchange rate used in the comparison of the export price to the normal value in the calculation of the dumping margin and the exchange rate used to determine the AEP, the number which gives effect to the measures.

Interested parties have also raised issues with the currency in which the AEP was set. All of these issues have been addressed below.

5.5.1 Date of sale for currency conversion

During the original investigation, neither Alpine nor Kukje, the exporter that was the subject of Stemcor's submission, made any claims or provided any information[27] to show that the material terms of the export sales were established on a date other than the date of invoice. Export sales information provided by these parties identified the rates of exchange for each transaction based on the invoice date. Therefore, the reinvestigation considers that there was sufficient information to establish that the invoice date was the appropriate date for the conversion of export currencies.

As Customs and Border Protection is required to only have regard to information before the CEO at the time of the original decision and is unable to collect any further

[27] While Alpine argues in a submission dated 10 April 2012, that it did not consider the invoice date to be the date of sale, it stated that it is 'not claiming the sales date based on order confirmation and for reasons of convenience is accepting the ACBPS preferred sales date based on invoice date'.

information in a reinvestigation, there is insufficient information to consider that the contract date best establishes the material terms of sale of the exported goods.

The reinvestigation therefore recommends affirming the delegate's decision in regards to this issue.

5.5.2 Exchange rate applied to determine the Ascertained Export Price

The original investigation used a single average exchange rate based on the rates published by the Reserve Bank of Australia to convert the AEP for each cooperating exporter from the currency of export to Australian dollars (AUD).

The reinvestigation considers that there may be circumstances in which it is more appropriate to use average exchange rates for part periods of the investigation period. For example, where exports have occurred in a single month of the investigation period then it would be appropriate to calculate the AEP using the average rate of exchange for the corresponding month of export rather than the average for the whole of the investigation period.

An examination of Kukje's export sales information reveals that there were regular export sales made throughout the investigation period. Given those circumstances, the reinvestigation considers that it was not unreasonable for an average rate of exchange over the whole of the investigation period to be used in calculating an AEP.

5.5.3 Currency used for the Ascertained Export Price

Interested parties have also raised issues with the currency in which the AEP was set and request that it be set in the currency in which export sales are made rather than in Australian dollars.

The Dumping and Subsidy manual states that the AEP will generally (emphasis added) be expressed in the currency in which the export sale is made[28]. One such circumstance where Customs and Border Protection would consider it appropriate to convert the currency of export into a common denomination for the purposes of imposing interim dumping duties is where exports by a single exporter are denominated in differing currencies.

The reinvestigation has examined export sales by a number of key exporters during the original investigation and found that currencies varied. As the manual only gives general direction, the re-investigation considers that it was not unreasonable for Customs and Border Protection to convert and calculate the AEP in another currency, namely AUD.

The reinvestigation further notes that this issue has been raised by interested parties because of the uncertainty that can arise due to exchange rate fluctuations when purchases are made in one currency and duty is collected in another currency. However, when completing an import declaration for goods subject to dumping duty,

[28] Dumping and Subsidy Manual, August 2012, pg 144.

importers can input the exchange rate relevant to the goods at the time they were purchased, thereby avoiding the uncertainty around exchange rate changes. Further information on exchange rates for the purpose of dumping declarations is available by contacting Trade Remedies Liaison.

5.5.4 Actual weight vs theoretical weight

Alpine has submitted that Customs and Border Protection erred by not taking its claim for an adjustment based on actual versus theoretical weight into account. The TMRO recommended that an adjustment between the export price and the normal value be investigated to account for different weights between the two.

The difference between the nominal weights of domestic and export sales was not raised by Alpine as an adjustment during the original investigation and no information was provided to support a claim of this nature. Therefore, the reinvestigation reaffirms the original finding in this regard.

However, in examining the submission put forward by Alpine to the TMRO, an issue has been raised regarding the use of theoretical weights for sales and actual weights for costs. While Alpine's domestic and export sales were made on the basis of theoretical weights, costs were recorded on the basis of actual weight. As theoretical weights were generally slightly higher than the actual weight, Alpine asserts that this resulted in an overstatement of costs which may be as high as 4%. Alpine argues that this overstatement resulted in less sales being found to be in the ordinary course of trade and a higher normal value. Alpine asserts that Customs and Border Protection should have investigated the issue and made an adjustment.

During the original investigation, the visit team examined this issue and concluded that the data presented by Alpine to support this claim for adjustment:

- had anomalies;
- represented a very small portion of production during the investigation period; and
- was provided late in the verification.

Following this finding, Alpine provided the investigation with a submission stating that, while it has raised this issue later in the verification, this issue was known to Customs and Border Protection and adjustments were made for this matter in the current and previous investigation. Alpine called on Customs and Border Protection to make an allowance for this factor when other exporters have been given this allowance. No further information was provided to substantiate the claim.

The reinvestigation has re-examined the matter. During an investigation exporters seeking a claim for an adjustment have a responsibility to provide evidence in support of their claims in a timely manner. This is for the practical reason of allowing the visit team to thoroughly examine the matter and verify the supporting data.

In this instance, the time at which the data was provided limited the extent to which the visit team could verify the claims. This was recorded in the visit report and, while Alpine made a further submission on this matter, it did not provide any further information to

support its claim despite statements in the report that the data was unreliable. The reinvestigation does not have the ability to gather further information. Therefore, the re-examination of this matter must be confined to the data provided at the verification visit.

The reinvestigation notes that the data provided relates to five days of production of HSS and the production of eight models. The data shows that on some of the selected dates the actual weight of finished goods was greater than the actual weight of HRC used, which indicates that one or more of the quantities provided are incorrect and/or not all production has been captured.

While the information provided indicates that there is a difference between actual and theoretical weights, the data cannot conclusively demonstrate the magnitude of the difference. In instances where other exporters received adjustments for the difference between actual and theoretical weight, the evidence supplied was well in excess of that provided by Alpine and generally the theoretical and actual weights for all models was provided.

Accordingly, the reinvestigation does not have sufficient evidence to be satisfied of what positive adjustment should be made for the differences between Alpine's actual and theoretical weight. In the absence of this information, Customs and Border Protection will not make an adjustment to Alpine's costs using data from another manufacturer as it cannot determine whether this adjustment is appropriate for Alpine. The re-investigation is unable to make any adjustment for this matter and reaffirms the findings of the original investigation.

6 CALCULATION OF DUMPING MARGIN FOR NON-COOPERATING EXPORTERS

6.1 Summary of the reinvestigation findings

Customs and Border Protection recommends that the Minister affirms the finding of the original investigation that dumping margins for HSS exported from selected non-cooperating exporters from China, Korea, Malaysia and Taiwan were correctly determined without application of s.269TG(3B) of the Act.

6.2 The original investigation

Exporter questionnaires were sent to all known suppliers of HSS from the countries under consideration. Customs and Border Protection received 22 responses to the exporter questionnaires, with 13 exporters providing adequate and timely responses.

Customs and Border Protection sought to substantiate the accuracy of the information provided by these exporters. Nine were visited for verification purposes and data for the other four was examined without on-site verification. Individual dumping margins were determined for those exporters from China, Korea, Malaysia, Taiwan and Thailand who provided adequate responses to the exporter questionnaire that were verified by Customs and Border Protection during the investigation. This resulted in the following determinations:

Country	Exporter	Dumping margin
China	Dalian Steelforce Hi-Tech Co. Ltd	13.4%
	Hengshui Jinhua Steel Pipe Co., Ltd	23.7%
	Huludao City Steel Pipe Industrial Co., Ltd	10.1%
	Qingdao Xiangxing Steel Pipe Co., Ltd	18.0%
	Zhejiang Kingland Pipeline & Technologies Co. Ltd	10.2%
	Jiedong Economic Development Testing Zone Tai Feng Qiao Metal Products Co., Ltd	32.0%
Korea	Kukje Steel Co., Ltd	3.2%
Malaysia	Alpine Pipe Manufacturing SDN BHD	3.0%
Taiwan	Shin Yang Steel Co., Ltd	2.8%
	Ta Fong Steel Co., Ltd	2.4%

In the case of the remaining exporters that did not respond, did not provide complete and adequate responses to the exporter questionnaire, or did not make themselves known to the investigation, their exportations were investigated using all relevant information.

Export prices for these selected exporters were determined under s.269TAB(3), after having regard to all relevant information, specifically:

- for exporters from China and Taiwan, the verified weighted average export price for the investigation period from other selected exporters in the relevant country,

by finish, excluding any part of that price that relates to post-exportation charges; and
- for exporters from Korea and Malaysia, the lowest verified quarterly weighted average export price from other exporters in the relevant country over the investigation period, by finish, excluding any part of that price that relates to post-exportation charges.

Normal values for these selected exporters were determined pursuant to s.269TAC(6), having regard to all relevant information, specifically:

- for exporters from China and Taiwan, the highest verified weighted average normal value for the entire investigation period from other exporters in the relevant country, by finish; and
- for exporters from Korea and Malaysia, the highest verified quarterly weighted average normal value from other exporters in the relevant country in the investigation period, by finish.

This resulted in the following determinations of dumping margins for selected exporters that did not furnish requested information:

Country	Dumping margin
China	57.1%
Korea	8.9%
Malaysia	20.0%
Taiwan	5.3%

6.3 Issues identified by the TMRO

The TMRO raised the following specific issues in relation to the determination of dumping margins for selected non-cooperating exporters from the countries under consideration:

- that the terms “selected cooperating exporters” and “selected non-cooperating exporters” are not found in the *Customs Act 1901*, which only provides for three categories of exporter, namely new exporters, residual exporters and selected exporters;
- that the categorization of selected non-cooperating exporters as selected exporters for the purpose of s.269T, turns upon whether the selected non-cooperating exporters were “investigated”;
- that an exporter can only be investigated and therefore categorized as a selected exporter for the purpose of s.269T when inquiry has proceeded to the point where individual export prices and normal values have been determined;
- the definition of “residual exporter” in s.269T necessarily includes exporters who:
    - were willing to cooperate but not selected to be part of a sampling exercise pursuant to s.269TACB(8);
    - provided information but that information was not reliable enough to allow the CEO of Customs and Border Protection to reach a specific decision on dumping;

  - failed to complete an exporter questionnaire so that their export prices and normal values cannot otherwise be determined;
  - existed but where unknown to Customs and Border Protection and who may or may not have been aware of the request to make themselves known.
- the words in s.269TG(3B) should bear their ordinary meaning pursuant to section 15AB of the *Acts Interpretation Act 1901* and will be applicable in all circumstances in which not all exporters are selected (either by way of sampling pursuant to s.269TACB(8) or due to exporters not cooperating with the investigation).

6.4 Submissions regarding the issues raised by the TMRO

OneSteel ATM submits that 'selected non-cooperating exporters' should be considered residual exporters and normal values and export prices for these parties should be assessed in accordance with the provisions of s.269TG(3B).

Stemcor and ThyssenKrupp argue that the dumping margins for their suppliers that were treated as selected non-cooperating exporters should be reviewed as a result of the TMRO's recommendations.

6.5 The reinvestigation

6.5.1 Categories of "exporter" pursuant to section 269T

The Act defines three categories of exporter in s.269T, being a selected exporter, a residual exporter and a new exporter.

A selected exporter is "an exporter of goods the subject of the application or like goods whose exportations *were investigated* for the purpose of deciding whether or not to publish that notice".[29] A residual exporter is "an exporter of goods the subject of the application or like goods other than: (a) a selected exporter; and (b) a new exporter of such goods."[30]

The central issue for this reinvestigation then is whether the exportations of non-cooperating exporters from China were investigated so as to meet the definition of a selected exporter for the purpose of s.269T.

6.5.1 Investigation for the purpose of section 269T

Customs and Border Protection addressed the issue of what constitutes an investigation in REP 159D, the reinvestigation of certain findings relation to clear float glass exported from the People's Republic of China, the Republic of Indonesia and Thailand.

In REP 159D Customs and Border Protection noted:

[29] s.269T, emphasis added
[30] s.269T

The terms "investigated" and "investigation" are not defined in the Act, the Explanatory Memorandum or the Anti-Dumping Agreement. Customs and Border Protection is therefore guided by available WTO and Federal Court decisions to determine what constitutes "investigation".

The WTO asserts that the term "to investigate" should take its ordinary meaning.[31] To investigate means to "search or inquire into; examine a matter systematically or in detail; [or] make an (official) inquiry into"[32]. The Appellate Body also applied the ordinary meaning of "investigation" which:

> …suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" of the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information. [33]

The duties of investigation and evaluation also preclude an investigating authority from "remaining passive in the face of possible short-coming in the evidence submitted…"[34] Thus, in conducting an investigation, Customs and Border Protection should undertake an "evaluative, comparative assessment" [35] of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations…"[36].

As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to s.269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to s.269TAB(4)[37] and 269TAC(7)[38].

6.5.2 Non-cooperating exporters

In determining export prices and normal values for non-cooperating exporters from China, Korea, Malaysia and Taiwan, Customs and Border Protection actively sought out and had regard to the following relevant information:

- the verified information of cooperating exporters;

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[31] Appellate Body, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* WT/DS295/R (29 November 2005) at para 7.185

[32] Definitions taken from the New Shorter Oxford Dictionary at p 1410 and quoted in WT/DS295/R at para 7.185

[33] Appellate Body, *United States – Definitive Safeguard Measures on imports of Wheat Gluten from the European Communities* WT/DS166/AB/R (22 December 2000) at para 53

[34] Appellate Body Report, *US – Wheat Gluten,* WT/DS166/AB/R_ at para 57

[35] Appellate Body Report, *Mexico – Beef and Rice* WT/DS295/R at para 7.167

[36] Appellate Body Report, *Mexico – Beef and Rice* WT/DS295/R at para 7.167

[37] For the determination of export prices

[38] For the determination of normal values

- importation data from Customs and Border Protection import database;
- information obtained and assessed by Customs and Border Protection from importers, and
- information obtained and assessed by Customs and Border Protection from the applicant.

The import data from Customs and Border Protection import database does not clarify whether the imported goods fall within the goods description for the purpose of the HSS investigation or differentiate the separate finishes of HSS. This meant that unit export prices derived from that data reflected a mix of products, some of which may not have been relevant to the investigation. Given this and the clear differences in unit prices between the various finishes of HSS, Customs and Border Protection considered the import data to be an unreliable basis for calculating export prices by finish.

An examination of information provided by importers during the investigation shows that the verified data only represents a small proportion of the total volume of HSS exported to Australia and does not represent exports by all selected non-cooperating exporters. The verified data is also not representative of the full range of HSS products distinguished during the investigation. Therefore it was reasonable for Customs and Border Protection to disregard this information for the purposes of calculating and determining export prices for selected non-cooperating exporters.

Export prices provided in the application for a dumping duty notice also did not distinguish between different finishes. Therefore similar issues arose with the reliability of the data included in the application to that in the Customs and Border Protection database.

In relation to the normal value information submitted in the application, Customs and Border Protection had amended Australian Industry's constructed normal value prior to initiation on the basis of information available to Customs and Border Protection. This information was suitable for initiation purposes. However once verified normal value information was available from cooperating exporters that became the most directly relevant information to the determination of normal value.

Ultimately Customs and Border Protection considered the most directly relevant and therefore best information available would be the export price and normal value data obtained and verified in relation to cooperating exporters from China, Korea, Malaysia and Taiwan.

The reinvestigation considers that the process undertaken by Customs and Border Protection constitutes an "investigation" for the purpose of the definition of "selected exporter". Customs and Border Protection sought to make an official inquiry into all known exporters from China. As non-cooperating exporters did not provide Customs and Border Protection with information so that an individual dumping margin could be determined, all relevant information was actively sought from interested parties, including importers and industry. This information was then critically assessed by Customs and Border Protection to ascertain whether it could be relied upon in order to determine export prices and normal values pursuant to s.269TAB(3) and 269TAC(6) respectively.

If the information was considered to be unreliable, it was disregarded pursuant to s.269TAB(4)[39] and 269TAC(7)[40]. This process of information gathering, critical analysis and determination constitutes an investigation as ordinarily defined.

Conclusion

The reinvestigation finds that non-cooperating exporters were investigated so as to be categorised as "selected exporters" for the purpose of s.269T.

The reinvestigation also finds that after having regard to all relevant information, export prices and normal values for all non-cooperating exporters were correctly established in accordance with s.269TAB(3) and s.269TAC(6) respectively.

The reinvestigation further finds that dumping margins for selected exporters were correctly established in accordance with s.269TACB(2)(a), by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

6.5.3 Summary

In summary, the dumping margins for selected non-cooperating exporters are as follows:

Country	**Dumping margin**
China	57.1%
Korea	8.9%
Malaysia	20.0%
Taiwan	5.3%

[39] For the determination of export prices

[40] For the determination of normal values

7 ARE STATE-INVESTED ENTERPRISES PROVIDING INPUTS TO HSS PRODUCERS 'PUBLIC BODIES'

7.1 Summary of reinvestigation findings

The delegate recommends the Minister affirms the finding of the original investigation that SIEs providing inputs to HSS producers are 'public bodies'.

The reinvestigation finds that sufficient evidence exists to reasonably consider that, for the purposes of the investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies'. The reinvestigation considers that these SIEs are exercising government functions and that there is evidence that the government exercises meaningful control over SIEs and their conduct. In performing government functions, SIEs are controlling third parties.

7.2 The original investigation

Part II.9.1 of Appendix B of REP177 addresses the issue of what is a public body and notes that:

> *The term 'public bodies', is not expressly defined under the Act, or the Agreement on Subsidies and Countervailing Measures (SCM Agreement).*

REP177 notes that in light of the WTO Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* dispute (DS379) consideration of the meaning of 'public body', Customs and Border Protection announced in ACDN 2011/27 that countervailing investigations involving allegations of subsidies being granted by public bodies would be conducted in accordance with the findings of the Appellate Body in DS379.

The assessment of public bodies in Appendix B therefore took account of the DS379 findings in arriving at its conclusions.

REP177 noted that the Appellate Body provided further guidance as to how it can be ascertained that an entity exercises, or is vested with government authority, outlining the following indicia that may help assess whether an entity is a public body (vested with or exercising governmental authority):[41]

- where a *statute or other legal instrument* expressly vests government authority in the entity concerned;
- where there is evidence that an entity is, *in fact, exercising governmental functions* may serve as evidence that it possesses or has been vested with governmental authority; and

[41] REP 177, pg 226

- where there is evidence that a government exercises *meaningful control* over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.

REP177 addressed each of the three indicia in its assessment of whether SIEs in China that produce HRC and/or narrow strip are public bodies.

Indicia 1: The existence of a 'statute or other legal instrument' which 'expressly vests government authority in the entity concerned'

The original investigation was not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing HRC and/or narrow strip.

The GOC submitted key pieces of legislation that govern SIEs, the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* (SOA Law) and the Company Law. These pieces of legislation related to wholly-state-owned enterprises and three other categories of SIEs.

The GOC submitted that under this legislation these enterprises operate in line with the general principle of separating government functions from enterprise management.

REP177 did not find provisions in these laws that expressly vest SIEs with government authority. However, it did not consider that these pieces of legislation expressly prevent SIEs from being vested with government authority or exercising government functions.

Indicia 2: Evidence that an entity is, in fact, exercising governmental functions

REP177 had not encountered direct evidence to suggest that hot rolled coil and/or narrow strip producing SIEs in China have expressly been granted the authority to exercise governmental functions (e.g. provided for in the entity's article of association, etc.).

However, Customs and Border Protection observed Article 36 of the SOA Law*,* which requires;

> *A state-invested enterprise making investment shall comply with the national industrial policies, and conduct feasibility studies according to the state provisions; and shall conduct a transaction on a fair and paid basis, and obtain a reasonable consideration.*
>
> [Emphasis added]

Customs and Border Protection considered this direction requiring SIEs to comply with national industrial policies, albeit related to investments in this instance, amounts to a direction that SIEs carry out a government function, namely the achievement of the GOC's national industrial policy objectives.

REP177 considered that there is a significant body of circumstantial evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the iron and steel industry.

REP177 found that the GOC had a clear government mandate and function to advance and improve the Chinese steel industry, as laid out in numerous government policies, plans and standards. REP 177 also found that the GOC actively implements and monitors the progress of its policies, plans and implementing measures. It is considered this activity is in line with Article 36 of the SOA Law.

Further evidence was found that demonstrates that Chinese iron and steel industry SIEs lead the implementation of these policies, particularly the merger and restructuring of the industry.

REP177 noted the provisions of:

- the *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (SASAC Guiding Opinion);[42] and
- the *Interim Measures for the Supervision of and Administrate of the Assets of State-Owned Enterprises* (the Interim Measures);[43]

which further indicate that SIEs have played an integral role in implementing GOC policies and plans.

REP177 considered that significant evidence exists to suggest that Chinese iron and steel industry SIEs, including those that produce HRC and/or narrow strip, play a leading and active role in implementing GOC policies and plans for the development of the iron and steel industry.

This development was considered to be a 'governmental function', and it is therefore considered these SIEs are in fact exercising governmental functions.

In REP177, it was noted that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g. annual reports of SIEs). Further evidence of this indicator may have been observed in this omitted information.

Indicia 3: Evidence that a government exercises meaningful control over an entity and its conduct

REP177 considered that sufficient evidence exists to determine that the GOC is in fact exercising meaningful control over Chinese SIEs generally, and SIEs that produce HRC and/or narrow strip.

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[42] December 5, 2006, General Office of the State Council – provided in relation to REP148, and also the HSS investigation

[43] Referred to, but not provided as an attachment, in the response to the GQ. However provided as Attachment 170 to the HSS investigation

As outlined above, REP177 found that the GOC has issued a multitude of plans, policies and implementing measures aimed at realising its overall policy aims in relation to the Chinese iron and steel industry. Evidence demonstrates that SIEs are leaders in the implementation of these policies and plans.

In addition to this SIE-led implementation, REP177 found that significant further evidence exists that demonstrates the GOC itself (including provincial governments, the national government, and associated GOC bodies, agencies and ministries) actively implemented and monitored the progress of these GOC policies and plans and placed constraints on SIEs to meet its goals. Thus, meaningful control is placed over the activities, decisions and conduct of enterprises in the industry by the GOC.

REP177 also found support for Indicia 3 in the GOC's broad 'Go Out' or 'Going Global' strategy. REP177 considered that this was implemented by the GOC and exercises control over business decisions of Chinese iron and steel industry SIEs.

While the GOC stated that it could not identify a document matching this description, it is understood that the 'go out' policy or 'going global' strategy involves a GOC initiative to encourage Chinese iron and steel enterprises to invest in foreign mineral companies so that they can have an input in ore pricing to help stabilise production costs and upgrade risk controls.

REP177 considered this to be evidence that large state invested steel enterprises carrying out the GOC's industrial development strategy of 'go-out'/'going global' are acting under the meaningful control of the GOC, such that SIE steel producers including HRC and/or narrow strip producers possess governmental authority and exercise such authority in the performance of government functions, namely, the achievement of the GOC's industrial development policy.

Conclusion on Indicia

REP177 considered that evidence exists to show that at least both Indicia 2 (evidence that an entity is, in fact, exercising governmental functions) and Indicia 3 (evidence that a government exercises meaningful control over an entity and its conduct) are satisfied in relation to Chinese HRC and/or narrow strip manufacturers.

REP177 noted that although not all 3 indicia have been satisfied in this case, it is noted that the Appellate Body in DS379 stated that 'where the evidence shows that the formal indicia of government control are manifold and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority'.[44]

REP177 considered that the position of SIEs that produce hot rolled coil steel and/or narrow strip in China are examples of entities that exhibit some public body characteristics and some private body characteristics.

[44] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* WT/DS379/AB/R (11 March 2011) at para. 318

GOC submissions and evidence suggest there is a certain degree of separation and independence of SIEs from the GOC, and that they are given certain freedoms to behave relatively independently. However, further evidence exists to show that these entities are still constrained by, and abiding by, GOC policies, plans and measures.

In noting this, REP177 considered that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply hot rolled coil and/or narrow strip should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

7.3 Issues identified by the Review Officer

The TMRO noted that the Appellate Body ruling on public bodies comprised three alternative tests, the three indicia that REP177 addressed.

Indicia 1: The existence of a 'statute or other legal instrument' which 'expressly vests government authority in the entity concerned'

The TMRO considered that REP177, rightly in his view, acknowledged that there was no evidence of any legal instrument expressly vesting government functions and authority in any Chinese HRC and/or narrow strip producer.

The TMRO then addressed whether REP177 properly applied either the second or third tests propounded by the Appellate Body.

Indicia 2: Evidence that an entity is, in fact, exercising governmental functions

The TMRO notes that the Appellate Body in decision DS379 described government functions and authority as being concerned with the power to control, compel, direct or command private bodies and persons. In his view, this aptly summarised the nature of government authority.

The TMRO said that the evidence analysed by Customs and Border Protection in REP177 indicates that certain producers of HRC and/or narrow strip are actively taking steps to comply with the policies promulgated by the GOC, and display awareness that there may be negative consequences to their business if they fail to do so.

However, in his view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons. Similarly the TMRO view of s.36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies requires no more than compliance with the policies of the Government of China and falls short of establishing that State-Invested HRC and/or narrow strip producers are invested with the power to control, compel, direct or command private bodies and persons.

The TMRO considered that Customs and Border Protection had no basis to conclude that the second limb of the Appellate Body test (Indicia 2) was met.

Indicia 3: Evidence that a government exercises meaningful control over an entity and its conduct

The TMRO said that even if it were accepted that the GOC exercises meaningful control over State-Invested HRC producers, the third test drawn from DS379 would again not be met, in his view, because the evidence again fails to establish that the enterprises are exercising governmental authority.

The TMRO also noted that, whilst Customs and Border Protection did not give express consideration to paragraph 269T(a)(iii) of the definition of subsidy, he considers for the same reason that there is no evidence that any Chinese HRC-producer had been entrusted or directed to carry out a governmental function.

7.3.1 Decision of the TMRO

The TMRO concluded that HRC and/or narrow strip producers were not public bodies for the purpose of the definition of 'subsidy' in s.269T of the Act and therefore directed the CEO to reinvestigate this finding.

7.4 Submissions regarding the issues raised by the TMRO

OneSteel ATM submits that there is sufficient evidence to demonstrate that SIEs in the Chinese iron and steel industry are exercising government functions and that the GOC is exercising meaningful control through SIEs that manufacture HRC. OneSteel ATM argues that the evidence to support this includes widespread government ownership of HRC producers and the GOC's broad macroeconomic policies which directs and influences the formation and structure of the iron and steel industry.

Dalian Steelforce and the GOC supports the TMRO's finding in regards to public bodies and considers that there is insufficient evidence to suggest that SIEs are public bodies.

7.5 The reinvestigation

7.5.1 Are HRC and/or narrow strip SIE producers public bodies?

In assessing whether HRC and/or narrow strip SIE producers are public bodies the re-investigation has followed the same framework as the original investigation by having regard to the three indicia outlined as guidelines by the Appellate Body in DS379, including whether SIEs are invested with the power to control, compel, direct or command private bodies and persons.

Indicia 1: The existence of a 'statute or other legal instrument' which 'expressly vests government authority in the entity concerned

The original investigation was not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing HRC and/or narrow strip and did not find provisions in the laws (that the GOC submitted are the key pieces of

legislation that govern Chinese SIEs[45]) that expressly vested SIEs with government authority.

The re-investigation has not found and is not aware of available information that shows that SIEs have been expressly vested with government authority.

The Appellate Body in DS379 notes that in some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body.

The Appellate Body goes on to note that "We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved[46].

The GOC submitted that SIEs operate in line with the general principle of separating government functions from enterprise management.

> *The principle of separation of government functions from enterprise management requests strict separation of government from the enterprise, to ensure that the enterprises themselves are the market players. The principle of separation of public administrative functions and the responsibilities of State-owned assets contributors requests that public administrative functions of government at any level be separated from the responsibilities of State-owned assets contributors of government at all levels. Both of the two principles of 'separation' request GOC entities not to interfere with the normal business activities of enterprises.*

Customs and Border Protection notes that Article 6 of the SOA Law states that the capital contributors' functions in wholly-owned SIEs must be carried out:

> *...based on the principles of separation of government bodies and enterprises, separation of the administrative functions of public affairs and the functions of the state-owned assets contributor, and non-intervention in the legitimate and independent business operations of enterprises.*

Article 15 further requires the capital contributor to act as a market participant:

> *Bodies performing the contributor's functions shall protect the rights legally enjoyed by the enterprises as the market participants, and shall*

[45] SOA Law and the *Company Law*

[46] Appellate Body Report, *United States - Certain Products from China* WT/DS379/AB/R at para. 318

> *not intervene in the business activities of enterprises except to legally perform the contributor's functions.*

The original investigation found that the evidence provided by the GOC indicated that the capital contributor is, expressly through legislative means, prevented from exercising government functions in the performance of its duties.

As with the original investigation, the reinvestigation considers that that the legislative provisions relate to the role of the capital contributor, and do not expressly prevent SIEs themselves from being vested with government authority or exercising government functions (though, as mentioned above, no statute or other legal instrument has come to light that appears to vest this authority).

Indicia 2: Evidence that an entity is, in fact, exercising governmental functions

The reinvestigation has not encountered direct evidence to suggest that HRC/narrow strip producing SIEs in China have expressly been granted the authority to exercise governmental functions (e.g. provided for in the entity's articles of association, etc.).

However, as outlined below, the reinvestigation considers that the information the original investigation gathered in regards to Indicia 2 to sufficiently demonstrate that show that Chinese steel SIEs, including those that produce HRC/narrow strip, exercise government functions as they play a leading and active role in implementing GOC policies and plans for the development of the iron and steel industry. In carrying out these functions, they compel private bodies to act in certain ways.

A number of GOC documents comprehensively outline the GOC's aims and objectives for the iron and steel industry[47] in China, which includes manufacturers of HRC and/or narrow strip. The overall aim of these policies, plans and measures is summarised in the *National Steel Policy*:

> *…to elevate the whole technical level of the iron and steel industry, promote the structural adjustment, improve the industrial layout, develop a recycling economy, lower the consumption of materials and energy, pay attention to the environmental protection, enhance the comprehensive competitiveness of enterprises, realize the industrial upgrading and develop the iron and steel industry into an industry with international competitiveness that may basically satisfy the demand of the national economy and social development in terms of quantity, quality and varieties.*

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[47] The GOC's NSP defines the 'iron and steel industry' as 'the selection of iron mines, manganese mines and chromium mines and working techniques and relevant supporting techniques such as agglomeration, carbonization, iron alloy, carbon products, fire-resisting materials, iron smelting, steel rolling and metal products'. This is broad, and extends from raw material mining through to the production of steel products themselves (including HSS). However, in practice, the NSP and other GOC macroeconomic policies extend beyond those activities and products listed in the NSP definition to include further matters, including coking coal mining and coking and steelmaking and casting. The term 'iron and steel industry' and related terms is therefore used in this report in the broad sense that the GOC uses it – ranging from the mining of steel raw materials, through to the manufacture of HSS and other metal products.

Thus, the essential objective of these policies, plans and measures is to advance and improve the Chinese steel industry, demonstrating that it is a government mandate and function.

The reinvestigation considers that when SIEs carry out the GOC's mandate for the economy they are exercising government functions.

Information gathered in the original investigation shows that SIEs uphold government directions in regards to:

- streamlining and restructuring the iron and steel sector;
- eliminating backwards and excess capacity;
- the GOC's Five-Year plans; and
- research and development.

Statements to this effect are made by iron and steel producing SIEs in China. Maanshan Iron & Steel Company Limited (Maanshan) in its 2010 Annual report states that following the publication of China's Twelfth Five-year Plan:

> *[t]o determine its corporate positioning and development objectives, the Company has developed a "Twelfth Five-year" development strategy and plan*[48].

The aims listed in the company's Twelfth Five-year plan are in keeping with those listed in the government's plan.

Baoshan Iron & Steel Co., Ltd (Baosteel) Annual Report for 2010, an SIE and China's largest steelmaker stated that:

> *As one of the engines of domestic iron and steel industry, Baosteel has been taking an active part in the reorganization of the industry in accordance with the national policies on iron and steel industry. By way of various capital operation including acquisition, merging, and transfer for free, Baosteel has quickly enlarged its production scale, and strengthened its comprehensive power, enhancing its core competitive power.*

The reinvestigation considered that in addition to the above, there is a significant body of evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the iron and steel industry.

When examining the findings of the original investigation, the TMRO concluded that the evidence put forward indicated 'that certain producers of HRC are actively taking steps to comply with the policies promulgated by the GOC, and display an awareness that there may be negative consequences to their business if they fail to do so'[49]. The TMRO did not consider that compliance with these policies equated to the exercise of government functions, as it did not equate to the exercise of power over third parties.

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[48] Maanshan Annual Report 2010, pg 30

[49] TMRO Report, para 245

The reinvestigation notes that policies such the *Notice of the State Council on Further Strengthening the Elimination of Backwards Production Capacities* and the *Standard Conditions of Production and Operation of the Iron and Steel Industry* contain penalties for non-compliance with policies. Adherence with these policies can be seen as companies acting within the requirements of the law, rather than the exercise of government functions.

However, the reinvestigation notes that the policies and regulations that SIEs are adhering to include not only those that incur negative consequences for non-compliance but also aspirational policies that are intended to shape the economy of China. For example, the Five-year Plans are considered to be aspirational documents by the GOC that outline its plans for the economy. While these are not enforceable, SIEs are market leaders in their implementation as demonstrated by the quote from Maanshan's annual report above. This indicates that SIE's actions are not simply those of companies seeking to comply with relevant legislation but that they are acting with a purpose. Customs and Border Protection considers that that purpose is to fulfil government functions.

Customs and Border Protection also considers that the *Interim Measures for the Supervision of and Administrate of the Assets of State-Owned Enterprises* (the Interim Measures);[50] indicates the integral role SIEs play in implementing GOC policies and plans.The Interim Measures explain SIE's role in implementing the government's policies for the economy. The purpose of the Interim Measures is:

> *to establish a State-owned assets supervision and management system that suits the needs of a socialist market economy, to better run State-owned enterprises, push forward the strategic adjustment to the layout and structure of the State economy, develop and expand the State economy, and realise the preservation of, and increase in the value of State-owned assets[51].*

In effect, the purpose of the Interim Measures is to further the Chinese economy.

Article 14 of the Interim Measures vests as one of SASAC's main obligations the responsibility to:

> *(2) maintain and improve the controlling power and competitive power of the State economy in areas which have a vital bearing on the lifeline of the national economy and State security, and improve the overall quality of the State economy.*
>
> *[Emphasis added]*

The reinvestigation considers that the requirement for SIEs to maintain the controlling power of the state economy must also apply to the iron and steel industry, which is considered to be a key part of the state economy.

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[50] Referred to, but not provided as an attachment, in the response to the GQ. However provided as Attachment 170 to the HSS investigation

[51] Interim Measures, preamble

While the original investigation was unable to determine the actual proportion of HRC and/or narrow strip producers that were SIEs, despite several requests to the GOC for this information, it did determine that SIEs accounted for a significant proportion of the iron and steel sector. Therefore, given their market dominance, the decisions of SIE's to implement or give effect to the GOC's objectives for structural reform in the steel industry are likely to significantly impact downstream producers of manufactured steel goods.

For example, the elimination of iron smelting and steel smelting production capacity by SIE's is expected to directly impact on the available supply of key raw material inputs to downstream producers. As a consequence, downstream producers of processed goods may be required to curb their own production, reinvest in new technology or merge with other similar enterprises. The reinvestigation notes that evidence gathered during the original investigation showed that relevant HSS producers contributed to the GOC's objectives.

To that extent, the reinvestigation considers that it is reasonable to conclude that SIE's producing HRC and/or narrow strip have indirect control over private enterprises that are engaged in the manufacture of HSS and other processed goods.

In the Chinese market, the consolidation of large SIE steel manufacturers forces other steel manufacturers to develop methods to become more competitive. Similarly, significant investment in research and development by SIEs require that other companies also invest in research and development or risk becoming obsolete.

However, SIE's influences on other market sectors and participants go further than this and in some instances SIEs actively seek to develop other market sectors in line with government policies. For example, Maanshan in its 2010 Annual report states that:

> *Under China's recent "Twelfth Five-year Plan" for the development of the iron and steel industry, priority will be given to the use of steel in the development of high-speed rail, urban rail transportation, marine engineering, high-end equipment manufacturing and ultra-high voltage smart grids, thus offering new opportunities for the Company's development*[52].

It goes on to state that:

> *While aiming to become a leader market player in the principal iron and steel operations, the Company will carry out the development of related industries in a timely manner, which an emphasis on fostering the development of machinery manufacturing, engineering technology, modern logistics, trade, coal chemical, automobile fittings and other related industries, with a view to extending its assets and searching for new income bases*[53].

The original investigation concluded that significant evidence exists to suggest that Chinese iron and steel industry SIEs, including those that produce HRC and/or narrow

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[52] Maanshan Annual Report 2010, pg 30

[53] Maanshan Annual Report 2010, pg 31

strip, play a leading and active role in implementing GOC policies and plans for the development of the iron and steel industry. This development is considered to be a 'governmental function', and it is therefore considered these SIEs are in fact exercising governmental functions.

After considering the information in the original investigation, the reinvestigation is of the view that in implementing the GOC's policies and plans for the Chinese economy SIEs are also carrying out government functions. In addition, SIEs are controlling other market participants to act in certain ways.

The reinvestigation considers that it was reasonable for the original investigation to come to that conclusion based on the evidence before it that SIEs are in fact exercising government functions in relation regulating the iron and steel industry.

Indicia 3: Evidence that a government exercises meaningful control over an entity and its conduct

The original investigation considered that sufficient evidence existed to demonstrate that the GOC was exercising meaningful control over Chinese SIEs generally and SIEs that product HRC and/or narrow strip. This evidence was summarised in Appendix A of REP177.

The reinvestigation has examined the evidence and notes that the following documents and polices that indicate government control over SIEs:

- the Interim Measures, which establish State supervision of SIEs in a way that promotes the GOC's policies for the economy; and
- the SOA Law, which outlines the requirement for SIEs to comply with national industrial policies when making any investments.

While these are general examples of legislation that applies to SIEs, the following documents show the control the GOC has over iron and steel producing SIEs particularly:

- the *Directory Catalogue on Readjustment of Industrial Structure*, which categorises certain industries into encourage, restricted and eliminate investment industries;
- the *Decision of the State Council on Promulgating the 'Interim Provisions on Promoting Industrial Structure Adjustment for Implementation'* , which outlines how the GOC promotes and restricts the development of industries in the categories listed above. For example, investments is prohibited in restricted and eliminated industries;
- the *Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities* which outlines the penalties for non-compliance with the GOC's plans for eliminating certain production capacities. This can include the revocation of the production licence; and
- the *Standard Conditions of Production and Operation of the Iron and Steel Industry,* which outlines the requirements for iron and steel producers in China including certain production size requirements. Companies that do not meet

these requirements can be prevented from getting credit and new production licences.

The reinvestigation considers that these notices and laws demonstrate that the GOC exercises meaningful control over iron and steel producing SIEs. The ability of the GOC to revoke licences or block credit if companies do not undertake certain action shows government control over SIEs. The need to adhere to the GOC's policies is demonstrated in Baosteel's annual reports over several years. As noted earlier, Baosteel is an SIE and the largest iron and steel producer in China.

2006 Annual Report:

> *…in order to achieve the restrictive target of energy saving, consumption lowering and pollution reducing, the Chinese government has promulgated a series of policies and regulations, explicitly pointing out the direction and timetable for the structural adjustment and elimination of the outdated capacity or the steel industry, and it is becoming common understanding to realise the adjustment of industrial layout by replacing the outdated capacity with the advanced capacity.*
>
> *…*
>
> *Baosteel firmly set up the scientific outlook on development, solidly implemented the state's policies for the development of steel industry, adhered to the sustainable development, strictly controlled the investment scale, rationally arranged the construction projects and optimized the investment structure...*

2008 Annual Report:

> *In 2008, guided by Policies for Development of Iron & Steel Industry and Circular Economy Promotion Law of the People's Republic of China, a series of progress in the steel industry have been made: regional and cross-regional consolidation in China's domestic steel industry has been accelerated; the strategic coastal deployment of major steel enterprises has basically formed, optimizing the industrial layout; the technical equipment of these enterprises has been rapidly boosted, improving the mix of products; new development in obsolete capacity shutdown, energy conservation and emission reduction has been achieved.*

2010 Annual Report:

> *As one of the engines of domestic iron and steel industry, Baosteel has been taking an active part in the reorganization of the industry in accordance with the national policies on iron and steel industry. By way of various capital operation including acquisition, merging, and transfer for free, Baosteel has quickly enlarged its production scale, and strengthened its comprehensive power, enhancing its core competitive power.*

[Emphasis added]

The reinvestigation further notes that the notices and legislation listed above which demonstrate GOC control over SIEs are consistent with the following GOC economic policies:

- National and regional Five-year plans;
- *The National Steel Policy*; and
- the *Blueprint for Steel Industry Adjustment and Revitalisation*.

The reinvestigation therefore considers that the GOC exercises meaningful control over SIEs in order to achieve its objectives for the iron and steel sector in China.

Accordingly, the reinvestigation considers that there is evidence to demonstrate that the GOC exercises meaningful control over SIEs and their conduct in the iron and steel sector, including those producing HRC and/or narrow strip.

Conclusion

The reinvestigation considers that the above analysis for the three Indicia in relation to Chinese HRC and/or narrow strip producers provide evidence that that SIEs are exercising government functions and that the GOC is exercising meaningful control over those entities.

The reinvestigation notes that the Appellate Body in DS379 stated that 'where the evidence shows that the formal indicia of government control are manifold and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority'.[54]

The reinvestigation notes the original investigation statement that, GOC submissions and evidence suggest there is a certain degree of separation and independence of SIEs from the GOC, and that they are given certain freedoms to behave relatively independently. However, further evidence exists to show that these entities are still constrained by, and abiding by, GOC policies, plans and measures. In doing so, SIEs are controlling the decisions of other parties to also adhere to these policies.

The original investigation concluded that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

The reinvestigations concludes after considering the available information that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies', in that they perform government functions in relation to the iron and steel sector and that the GOC exercises meaningful control over these SIEs and their conduct.

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[54]Appellate Body Report, *United States –Certain Products* at para. 318

8 LESS THAN ADEQUATE REMUNERATION FOR HRC PROVIDED UNDER PROGRAM 20

8.1 Summary of reinvestigation findings

The delegate recommends that the Minister affirm the finding of the original investigation that SIEs conferred a benefit to HSS manufacturers by providing raw materials at less than adequate remuneration. The reinvestigation is satisfied that an assessment of adequate remuneration is not required to be based on an assessment of return on investment. Further, the reinvestigation considers that in this instance it was reasonable for the reinvestigation to base its assessment of adequate remuneration on a benchmark constructed using a basket approach of verified raw material costs from verified data provided by exporters in other countries that were under investigation.

8.2 The original investigation

In the original investigation, it was found that Chinese exporters of HSS received a subsidy from SIEs in the form of the provision of raw materials for less than adequate remuneration.

It was found that SIEs were “public bodies” and these bodies provided a benefit to HSS producers by suppling HRC and/or narrow strip to HSS producers at a price which did not reflect competitive market costs.

The original investigation calculated the value of the subsidy received as the difference between what HSS producers paid to SIEs and adequate remuneration. The original investigation concluded that adequate remuneration could be reasonably considered to be competitive market costs. In order to determine a benchmark for competitive market costs, several options were considered.

Private domestic prices were examined but the original investigation found them to be distorted by the significant influence from the GOC before and during the investigation period. Import prices were also considered as a benchmark but it was found that the volume of imports was relatively low and that these prices were also influenced by the prevailing market conditions in China.

Accordingly, the original investigation used a ‘basket’ approach to create a benchmark reflective of competitive market costs. The benchmark was determined using the weighted average price for HRC from verified selected HSS exporters cooperating with the investigation from Korea, Malaysia and Taiwan at comparable terms of trade and conditions of purchase to those observed in China.

8.3 Issues identified by the TMRO

The TMRO disagreed with the original investigation’s interpretation of the phrase “adequate remuneration”. After examining WTO Appellate Body report DS257 on Softwood Lumber from Canada which considered the issue, the TMRO stated that this adequate remuneration refers to the adequacy of the return on investment, rather than

whether prices were at a level equivalent to a competitive market unaffected by government intervention. The TMRO specifically defined it as "*a comparison between the cost to make and sell and the price of the sale of the goods*[55]".

As the original investigation had no evidence of the rates of return that HRC producers achieved and the TMRO considered that SIEs were not public bodies, the TMRO considered that a finding could not be made that HRC was supplied at less than adequate remuneration. The re-investigation notes that the issue of public bodies was addressed in chapter 7 and SIEs were found to be public bodies.

8.4 Submissions regarding the issues raised by the TMRO

OneSteel ATM submits that the TMRO's conclusion that adequate remuneration must be assessed on the basis of return on investment is incorrect and that the WTO jurisprudence endorses a range of approaches. In addition to practical concerns regarding the TMRO's approach, OneSteel ATM considers that in certain situations, this methodology would present anomalous results.

Dalian Steelforce supports the TMRO's finding and argues that no subsidy is granted for the purchase of HSS inputs at less than adequate remuneration. Dalian Steelforce argues that it has not encountered prices from SIEs that are consistently lower than those offered by other suppliers.

8.5 The reinvestigation

The reinvestigation has examined whether "adequate remuneration" in section 269TACC(4) and (5) of the Act must be interpreted as adequate return on investment and more specifically, as found by the TMRO, "*a comparison between the cost to make and sell and the price of the sale of the goods*[56]".

The Agreement on Subsides and Countervailing Measures (the SCM) outlines how the amount of a subsidy is calculated in terms of the benefit to the recipient in Article 14. This refers to the provision of goods for less than adequate remuneration and states that under section (d) that:

> *For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:….*
>
> *(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in*

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55 TMRO Report, Para 273

56 TMRO Report, Para 273

> *relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).*

Australia's anti-dumping legislation has a similar statement under s.269TACC(4)(d).

The Appellate Body considered that what is required by the term adequate remuneration in Report DS257. Customs and Border Protection does not consider that the Appellate Body concluded that this must be assessed by reference to return on investment. In the following excerpt the Appellate Body examines an interpretation of Article 14 made by the WTO Dispute Resolution Panel.

> *We agree with the Panel that the term "shall" in the last sentence of the chapeau of Article 14 suggests that calculating benefit consistently with the guidelines is mandatory. We also agree that the term "guidelines" suggests that Article 14 provides the "framework within which this calculation is to performed", although the "precise detailed method of calculation is not determined". Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States' submission that the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance"*[57]
>
> *(emphasis added)*

The Appellate Body again stated:

> *We agree with the submissions of the participants and third participants that alternative methods for determining the adequacy of remuneration could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs*[58]

While the Appellate Body was careful not to endorse any specific benchmarking methodology and noted that the benchmark used had to reflect the prevailing market conditions, its agreement that both prices and costs could be used to determine a benchmark for adequate remuneration shows that it did not interpret the phrase adequate remuneration to solely refer to return on investment.

The Appellate Body went further by identifying a potential scenario where:

> *there may be situations in which there is no way of telling whether the recipient is "better off" absent the financial contribution. This is because the government's role in providing the financial contribution is so predominant*

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57 Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* WT/DS257/AB/R at para. 92

58 As above, para. 106

> *that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.*

Indeed there are many instances in which the level of return on investment is inconclusive in determining whether remuneration for goods was adequate. For a commodity product such as steel, goods could be sold at a high price with a high level of profit in a booming market but nonetheless may still be at a price which does not represent adequate remuneration taking into account the prevailing market conditions.

In the original investigation, Customs and Border Protection examined and discarded the option of creating a benchmark from the prices of private domestic sellers and the price of imports on the basis that those prices are substantially influenced by the GOC's financial contribution and other policies/measures.

A basket approach was subsequently chosen that used the HRC prices from verified exporter data from other countries gathered in the course of the investigation and adjusted to take account of:

- the increased purchase price of pre-galvanised HRC over black HRC, with reference to the quarterly average purchase price difference between the Steel Business Briefing China domestic Shanghai HRC price and the China domestic Shanghai pre-galvanised HRC price;[59]
- differences in delivery terms observed in China (ex-works, delivered); and
- the reduced cost of narrow strip in China.

The reinvestigation considers that the original finding in REP177 was not unreasonable in assessing the benchmark using the methodology it did. The reinvestigation affirms the finding of the original investigation.

[59] Reported by SBB as VAT-inclusive, but VAT removed for the purposes of establishing the benchmark.

9 RECOMMENDATIONS

Customs and Border Protection recommends that the Minister affirm the following findings of REP177 subject to the reinvestigation:

9.1 Dumping

9.1.1 Finding 1 – Market situation in the Chinese iron and steel market

The delegate recommends that the Minister affirm the findings of the original investigation in regards to a finding of the market situation that made sales unsuitable for use in determining normal value. The reinvestigation considers that the finding of market situation in relation to the domestic market for HSS in China was made by the CEO on the basis of consideration of all available relevant evidence. The reinvestigation also considers that the totality of evidence gathered by Customs and Border Protection during the investigation, which the CEO had regard to in making his decision, was sufficient to support the CEOs finding of a market situation in the iron and steel sector.

9.1.2 Finding 2 – the benchmark calculations used to construct normal values for Chinese exporters

Following the delegate's finding that there was a particular market situation in the Chinese iron and steel sector, the delegate recommends that the Minister affirm the findings of the original investigation that it was appropriate to use a benchmark cost of HRC in constructing normal values in China.

However, the delegate recommends that the Minister vary the dumping duty notice as it relates to Dalian Steelforce due to a change in the amount of profit applied to its normal value.

9.1.3 Finding 3 – Export price for relevant exporters

The delegate recommends that the Minister affirm the finding of the original investigation that:

- the date of sale of currency conversion purposes for relevant exporters be the invoice date;
- the ascertained export price be converted to Australian dollars from the currency of export using an average exchange rate;
- the currency of the ascertained export price by Australian dollars; and
- no adjustment be made to Alpine's export price and dumping margin for the difference between actual and theoretical weight.

9.1.4 Finding 4 - the calculation of the dumping margin for 'selected non-cooperating exporters

Customs and Border Protection recommends that the Minister affirms the finding of the original investigation that dumping margins for HSS exported from selected non-

cooperating exporters from China, Korea, Malaysia and Taiwan were correctly determined without application of s.269TG(3B) of the Act.

9.2 Countervailing

9.2.1 Finding 1 – SIEs that produced HRC and/or narrow strip were 'public bodies'

The delegate recommends the Minister affirms the finding of the original investigation that SIEs providing inputs to HSS producers are 'public bodies'.

The reinvestigation finds that sufficient evidence exists to reasonably consider that, for the purposes of the investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies'. The reinvestigation considers that these SIEs are exercising government functions and that there is evidence that the government exercises meaningful control over SIEs and their conduct. In performing government functions, SIEs are controlling third parties.

9.2.2 Finding 2 – HRC was provided to HSS producers by SIEs at less than adequate remuneration

The delegate recommends that the Minister affirm the finding of the original investigation that SIEs conferred a benefit to HSS manufacturers by providing raw materials at less than adequate remuneration. The reinvestigation is satisfied that an assessment of adequate remuneration is not required to be based on an assessment of return on investment. Further, the reinvestigation considers that in this instance it was reasonable for the reinvestigation to base its assessment of adequate remuneration on a benchmark constructed using a basket approach of verified raw material costs from verified data provided by exporters in other countries that were under investigation.

10 EVIDENCE OR OTHER MATERIAL RELIED ON

In making its findings, the reinvestigation had regard to the following material or other evidence:

- REP177, SEF177 and TMRO Report 14 December 2012 and appendices;
- Relevant information provided to Customs and Border Protection's original investigation by Australian industry, importers, exporters, manufacturers, other parties and Customs and Border Protection's commercial database;
- Submissions to the TMRO and to the reinvestigation as far as they relate to the relevant information or conclusions based on the relevant information; and
- Submissions provided to the reinvestigation as far as they relate to the relevant information or conclusions based on the relevant information