

8 February 2013

Mr John Bracic
Director, Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Mr Bracic

Re Australian Customs Dumping Notice No. 2013/07 – Reinvestigation of certain findings in respect of Certain Hollow Structural Sections exported from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan

Please find attached for your consideration a submission by OneSteel Australian Tube Mills Pty Ltd ("OneSteel ATM") concerning the Re-investigation inquiry into Certain Hollow Structural Sections exported from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan.

If you have any questions concerning this submission, please do not hesitate to contact me.

Yours sincerely



Matt Condon
Manager, Trade Measures
OneSteel Manufacturing
P 02 8424 9880 F 02 8424 9885
M 0409 861 583 E condonm@onesteel.com

Introduction

1. On 12 August 2011, OneSteel Australian Tube Mills Pty Ltd ("OneSteel ATM") made an application for the publication of a dumping duty notice in respect of certain Hollow structural Sections ("HSS") exported from the People's Republic of China ("China"), the Republic of Korea ("Korea"), Malaysia, Taiwan and the Kingdom of Thailand ("Thailand"), and an application for a countervailing duty notice in respect of HSS exported from China.
2. Following an investigation by the Australian Customs and Border Protection ("Customs and Border Protection"), the following decisions were made on 6 and 7 June 2012, respectively:
 - (a) The investigations into exports of HSS from Thailand, and the countervailing inquiries into HSS exported by Qingdao Xiangxing Steel Pipe Co., Ltd ("Qingdao") and Huludao City Steel Pipe Industrial Co., Ltd ("Huludao"), were terminated; and
 - (b) Trade Measures Report No. 177 ("Report No. 177") containing the following recommendations were provided to the Minister for Home Affairs:
 - to require a dumping duty notice to be published in respect of HSS exported to Australia from China, Korea, Malaysia and Taiwan; and
 - to require a countervailing duty notice to be published in respect of HSS exported to Australia from China by all exporters other than Huludao and Qingdao.
3. The Minister for Home Affairs accepted Customs and Border Protection's recommendations as detailed in Report No. 177. On 3 July 2012, the Minister published a dumping duty notice and a countervailing duty notice notifying the decisions.
4. Following publication of the Minister's decision, seven applications for the review of the decision of the Minister to publish a dumping duty notice were received by the Trade Measures Review Officer (the "Review Officer"). A further four applications were received in respect of the Minister's decision to apply countervailing duties on HSS exports from China.
5. The Review Officer considered the applications for review and received a further three submissions from interested parties. Following review, the Review Officer recommended to the Minister that certain grounds concerning the original inquiry be re-investigated. The grounds to be re-investigated as directed by the Minister are as follows:
 - The Minister has directed the Chief Executive Officer of Customs and Border Protection to reinvestigate certain findings in relation to the decision to publish a dumping duty notice:
 - the finding that there was a particular market 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.269TAC(1) of the Customs Act 1901 ("the Act");

- the calculation of the benchmark used to construct a normal value for Chinese HSS producers under s.269TAC(2)(c) of the Act;
 - 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
 - the calculation of the dumping margin for 'selected non-cooperating exporters'.
6. In relation to the decision to publish a countervailing duty notice, the Minister has directed the CEO to reinvestigate:
- the finding that State-invested enterprises providing hot rolled coil steel to HSS producers under Program 20 are 'public bodies'; and
 - the finding that hot rolled coil supplied under Program 20 was provided for less than adequate remuneration.
7. OneSteel ATM provides this submission to address each of the matters referred to by the Minister that are to be re-investigated by the CEO.

The finding of a 'particular market situation' for HSS sold in China

8. The Review Officer's Report detailing the 'market situation' finding recommendation for reinvestigation is contained in Paragraphs 33 to 117. Paragraphs 33 to 36 detail the applicants' grounds for review; Paragraphs 37 to 63 detail the legislative provisions and a discussion concerning related Explanatory Memorandums to amendments to the relevant legislation over recent time. Paragraphs 64 to 79 outlines Customs' findings on market situation, and Paragraphs 80 to 82 details the matters contained in the Government of China submission.
9. The Review Officer's consideration is included in Paragraphs 83 to 108 (with the Review Officer's conclusions reflected in Paragraphs 109 to 117).
10. The Review Officer has indicated circumstances where it is considered a market situation does not arise. Such circumstances include where market participants make "their own commercial decisions"¹. Similarly, the Review Officer considers a market situation does not arise where the Government "encourages" mergers and other activities to enhance efficiency², or merely exercises "the ordinary functions of government"³.
11. By contrast, the Review Officer contemplated that Government intervention that extend beyond the ordinary functions of government could "create a market situation that renders domestic sales unsuitable for determining normal values"⁴. Examples cited by the Review Officer where intervention could influence prices include the Government provision of free or subsidized raw materials.

¹ Refer "Decision of the Trade Measures Review Officer – Hollow Structural Sections, 14 December 2012, paragraph 83.

² Ibid, paragraph 84.

³ Ibid, paragraph 85.

⁴ Ibid, paragraph 86.

12. The Review Officer considered that the key issue in the HSS case is “*whether or not there is sufficient evidence of sufficiently distorting intervention by the Government of China*”⁵ (emphasis added).

Mandatory and exhortatory intervention

13. In examining the level of influence of the Government of China (“GOC”) on the domestic HSS market, the Review Officer categorized policy announcements between “mandatory” and “exhortatory” intervention. The Review Officer cited “mandatory language” as including⁶:
- the National Steel Policy that outlines the repercussions of non-compliance with the policy, including denial of registration or refusal to issue permit, and prohibitions on the provision of finance to enterprises that do not comply with the policy;
 - Section 36 of the *Law of the People’s Republic of China on the State-Owned Assets of Enterprise* provides that ‘a State invested enterprise making investment shall comply with the national industrial policies’;
 - the Interim provisions on Promotion Industrial Structural Adjustment provides that the people’s governments shall take restrict and eliminate out-dated production capacities and prevent blind investments, and that ‘If any enterprise violates the provisions, its persons [shall be] directly held liable and the relevant leaders shall be subject to liabilities in accordance with the law’.
14. The Review Officer also considered that the “strongest example” of mandatory language was in Article 19 of the Interim Provisions on Promotion Industrial Structure Adjustment, that states in part⁷:
- “If any enterprise of the eliminated category refuses to eliminate the production technique, equipment or products, the local people’s government at each level and the relevant administrative department shall, in accordance with the relevant laws and regulations of the state, order it to stop production or close it [...]”
15. Turning to the examples of “aspirational language” referred to by the Review Officer, reference was made to the following⁸:
- the National Steel Policy reference to the offer of “support for research and development”, “encouraging the use of domestic technologies and equipment” and “encouraging mergers and reorganization”;
 - Chapter 13 of the 11th National Five Year Plan that provides the aims of the GOC that include “encouraging enterprises to carry out trans-regional collectivized restructuring”;
 - the Outline of the Eleventh Five –Year Plan for the Economic and Social Development of Tianjin City, which refers to actively promoting adjustment of the metallurgical industry”.

⁵ Ibid, paragraph 87.

⁶ Ibid, paragraphs 89.1 to 89.3.

⁷ Ibid, paragraph 90.

⁸ Ibid, paragraph 91.

16. The Review Officer made further mention of the “strongest example of the aspirational nature of the policies” as referred to in the Circular of the State Council on Accelerating the Restructuring of the Sectors with Production Capacity Redundancy, which included the following⁹:

- “The key to promote the restructuring is to give full play to the fundamental role of the market in allocating resources and fully exert the market strength to promote the survival of the fittest...”

17. Following the Review Officer’s analysis of what was considered “mandatory” and “aspirational” policies of the GOC, the Review Officer concluded that he was not satisfied Customs and Border Protection had sufficient evidence that the information relied upon by Customs and Border Protection was anything more than “suspicion” alone and that further *“concrete evidence of the implementation of the government policies and their effect in the market, such as the generation of an evidently artificial domestic price”* was required¹⁰. Only then, in the opinion of the Review Officer, would it be possible to make a positive market situation determination.

Tariffs and taxes

18. The Review Officer highlighted to the range of factors identified by Customs and Border Protection that provided evidence of the distorting intervention by the GOC, namely¹¹:

- Chinese export tariffs on coke and coking coal;
- the occurrence of mergers and acquisitions within the Chinese iron and steel industry;
- what it considered was the supply of HRS to HSS producers at subsidized prices;
- the fact that HRC prices in China were lower than in other countries under investigation; and
- comments made by some market participants about GOC policies.

19. It was considered by the Review Officer that the taxes on the export of coke and coking coal were a ‘clear example of government intervention’. However, the Review Officer considered that as there was no data available on the impact of the export tax on the domestic price of coke and therefore the impact on the HSS domestic price was not made.

20. In a reference to the export taxes applicable to coke and coking coal, the Review Officer stated¹²:

- *“The Government of China submitted, and Customs seemed to accept in the Report [although it is not mentioned where in the Report this is said to have occurred] that this export tariff policy is motivated by environmental*

⁹ Ibid, paragraph 92.

¹⁰ Ibid, paragraph 94.

¹¹ Ibid, paragraph 96.

¹² Ibid, paragraph 100.

concerns, including protection or improvement of air quality, and by a desire to avoid greater degradation than necessary by not producing more coke or coking coal than is needed for its domestic industries.”

21. In the Review Officer's conclusions on the impact of the export taxes and tariffs the Review Officer concluded *“I am thus not convinced that these export tariffs extend beyond the ordinary and acceptably distorting business of government so as to justify a finding of market situation.”*
22. In concluding on his analysis of Customs and Border Protection's reasons for finding a market situation, the Review Officer summed up¹³:
 - *“It is clear that mergers and acquisitions have occurred in the Chinese iron and steel industry, and these would appear to be consistent with the policies for that industry enunciated by the Government of China. However, Customs was [not] able to provide to me any evidence that these had occurred either because of those policies or by reason of their enforcement by the government. They may equally have occurred simply because the relevant market participants judged them to be in their best commercial interests”.*

OneSteel ATM's comments

23. Before analysing the specific observations relied on by the Review Officer to justify his conclusion that ... the currently available evidence is not adequate to definitively establish a market situation finding¹⁴ ...OneSteel wishes to identify certain features of the report that are relevant to the conduct of the reinvestigation. The suggestion by the Review Officer at paragraph 113 of the Report that the CEO, on reinvestigation, will be obliged to reach the same conclusion should be ignored. In addition to the conduct of the re-investigation being well beyond his remit, the observation fails to recognise that, for a variety of reasons, two decision makers assessing the same material may legitimately reach different conclusions especially in circumstances involving the interpretation, without the benefit of any significant jurisprudence, of such imprecise concepts as market situation and suitability.
24. OneSteel notes, for example, that the use of the term 'definitively' in the Review Officer's conclusion demonstrates that he invoked a very demanding standard in reaching a final recommendation. By contrast he had already allowed that Customs ...*had reasonable cause to suspect*¹⁵ ...that a market situation existed and also canvassed the type of evidence necessary to justify a view that ...*it was more likely than not*¹⁶ ...that a market situation had arisen. The 'definitively' standard finally adopted by the Review Officer is not derived from the Act, the Anti-Dumping Agreement ("ADA") or relevant jurisprudence and is patently too onerous as it exceeds even the criminal standard of beyond a reasonable doubt. OneSteel submits that in conducting the reinvestigation the appropriate standard to be applied by the CEO should be no greater than 'more likely than not' and that, contrary to the observation of the Review Officer, the various interventions by the Government of China in the HSS market are of a kind and degree clearly sufficient

¹³ Ibid, paragraph 101.

¹⁴ Ibid, paragraph 111

¹⁵ Ibid, paragraph 93

¹⁶ Ibid, paragraph 94

to ground a satisfaction that a market situation is more likely than not.

25. An alternative approach open to the CEO in assessing normal value for exports from China arises out of observations by the Review Officer concerning the candour of the Government of China during the course of the investigation and the review:
26. *...in many instances, the Government of China declined to provide Customs with information of relevance sought or provided information that was not adequate. Indeed, in its submission to me the Government of China did not overtly and unequivocally address the key issue, but focussed instead on forensic aspects.*¹⁷
27. *I do not know whether ...[there is definitely no market situation] ...in part because the Government of China did not provide all the factual material sought from it by Customs.*¹⁸
28. *I note that its [GOC's] submission does not go so far as to expressly deny any measures to implement the policies by regional governments or other public authorities. In this regard the submission appears to be very carefully worded.*¹⁹
29. In circumstances where requested information relevant to the issue of the suitability of domestic prices has not been provided and other information on that issue that has been provided is incomplete and inadequate, the provisions of Article 6.8 of the ADA and s.269TAC(6) &(7) of the Act must be considered. Article 6.8 provides:
30. In cases in which any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.
31. Numerous authorities²⁰ make it clear that the purpose of Article 6.8 and the incorporated annex is to ensure that administrations use the most reliable information available. In the present matter because of both the failure to provide requested material and the provision of inadequate material it is clear that the information available to the CEO and relevant to the assessment of normal value under s.269TAC (1) of the Act is unreliable. Consequently there are reasonable grounds for the CEO to recommend to the Minister that he disregard that information under s.269TAC (7) of the Act and proceed to assess normal value under s.269TAC(6) by reference to the relevant and reliable information available to him. OneSteel notes that The Review Officer himself acknowledges at paragraph 130 of the Report that there may be circumstances in which it is open to the Minister to invoke either that section or s269TAC(2)(c)(i).
32. It is OneSteel ATM's submission that the Review Officer has not fully evaluated the relevant information relied upon by Customs and Border Protection in its finding of a market situation for HSS sold in China. In this regard, it is appropriate to follow a similar methodological approach to that of the Review Officer and examine the broader information in the public domain that is supportive evidence demonstrating GOC intervention in the iron and steel industry.

¹⁷ Ibid, paragraph 93

¹⁸ Ibid, paragraph 111

¹⁹ Ibid, paragraph 95

²⁰ e.g. US – Hot-Rolled Steel: DS 184; Egypt – Steel Rebar: DS211

33. In considering distortion in the Chinese iron and steel market, Customs and Border Protection took account of:

- the GOC's broad, overarching macroeconomic policies and plans that outline the specific objectives for the China iron and steel industry; and
- specific "implementing measures" that aid implementation of the broader policies and plans.

34. The broad macroeconomic policies included:

- The National Steel Policy ("NSP");
- National and regional five-year plans/guidelines (including the 10th and 11th Five-Year Plans);
- the BluePrint for Steel Industry Adjustment and Revitalization ("the Revitalization Plan").

35. Customs and Border Protection outlined the "Alignment and importance" of these policies, stating²¹:

- *"The 11th National FYP was issued for the period 2006-2010, shortly after the promulgation of the NSP in 2005, while the Revitalization Plan was promulgated in 2009 for the period 2009 – 2011. Each policy plan is complimentary and consistent in their aims and objectives for the Chinese iron and steel industry, with many common aims and objectives between the documents".*

36. The Review Officer has coined the National Steel Policy and the Five-Year Plans as "aspirational" in nature. OneSteel ATM concurs with Customs and Border Protection's interpretation of the macroeconomic plans as **directions** of the GOC to deliver on objectives and aims for the Chinese iron and steel industry. OneSteel ATM would submit that the words alone in such documents are not sufficient to determine their meaning for current purposes, whereas words like these may, with respect, be correctly considered "aspirational" in some contexts, they would not be in other contexts. It is OneSteel ATM's submission that the overall context here (including such significant facts such as the high level of GOC equity interests in the steel industry, the direct intervention of the GOC in the coking coal/coke market and the matters set out below) makes it more than legitimate for Customs and Border Protection's to reach the conclusion that it did in the interpretation and impact of these macroeconomic plans, namely that they were effectively directions and not merely aspirational.

37. OneSteel ATM is concerned that the Review Officer did not elaborate on the macroeconomic plans contained in the NSP, the Five-Year Plans, or the Revitalization Plan. The key elements in each plan were identified by Customs and Border Protection in Report No. 177. It is appropriate to reflect on each plan. In 2005 the NSP included objectives aimed toward:

- requiring a decrease in the number of enterprises achieved by rationalization of iron and steel industry players through mergers and acquisitions under the supervision of the National Development and Reform Commission ("NDRC");

²¹ Trade Measures Report No. 177, P. 125.

- consolidation of steel production under the supervision of NDRC to achieve an outcome by 2010 that the top 10 iron and steel enterprises in China accounted for over 50 per cent of national production (and 70 per cent by 2020);
- limiting the establishment of new iron and steel enterprises;
- a direction to manufacture increased volumes of higher valued production by 2010.

38. Customs and Border Protection also referenced how the NSP would deliver on the GOC's aims and objectives for the iron and steel industry, including²²:

- "cutting of production and relocation of enterprises in certain regions while encouraging establishment in other regions;
- elimination of 'backwards capacity';
- prescribing equipment levels 'technical and economic indexes' and industry access conditions;
- offering support for research and development;
- encouraging the use of domestic technologies and equipment and prohibiting the use of second-hand 'backward' production equipment that has been 'eliminated';
- encouraging mergers and reorganization of iron and steel enterprises;
- setting minimum levels of 'self-owned capital' in certain projects and limiting foreign investment in the iron and steel industry (foreign investors prohibited from having a controlling share); and
- restricting exports of 'preliminary processed products' such as coke, iron alloy, pig iron, waste steel and steel ingot with 'high energy-consumption and serious pollution'."

39. The Revitalization Plan outlined key tasks for achievement including²³:

- stabilizing the domestic market and improving climate for export;
- speeding up the dismantling of 'backward capacity' while 'strictly keeping the total standstill (controlling production levels);
- increasing industry concentration and 'enhance' reorganization (through promoting mergers and acquisitions including promoting specifically-named mergers);
- encouraging technical innovation and progress;
- rationalizing the location of capacity 9including a 'coastal steel base' and encouraging the Shougang and Caofeidian Steel projects are finalized;
- raising production quality and changing product types produced (e.g. developing 'key steel products (high speed railway, high-strength automotive, etc) and raising the 'certificate standard' to promote steel quality to 'reach advanced international level');
- stabilizing the import of iron ore (including 'normalize' the market order – including building an 'import pricing mechanism' – some sources have said this is aimed to go as far as reducing the price of iron ore); and
- develop resources domestically and internationally (increasing the level of iron ore exploitation, encourage ore exploitation abroad, etc.).

²² Ibid, P.119.

²³ Ibid, P.124.

40. Customs and Border Protection further detailed the 'policy options' for the Revitalization Plan (refer to 8 points listed at P. 125 of Report No. 177).
41. Customs and Border Protection noted that the aims of the NSP and Revitalization Plans were aligned with the 11th National Five-Year plan. OneSteel ATM has observed that enterprises listed in the top 10 iron and steel producers evidence on websites²⁴ how they have achieved the goals and objectives set in the 11th National Five Year Plans and how they are working toward achieving the GOC's stated aims and objectives contained in the 12th National Five Year plan (2011 to 2016).
42. Customs and Border Protection highlighted the mergers to create the steel conglomerates Baosteel, WISCO, Anshan Iron and Steel, Heibei, and Shougang. It further detailed how Baosteel detailed in its 2010 Annual Report and declarations made by General Steel in its Form 10-K SEC filing documents in 2009 and 2010 referring to the GOC's objectives for the iron and steel industry and how the mergers and acquisitions were GOC-directed.
43. OneSteel ATM disagrees with the Review Officer's reluctance to be satisfied that the mergers and acquisitions within the Chinese iron and steel industry had occurred because of GOC direction but, rather, because "the relevant market participants judged them to be in their best interest". OneSteel ATM's submission is that this merger and acquisition activity must be seen in context, in particular a context that includes a high level of GOC equity interests in the steel industry and the direct intervention of the GOC in the coking coal/coke market.
44. OneSteel ATM further rejects that the export tariffs and taxes applicable to raw material inputs in the iron and steel industry (e.g. the 40 per cent export tax on coke, the 10 per cent export tax on scrap steel) can be described merely as being in the "ordinary" course of government business when: (a) it is widely accepted²⁵ that the intent of the taxes is to increase domestic supply and reduce domestic prices for the nominated goods, and (b) the GOC has substantial equity interests in the steel industry.

TMRO Review Decision on ARWs exported from China

45. It is noted that in December 2012 that the Review Officer also completed a review investigation into aluminium road wheels ("ARWs") exported from China²⁶. In his examination of appeals against a positive market situation finding for ARWs sold in China, the Review Officer affirmed the Minister's decision that a market situation for ARWs sold in China was established. In the ARWs review, the Review Officer stated²⁷:
- "...I am satisfied that Customs found not just mere statements of policy but sufficient examples of governmental intervention in the aluminium market that might reasonably be relied upon to conclude that the prices in the Chinese ARW market were distorted to a sufficient degree such that they were unsuitable to give a true normal value. In reaching this conclusion, **I rely primarily on the intervention that occurred in the form of tax and**

²⁴ www.wisco.com.cn

²⁵ including by the WTO Appellate body in decisions DS394, DS395 and DS398, as well as by investigating authorities in Canada and the USA into exports of welded pipe and tube from China.

²⁶ Refer www.tmro.gov.au

²⁷ TMRO Report Aluminium Road Wheels, Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice, December 2012, paragraph 95.

tariff policy and, to a lesser extent in the form of provision of subsidies.”
(emphasis added).

46. The circumstances in the ARWs investigation are not dissimilar to the HSS investigation. The Review Officer referenced the HSS matter and stated that the *“absence of evidence of the impact of tariffs on coke and coking coal on HSS prices was a material deficiency in any finding of unsuitability of domestic prices”*²⁸.
47. With respect, it is OneSteel ATM's submission that the Review Officer's finding in the ARWs Review is contradictory to the finding in HSS on market situation.
48. The available information does not support the Review Officer's conclusion in respect of the deficiency in the HSS matter (as referenced in the ARWs Review). The 40 per cent export tax on coke and the 10 per cent export tax on coking coal operate to suppress the selling prices of both products to the advantage of Chinese steel manufacturers. The taxes suppress the domestic coke price in China resulting in lower Chinese slab steel and narrow strip prices. OneSteel ATM's application demonstrated that the Chinese domestic narrow strip price was A\$200 per tonne (or 26 per cent) below the Japanese domestic hot rolled coil (“HRC”) price over the period July 2010 to June 2011 (the investigation period)²⁹. Narrow strip or HRC accounts for up to approximately 80 per cent of the production costs for HSS.
49. The impact of the GOC's tariff and taxes policy to apply a substantial 40 per cent export tax on coke – that operates as a disincentive for Chinese producers to export coke – can be directly linked to reduced selling prices for domestic coke and narrow strip and HRC in China, and subsequently the artificially low Chinese domestic prices for HSS. OneSteel ATM submits that the Review Officer's claim of a lack of evidence of the impact of the export taxes and tariffs on coke and coking coal is not correct, and submits that sufficient information was readily available to Customs and Border Protection during the HSS investigation.
50. OneSteel ATM submits that there is no material distinction between the HSS and ARW matters as the GOC's use and intent of export tariffs and taxes is remarkably similar (in terms of impact on downstream selling prices).
51. OneSteel ATM further notes that the Review Officer has afforded minimal reliance on the strategic macroeconomic policies of the GOC to implement its policies and objectives for the Chinese iron and steel industry as embodied in the pronouncements of the NSP, the 11th and 12th Five Year Plans and the steel industry Revitalization Plan. OneSteel ATM submits that the plans that are enacted by State-Invested enterprises (“SIEs”) in the Chinese iron and steel industry can be considered to reflect usual government business when the participants (primarily SIEs) report achievements and planned actions in accordance with the GOC's aims and objectives (including the closure of smaller production facilities and approving mergers that extend beyond normal commercial practice).
52. OneSteel ATM strongly submits that the Review Officer's conclusion on the absence of a market situation for HSS in China is not correct and that the Minister's acceptance of the finding of Customs and Border Protection on market situation for HSS in China was correct. OneSteel ATM concurs with the Minister's finding that the GOC's macroeconomic policies contained in the NSP, the 11th and

²⁸ Ibid, paragraph 100.

²⁹ Refer OneSteel ATM application for dumping and countervailing measures, P.73.

12th Five Year Plans, the Revitalization Plan, and via the strategic use of export tariffs and taxes, has intervened in the structure of the Chinese iron and steel industry in a manner that extends beyond the normal government role and thereby substantially influences Chinese domestic steel industry prices (including for narrow strip, HRC and HSS).

The constructed normal value for China - raw material narrow strip/HRC benchmark price

53. The Minister's direction to the CEO of Customs and Border Protection to reinvestigate certain matters in relation to the decision to publish a dumping duty notice included the following:
- "the calculation of the benchmark used to construct a normal value for Chinese HSS producers under s.269TAC(2)(c) of the *Customs Act 1901*".
54. A review of the relevant paragraphs 118 to 169 of the TMRO decision does not indicate an error by Customs and Border Protection as is suggested in the second item recommended for re-investigation by the Minister. The only reference to a possible concern relates to whether the Minister considered whether or not he should make a decision under s.269TAC (2)(d), however, no such direction is evident.
55. In each other sub-category within "The constructed normal value for China" sub-heading, each finding and recommendation by Customs and Border Protection has been affirmed by the Review Officer.
56. OneSteel ATM is open to advice from Customs and Border Protection if the above interpretation of paragraphs 118 to 169 in the Review Officer's decision is incorrect.

The determination of the export price

57. OneSteel ATM understands there are two matters requiring re-investigation in respect of the export price for Alpine and purchases by the importer Stemcor. These are:
- (a) whether contract date of invoice date is the relevant date for the purpose of currency conversion; and
 - (b) whether Customs and Border Protection adequately considered an adjustment for Alpine to account for the difference between actual and theoretical weights of goods sold.
58. Report No. 177 addresses Alpine's submission concerning the use of the contract date (as opposed to invoice date) as the relevant date for the purpose of currency conversion, and the claimed tolerance differences between domestic and export sales. At Section 6.9.1 (of Report No. 177) Customs and Border Protection confirmed that at verification "these claims were not clearly made by Alpine" and that it is not in possession "of all necessary information to perform these amendments" to Alpine's normal value.

59. Customs and Border Protection determined Alpine's normal value(s) on the basis of the information sourced from the verification visit that was provided in a timely manner.
60. Customs and Border Protection is not in possession of the relevant information to assess Alpine's claims. Similarly, Customs and Border Protection has indicated that it cannot determine the "reasonableness" of the claims.
61. OneSteel ATM submits that Customs and Border Protection should not accept unverified information for the purposes of adjusting normal values for Alpine (or for adjusting the respective normal values for exporters supplying to Stemcor). To accept unverified information would establish a dangerous precedent that OneSteel ATM urges the Minister not to accept.

Dumping margins for 'selected non-cooperating exporters'

62. Section 6.12 of Report No. 177 addresses the exporters that Customs and Border Protection termed "selected non-cooperating exporters". Specifically, these are exporters that are not "new" exporters or "selected" exporters, and may have more appropriately been termed "residual" exporters.
63. It is noted by OneSteel ATM that as at the date of this submission there is legislation awaiting Royal Assent³⁰ for the purposes of more appropriately defining the types of exporters identified in anti-dumping and countervailing investigations.
64. For the purposes of the HSS re-investigation however, OneSteel ATM submits the 'selected non-cooperating exporters' should be considered residual exporters and assess normal values and export prices in accordance with the provisions of s.269TG(3B).

Whether State-invested enterprises providing HRC to HSS producers under Program 20 are 'public bodies'

65. As indicated in Report No. 177 and by the Review Officer, 'public bodies' is not defined in the Customs Act 1901. Customs and Border Protection refers to a WTO Appellate Body finding in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (Dispute DS379) where the meaning of 'public bodies' was considered.
66. The Appellate Body provided some indicia that may assist in assessing whether an entity is a public body, namely³¹:
- 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

³⁰ Customs Amendment (Anti-Dumping Improvements) Bill (No. 3) 2012.

³¹ Trade Measures Report No. 177, P.231.

- 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.
67. Customs and Border Protection examined the Appellate Body's indicia (the Review Officer referred to these as the three tests). It is agreed that the first indicia has not been evidenced by Customs and Border Protection during its investigation.
68. For the second and third tests Customs and Border Protection determined that it was satisfied that the indicia was sufficiently evidenced whereas the Review Officer disagreed with Customs and Border Protection's findings (and hence the grounds for re-investigation were established).
69. OneSteel ATM considers that Customs and Border Protection has correctly examined whether sufficient information is available to enable a conclusion to be made as to whether an entity is in fact exercising governmental control. It may be as a consequence of the Review Officer's reluctance to consider the macroeconomic policies as enunciated in the NSP, the 11th and 12th Five Year Plans, and the Revitalization Plan, that the Review Officer does not consider that the predominantly State-owned HRC producers are entities that essentially perform government functions as required by the nominated policies.
70. Customs and Border Protection nominates the "Broad GOC Policies and Plans"³² by which the GOC directs and influences the formation and structure of the Chinese iron and steel industry. Customs and Border Protection discussed the eight specific plans and provisions in detail at Appendix A to Report No. 177.
71. The policies contained in the plans outline the GOC's aims and objectives for the Chinese steel industry. The implementation of the plans is evidenced by the enterprises reporting compliance with the 11th Five Year plans on their websites (e.g. Baosteel and WISCO) and it can be concluded as representation of the implementation practices of the arm of government. It should also be recalled that the specific directions to pursue goals for production output, location and the closure of mills are objectives of the NDRC that have been implemented by the industry through the significant level of state-ownership in the sector.
72. OneSteel ATM notes that in the US countervailing investigation into light-walled rectangular pipe and tube exported from China the U.S. authorities concluded that 96.1 per cent of enterprises in the hot rolled steel (i.e. narrow strip and HRC industry) were State-Owned Enterprises (or SIEs). It should be noted that the GOC confirmed to the US authorities that the extent of government ownership was 70.81 per cent in the Chinese HRC industry³³.
73. It is therefore reasonable to conclude – as Customs and Border Protection concluded – that the SIEs in the Chinese iron and steel industry are exercising governmental functions. OneSteel ATM strongly submits that the conclusion of the Review Officer that the policies and implementation actions of SIEs "falls short" of establishing the existence of exercising governmental functions should not have been found on the evidence.

³² Ibid, P.236.

³³ US Department of Commerce, Countervailing Inquiry into Light Walled Rectangular pipe and tube exported from P R China, 13 June 2008, P.36.

74. Customs and Border Protection also concluded that it was satisfied that there existed sufficient evidence to conclude that the government exercises meaningful control through SIEs that manufacture HRC. As indicated, it is well established that the level of government ownership in SIEs that produce HRC is significant. Customs and Border Protection evidenced the binding nature of GOC plans on enterprises, the reporting of progress on industry consolidation and elimination of backwards capacity, and the reporting by enterprises that the mergers have been GOC-directed.
75. These findings support a conclusion that the GOC has exercised meaningful control over SIEs in the iron and steel industry. It can therefore be reasonably concluded that the level of influence and control exercised by the GOC through SIEs is an extension of the arm of government and that the SIEs may be considered public bodies.
76. OneSteel ATM submits that the Review Officer's assessment that there is insufficient evidence to support a finding that SIEs that produce or supply HRC and/or narrow strip to HSS producers are public bodies should not have been found on the evidence. On the contrary, OneSteel ATM submits that there exists sufficient reliable information in the public domain in support of Customs and Border Protection's finding.

Whether HRC supplied under Program 20 was provided for at less than adequate remuneration

77. The assertion by the Review Officer at paragraphs 270 – 275 that the only relevant test of adequate remuneration is a comparison of the costs and selling prices of the suppliers of inputs to the HSS production process is clearly untenable. As Customs and Border Protection obviously pointed out to the Review Officer³⁴, WTO jurisprudence endorses a range of price related approaches that administrations can adopt in determining the adequacy of remuneration. For good reasons that jurisprudence contains no reference to or endorsement of a cost/price test.
78. In the first place any consideration of the interpretation of the terms of the ADA or the Act must take account of the administrative practicalities of an anti-dumping or countervailing investigation. It is simply not feasible to expect that corporations not directly concerned with the exportation of particular goods will engage with the officials of a foreign government, respond to their intrusive questions and reveal their confidential cost information. If the exclusive test proposed by the Review Officer was to prevail it would be virtually impossible to ever establish the existence of an actionable subsidy. Consequently to give effect to the purpose and intention of the SCM agreement a series of Panel and Appellate Body decisions have established tests of adequate remuneration that are practical and capable of being applied by investigating administrations.
79. Secondly, even if practical, the test proposed by the Review Officer would inevitably give rise, on occasion, to unintended and anomalous consequences. While selling prices in excess of costs must be regarded as a normative commercial situation in the long term, it is not uncommon for that relativity to be reversed in the short term. Applying the test in the latter situation might result in findings of subsidisation when the level of remuneration, albeit below cost, was

³⁴ Ibid, paragraphs 267 -269

'adequate' when measured against the levels applying in unsubsidised environments.

80. The CEO in the present matter has clearly acted in accordance with WTO rulings and One Steel submits that he should, in the context of the reinvestigation, continue to apply those tests and reject the incorrect methodology proposed by the Review Officer.
81. The correct approach to assessing whether narrow strip and/or HRC has been supplied at less than adequate remuneration is to examine a benchmark price (as the Review Officer accepted with aluminium alloy in China versus the London Metal Exchange prices) to confirm whether Chinese prices were at less than adequate remuneration.
82. OneSteel ATM concurs with the approach followed by Customs and Border Protection that the appropriate methodology to establish whether narrow strip and/or HRC was supplied by Chinese producers at less than adequate remuneration was to benchmark against market selling prices (as verified in Korea, Malaysia and Taiwan). To do otherwise will be to introduce subjectivity into an assessment when objectivity is essential given that the bodies being assessed are "public bodies".

Conclusions and Recommendations

83. OneSteel ATM submits that the Review Officer's conclusion that a market situation for HSS in China has not been adequately established should not have been found on the evidence. On the contrary, OneSteel ATM submits that Customs and Border Protection has demonstrated that the existence of a broad array of GOC plans and policies (including the NSP, the 11th and 12th Five Year Plans, the Revitalization Plan, etc) that have detailed the GOC's blueprint for the Chinese iron and steel industry means that a market situation has been demonstrated. Through its high level of ownership in the sector as well as its direct intervention in the coking coal/coke sector, the GOC has been able to implement these plans and policies to execute its desired aims and objectives for the industry.
84. It is therefore submitted that the available evidence comfortably supports a finding that a market situation for HSS in China exists.
85. In respect of the remaining matters raised for reinvestigation by the Review Officer, OneSteel ATM submits:
- it is unclear whether the Review Officer has established that Customs and Border Protection has erred in its assessment of a benchmark for comparing Chinese narrow strip and/or HRC prices;
 - Customs and Border Protection did not have access to verified information to enable it to adjust Alpine's normal value (or the normal values of Stemcor's suppliers) to take account of adjustments associated with exchange rates and differences between actual and theoretical weights;
 - the normal values and export prices for 'selected non-cooperating exporters' should be assessed as for residual exporters;

- Chinese narrow strip and/or HRC producers are considered public bodies;
and
- Customs and Border Protection has correctly determined that Chinese narrow strip and/or HRC has been sold at less than adequate remuneration by benchmarking the Chinese prices with external market prices (or an aggregate thereof).