1 July 2015

MOFCOM

Anti-Dumping Commission review of AD/CV measures applicable to aluminium road wheels

Submission of the Government of China

A Introduction

This submission is made on behalf of the Government of the People's Republic of China ("the GOC') in relation to the review of the measures applicable to exports of Chinese aluminium road wheels ("ARWs"), currently being undertaken by the Australian Anti-Dumping Commission ("the Commission").

The GOC is deeply concerned about the treatment of China and Chinese exporters in relation to certain critical aspects of recent Australian anti-dumping and countervailing investigations.

These concerns are centred on two persistent features of Australia's implementation of the World Trade Organisation's *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the AD Agreement") and *Subsidies and Countervailing Agreement* ("the SCM Agreement"), specifically:

- the misuse of the concept of a "particular market situation" ("PMS") in the determination of

normal value and, when it is used, its clear misapplication; and

- the misuse of the concept of "public body" in subsidy determination.

B Australia's recognition of China's market economy status

The Australian investigating authorities first accepted that Chinese producers and exporters were entitled to normal values to be determined on the basis of their own domestic prices and costs in 1997.[1] Subsequently, Australia formally recognised China's full market economy status in 2005, both diplomatically[2] and legally.[3] As a result, Australia does not apply the discriminatory Article 15 of China's WTO Accession Protocol against Chinese exporters. Domestically, the *Customs (International Obligations) Regulations 2015* ("the Regulations") specifically prohibit its usage against China. The Commission itself and, prior to the Commission, the Australian Customs and Border Protection Service ("Australian Customs"), have acknowledged Australian's recognition of China as a market economy.

Despite this, there has been an increasing pattern of disregard of this recognition on the part of the investigating authority and the relevant Minister. In the original ARW investigation, and a number of other investigations and reviews, the positive expectations of the Australian Government's recognition of China's market economy have not been met. Specifically, China and Chinese exporters have been adversely affected by the identification of a claimed PMS in the market for the goods under consideration, and by allegations that certain input costs do not reflect competitive market costs. These derogations from the AD Agreement relate to views formed by the investigating authority about government influence on the industries concerned.

The only express legislative bases upon which the Commission and the relevant Minister are allowed to consider the existence and impact of government influence in an anti-dumping investigation context are the following:

- Section 269T(5C) of the *Customs Act* 1901 ("the Act");

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[1] See *Final Finding on Glyphosate Acid from the People's Republic of China* – Australian Customs Dumping Notice No. 97/033.

[2] In 2005 Australia's Department of Foreign Affairs and Trade and China's Ministry of Commerce signed the *Memorandum of Understanding on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement Between Australia and the People's Republic of China*.

[3] In 2005 the *Customs Amendment Regulations 2005 (No 2)* (SLI No 77 of 2005) added China to the list of countries to which the non-market economy provisions of the *Customs Act 1901* could not be applied.

- Section 269TAC(4) of the Act; and
- Regulation 46 of the Regulation.

These sections and regulations all relate to the legal treatment of non-market economy ("NME") or economy in transition ("EIT") countries.

The rejection of domestic market prices and costs in normal value determination for certain Chinese exporters appears to be a thinly disguised way of treating Chinese exporters as if they continued to be subject to the NME or EIT provisions under the Act. The treatment of China's exporters in this way is a throwback to the application of non-market economy rules that were applied to China in anti-dumping investigations in Australia before 1997.

In the context of this case, the GOC insists that China has fully-formed, fully-functioning and competitive aluminium, aluminium alloy and ARW markets. As well as that, Australia has accepted China's full market economy status, and has both agreed with China, and legislated domestically, not to discriminate against Chinese exporters under Article 15 of China's WTO Accession Protocol.

Previous findings with regard to Chinese aluminium products[4] contradict these facts and recognitions. The GOC maintains that the application of the concept of a PMS has been legally flawed. Furthermore, more contemporary facts than those previously considered by the Commission, and clear factual distinctions between ARWs and aluminium extrusions, serve as additional reasons for the Commission to look at the issues in a different light in this present ARW investigation.

C Particular market situation

Quintessential to the Commission's and Australian Customs' PMS findings, it is said that:

> *The Commission considers that it is likely that there has been an impact on aluminium extrusions prices, brought about in a significant part by the GOC influence on the primary aluminium industry. It is considered that this influence has resulted in lower aluminium extrusions prices than what would have been the case if the relevant markets operated without GOC influences and interventions.*[5]

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[4] The concerns of the GOC extend also to PMS and competitive market cost findings made in relation to steel products.

[5] Statement of Essential Facts No 248, *Review of Anti-Dumping Measures – Certain Aluminium Extrusions Exported from the People's Republic of China*, at page 69. The findings of the investigating authority and of the review body have been internally inconsistent and inconsistent with each other. For example, in its original

The GOC respectfully submits that this is not an appropriate basis for finding that a PMS exists. The relevant question is not whether or not a market has been influenced by government policies or indeed whether or not government influences exist. A sale of a product in the domestic market of a WTO Member in which the price is discovered under competitive conditions cannot be said to have taken place under a PMS just because producers take into account social, environmental and industrial policies – policies that exist to support broad public welfare and the operation of the market - when they compete in that market.

Every market is influenced, in one or other ways, by the government of the country in which it operates – and to some degree is impacted by foreign governments as well – either in the form of positive government action or passive government action. Neither the AD Agreement nor the Act envisage that an investigating authority should ask itself whether the market concerned is a perfect and pure market without government influence, failing which a PMS must therefore be found to exist. That is not called for by the WTO system. It would not be a real world exercise. There would be absolute chaos, and the anti-dumping instrument would lose all meaning, if investigating authorities suddenly decided that overarching national regulations could disqualify market-based sales from normal value assessment.

A PMS only arises where there is something notable or extreme in the domestic market that disrupts the ability to compare the prices in sales in that market with the prices in export sales. As noted by the AD Agreement the only relevant situation is a "*particular market situation…in the domestic market of the exporting country, such [that] sales do not permit a proper comparison*". A PMS is therefore something that must affect the comparability of a domestic price-based normal value with export price.

In terms of comparability, Article 2.4 of the AD Agreement requires that due allowance be made for factors that are demonstrated to affect the comparability of the domestic price and the export price. This implies that a PMS is something that effects the comparability of the export price and the normal value, but which cannot be addressed by making a "due allowance" adjustment.

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investigation concerning aluminium extrusions, *Dumping and countervailing investigation ITR 148 - Aluminium extrusions exported from China*, Australian Customs had found that there was not a PMS in the aluminium extrusions market. Then, in its *Dumping and countervailing investigation ITR 181 - Aluminium road wheels exported from China* Australian Customs determined that there was a PMS. In *Hollow Structural Sections – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice* (14 December 2012), the Trade Measures Review Officer disagreed with Australian Customs that a PMS existed in the Chinese market for that product, and directed a reinvestigation. But in the reinvestigation Australian Customs then reinstalled its original PMS decision, see *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).

Importantly, if the same inputs are used for domestically sold and for exported products, then the cost of those inputs cannot create a PMS because the costs would not affect the "comparison" of the domestic price-based normal value and the export price. And in any case, if there were differences in the inputs used or their cost, then a "due allowance" adjustment can be made to the normal value, in order to address the impact these changes would have on comparability.

The GOC sees logical inconsistencies in the way in which the Australian investigating authority has found that government influence has created a PMS. Our submissions in this regard are made without derogating from the GOC's primary point, which is that the overarching influence that a government adopts in its social and economic development cannot be a basis for the finding of a PMS.

- An example of such an inconsistency can be seen from the aluminium extrusions review,[6] in which the Commission identified that there had been a purchase of 300,000MT of primary aluminium by the Reserve Bureau. This was considered to be a government influence in the market. Even if this could be regarded as government influence, in terms of economic theory such an influence could only be expected to increase or support the price of primary aluminium in the market, rather than to lower it. Despite this, the Commission considered this to be an aspect of government influence contributing to a PMS – even though the PMS was ultimately established on the proposition that producers paid an artificially low input cost for aluminium as a result of government influence.

- Another example of this selective consideration of evidence is the use of the GOC's environmental policies as a means of finding the requisite level of "influence" over the market such as might justify a PMS. The GOC's environmental policies, including its effort to address overcapacity in overly-polluting industries, could be expected to suppress increased production and increase the costs of environmental compliance. Again, a finding that the aluminium inputs are artificially low priced, and that a PMS exists on this basis, contradicts the effect one would expect the government's policies to have, which is that the influence likely have a cost-increasing impact (due to reduced/restricted supply and higher costs).

The GOC respectfully submits that it is not acceptable for an investigating authority to come to the

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[6] Statement of Essential Facts No 248, *Review of Anti-Dumping Measures – Certain Aluminium Extrusions Exported from the People's Republic of China*, at page 60.

conclusion of a PMS by simply identifying a number of government policies or involvement in either the industry for the goods under consideration or the upstream industry, and then to leap to a finding that the influences are creative of a PMS. Presumably, if government influence can create a PMS, then the actual situation that the influence causes, and the relationship between the influence and the situation, would need to be identified and explained in a cogent and defensible way.[7]

An ambiguous PMS assessment then becomes even more troublesome when it is later coupled with a finding under Regulation 43 (formerly Regulation 180) that costs of the "influenced" input do not reasonably reflect competitive market costs. Under this Regulation, the Commission is required to consider whether the input costs reasonably reflect competitive market costs. The GOC has never seen, in the recent run of reports where Regulation 43 has been applied, any finding to the effect that the Chinese market for the input in question was not competitive. The Commission's practice has been to determine, on the basis of its PMS finding, that the relevant market is influenced by government policy. This ignores the simple fact that a market can be a competitive market even if it is impacted upon by some form of government policy. The fact that the markets concerned are competitive markets is not taken into account.

Moreover, the alternative normal values that are permitted when there is a PMS are a third country price normal value, or a cost based normal value. There is nothing in the ADA to permit the surrogation of costs with higher costs. The GOC has repeatedly stated this and will strongly continue to do so.[8]

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[7] On the topic of the impact of government policies on cost, the GOC notes the comments of the Australian industry regarding the increase Chinese exports of "aluminium semis", in its submissions dated 1 April 2015. Aluminium semis are not subject to the 15% export tax. This increase in exports tells us that it cannot be assumed that a GOC tax measure on primary aluminium will have the effect of reducing domestic prices of primary aluminium, because suppliers will simply export semis instead. GOC regulatory measures do not necessarily influence the market in a way that might be theoretically expected. Chinese prices form a dynamic part of the world market, and influence prices in that world market.

[8] At our recent meeting with the Commission, there was some discussion around the question of what the GOC would consider might constitute a PMS, and how a cost based normal value would cause there to be a different normal value than the actual price. In that regard we firstly advised that a strong consumer preference for a particular product in a market could be argued by an exporter to constitute a PMS, in circumstances where Australian consumers did not share that preference. For other examples please refer to the views of the Trade Measures Review Officer in *Hollow Structural Sections – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice* (14 December 2012) at paras 60 to 63. Secondly, we note that the ability, under Article 2.2 of the AD Agreement, to move to a cost-based normal value *or* a third country price normal value applies to disqualifying factors other than a PMS. Thus, it cannot be said that the drafting of the AD Agreement compels the consideration of a cost-based normal value if a PMS is presented. There is no conundrum. The drafting of the AD Agreement is open to the preferable interpretation that in the circumstance of a PMS the investigating authority would look to a third country price as a more reasonable comparative price. In the example we have suggested, the

The question that the Commission is required to ask under Australian law is whether the financial records of an exporter reasonably reflect the competitive market cost. [9] The question is not whether the market is influenced by government policy. A market is still a competitive one even if it is impacted upon by some form of government policy.[10]

China has fully-formed, fully-functioning and competitive aluminium, aluminium alloy and ARW markets. We see no ability to determine that a PMS exists in these markets. Even if such a situation did exist – a situation that can only exist in rare cases with special circumstances - a PMS finding is not a shortcut to cost surrogation of the same type that reflects the long-past NME or EIT treatment of Chinese exporters. PMS is not a tool to reject the domestic selling prices of Chinese exporters and also their costs. This is an NME approach in practical terms and in poor disguise, and is an abuse of the AD Agreement by Australia against China, a fully-fledged fellow WTO Member.

D The ARW industry and market in China

The GOC should not have to participate in anti-dumping investigations at all, in that they are matters for exporters to deal with in their own interest. Moreover, the GOC has adopted a general policy not to participate in those parts of anti-dumping investigations that are directed towards the identification of a PMS based on observations about the GOC's industrial policies and regulations. This way of thinking does not comply with any allowable usage of "PMS" under the AD Agreement.

The GOC rejects any adverse inferences made against China and its exporters in other recent investigations on the purported grounds of non-cooperation by the GOC. The application of a PMS in those cases where it has been invoked has not been consistent with the AD Agreement. Indeed, the

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investigating authority could look to third country prices to a market where consumer preferences were more comparative to those in the exporter's home market as the basis for a normal value.

[9] The GOC maintains its view, repeated on many occasions before now, that Regulation 43 is an impermissible implementation of the relevant parts of Article 2.2.1.1 of the AD Agreement. The salient sentence in the AD Agreement states:

> *For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.*

The AD Agreement simply states a requirement that the exporter's records reasonably reflect *the* costs. The words *"reasonably reflect competitive market costs"* do not appear anywhere in the AD Agreement. In making this point the GOC does not resile from the proposition that ARW input costs in China are competitive market costs.

[10] The GOC refers the Commission to the comments of the Trade Measures Review Officer in this regard in *Hollow Structural Sections – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice* (14 December 2012) at paras 83 to 86.

GOC finds that the Australian investigating authority is far too ready to copy the claimed evidence and assumptions of other jurisdictions whose laws and policies are different from Australia's and who discriminate against Chinese exporters on the purported basis of Article 15 of the AD Agreement as domestically implemented by them. The Australian investigating authority is asked to desist from such imitation and to give China and its exporters the proper treatment to which they are entitled under the AD Agreement without derogation and as a full WTO Member.

Notwithstanding that policy, the GOC has participated in this ARW review. It has lodged comprehensive and extensive information on the subject matter raised in the Commission's questionnaires. The opportunity and indeed the obligation is now presented to the Commission to reverse its previous PMS findings in relation to ARWs, based on a full appraisal of contemporary conditions in China and the clear explanations of the GOC's position that have been provided to the Commission.[11]

The GOC's responses to the government questionnaire ("the GQ") and the supplementary government questionnaire ("the SGQ") show that the contemporary ARW industry and market in China is fully marketised and hugely competitive. The GOC would once again draw the Commission's attention to the following aspects of the information it has submitted:

- In response to GQ B-2(i) and the preamble to the response to Section C of the GQ, the GOC has explained both supply side and demand side factors, which show a vibrant, fast growing and extremely competitive market.

- As pointed out in response to GQ B-2(ii), the relevant raw material of the current investigation is aluminium alloy for most of the ARW exporters concerned, not primary aluminium. It is further noted that the aluminium alloy market is dominated by private enterprise suppliers. There are also significant volumes of exports and imports.

- As pointed out in the preamble to Section C of the response, non-SIE aluminium alloy supplier's production volume increased from 45.81% in 2011 to 65.68% in the first half of 2014.

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[11] The GOC notes that the PMS finding in Statement of Essential Facts No 248, *Review of Anti-Dumping Measures – Certain Aluminium Extrusions Exported from the People's Republic of China*, as recently issued, was made *"[a]fter having regard to all relevant information"* (see page 27). Without detracting from the GOC's disagreement with the PMS finding expressed in that Statement of Essential Facts, it is noted that ARWs are a different product to aluminium extrusions, and that the GOC did not participate and therefore did not directly contribute facts to the Commission for that review as it has done in this one.

- As pointed out in the Preamble to Section C, primary aluminium has been removed from the class of restricted projects under the *Catalogue of Adjustment of Industrial Structure* since 2013, and there has been an increase in the production capacity of primary aluminium in China even in the face of a policy that seeks to constrain investment in new electrolyte aluminium/primary aluminium out of concern for the environment. This highlights the market-driven nature of the industry and the imprecision and even the failure of GOC policies in achieving what might be expected of them.

- As per the response to GQ C2.8, the 12th Five Year Plan does not mention the controlling of quantity in relation to primary aluminium production at all.

- As per the response to GQ C3.1, distinctions exist between the ARW industry and the "aluminium industry" and between the primary aluminium and aluminium alloy sectors.

The Commission is required to make findings in this ARW review based on the facts as presented, and must not simply replicate facts, assumptions and findings previously arrived at.

The GOC does not accept that a PMS within the meaning of Art.2.2 of the ADA can be determined using a test of "government influence" that ignores the competitive realities of the market concerned. But if the competitive situation in the market is (wrongly) identified as an important element in the consideration of a PMS, then the outlying policies, laws and regulations would necessarily have to be analysed in a complete and reasonable manner.

The GOC emphasises that:

- the Chinese markets for primary aluminium, aluminium alloy and ARWs have become even more competitive since the time of the original investigation;

- key features of GOC policy that were considered to be significant to the investigating authority in its original decision no longer exist;

- the non-SIE participants and their production volumes have increased sharply since the original investigation.

Additionally, as the Commission is well aware, aluminium alloy is a further processed product of aluminium billet, incorporating different alloy materials to impart different characteristics of strength, formability and appearance. It is only one of a number of inputs used in the production of ARW. It is

reported that aluminium alloy accounts for around 48% of the total cost of manufacture of ARWs by Chinese producers.[12] This is a particularly relevant fact, given the administrative precedent established by the Commission in the recent investigation regarding deep drawn stainless steel sinks exported from China. As the Commission no doubt recalls, in this investigation a PMS allegation was made by the Australian industry, but was rejected by the Commission on the following bases:

- the input to stainless steel sinks was not steel – it was stainless steel, a next stage downstream product;

- the stainless steel input – "304 SS CRC" - accounted for about 45% to 55% of the total cost of manufacture incurred by Chinese manufacturers, which the Commission said was *"considerably lower than the proportion of the cost to manufacture represented by distorted raw materials in the production of HSS, hot rolled plate steel, galvanised steel and aluminium zinc coated steel, all of which were found to be subject to have particular market situations in China during the Commission's investigations into each product"*; and

- the cost uplift, being the difference between the Chinese manufacturer's actual costs and the benchmark chosen to represent "market costs" undistorted by Chinese government influence, was about 10%, which was said to be also *"substantially lower"* than the difference in previous steel cases where the Commission conducted costs surrogation.[13]

There are close similarities between the circumstances of the PMS consideration in the stainless steel sinks case and in this ARW case. In each case the input to the goods under consideration are further processed products from those which the Commission has difficulty accepting. In the sinks case, the input is stainless steel, not carbon steel. In the ARW case, the input is aluminium alloy, not primary aluminium. The proportionate cost of the finished products constituted by the stainless steel and the aluminium alloy are in the same range. We would imagine – without knowing where the Commission will end up on this – that the actual-to-benchmark cost differences are also not dissimilar.

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[12] Submission from Capral Ltd to the Anti-Dumping Commission dated 19 June 2014, in relation to the review of anti-dumping measures on exports of aluminium extrusions from China, and as cited by the Anti-Dumping Commission in *Statement of Essential Facts No.248 – Review of Anti-Dumping Measures – Certain Aluminium Extrusions Exported from the People's Republic of China* at page 47.

[13] *Report No. 238 – Alleged Dumping of Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China and Alleged Subsidisation of Deep Drawn Stainless Steel Sinks Exported from the People's Republic of China* ("Report 238"), page 131

Thus, putting to one side its disagreement with the propositions that government influence can be creative of a PMS in either the Chinese steel or aluminium industries, and that there are artificially low prices for inputs to either sinks or ARWs, and that those prices do not constitute competitive market costs, the GOC finds the sinks case to be a direct precedent and template for the rejection of a PMS in this ARW case.

E Public body

The GOC reiterates that Chinese-based State-invested primary aluminium and aluminium alloy producers in China are not *"public bodies"* in the context of Article 1.1(a)(1) of the SCM Agreement or under the relevant Australian legislation, nor do such entities provide aluminium alloy or primary aluminium to ARW producers for less than adequate remuneration. The finding Australian Customs made to the contrary in the original investigation was incorrect. This error should be reversed in this review.

In this submission, the GOC will address only the continued allegation that State-invested enterprises ("SIEs") were or are public bodies. The GOC's view is that the Australian investigating authorities have continued to misconstrue the test put forward by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties of Certain Products from China* ("DS379") and have continued to misinterpret the information before it. The GOC will establish this by outlining:

- firstly, the substantive question in a public body determination, being whether the entity has "government authority"; and
- secondly, the evidentiary issue, being whether the entity is "meaningfully controlled" by the GOC.

1 The substantive question before the Commission – "government authority"

In attempting to apply the framework of the public body test established by the Appellate Body in DS379 in the original ARW investigation, Australian Customs found that SIEs were public bodies on the purported basis that that there was evidence that SIEs were, in fact, exercising governmental functions and that the GOC exercised meaningful control over SIEs. The GOC considered there were significant flaws and misinterpretations in Australian Customs' consideration of the evidence before it, and applied to the Trade Measures Review Officer ("TMRO") for review of the decision.

The TMRO agreed with the GOC, concluding that:

> *288. 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 my view, this aptly summarises the nature of government authority. The evidence analysed by Customs indicates that certain producers of aluminium and/or alloy are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my 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.*[14]

However, upon reinvestigation, Australian Customs disagreed with the TMRO, finding that:

> *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 ARWs from China, SIEs that produce and supply aluminium and/or alloy should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.*[15] [footnote omitted]

In other words, Australian Customs ignored the findings of its own review body. The original recommendation to the Minister was reinstalled, on the basis that the GOC had "meaningful control" over "SIEs" and their conduct. Despite being an inferior administrative agency to the TMRO, Australian Customs decided not to accept the TMRO's ruling that for an SIE to be a "public body" it must be invested with the power to control, compel, direct or command private bodies and persons.

The Commission has continued this practice. In two recent investigations the Commission has cited the WTO Panel decisions in *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* ("DS436")[16] and *United States Countervailing Measures on Certain Products from China* ("DS437")[17] in support of that practice. The GOC respectfully submits that the Commission has seriously misinterpreted the Panel reports in DS436 and DS437 in these investigations – concerning silicon metal and stainless steel sinks – in recommending to the Minister that SIEs in those cases were able to be considered as "public bodies".

In making those recommendations, and in expressing the view that the TMRO's views no longer stand, the Commission has fastened on comments made by the DS437 Panel in response to a submission

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14 *Decision of the Trade Measures Review Officer – Aluminium Road Wheels – Review of a Decision to Publish a Dumping Duty Notice and a Countervailing Duty Notice*, para 268.

15 *International Trade Remedies Branch Report to the Minister N. 204 – Reinvestigation of Certain Findings in Report No 181 – Certain Aluminium Road Wheels Exported to Australia from the Peoples Republic of China* ("Report 181"), page 51

16 WT/DS436/R 14 July 2014.

17 WT/DS437/R, 14 July 2014.

made to the Panel by China in one of its submissions. Specifically, the Commission cites the following comment:

> *In our view, governments, either directly themselves or through entities that are established, owned, controlled, managed, run or funded by the government, commonly exercise or conduct many functions or responsibilities that go beyond "the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct".*[18]

This is actually an extract from a larger paragraph in the DS437 Panel report that provides as follows:

> 7.69. *We also observe that the above-mentioned definition of the Appellate Body in Canada-Dairy refers to the "essence" of a government. The use of the word "essence" would indicate that the Appellate Body did not consider that this definition exhausted the scope of the powers and functions that modern governments routinely have or perform. As the Appellate Body itself recognized dictionaries are not "the sole source for determining the ordinary meaning of a treaty term". Other sources such as the Encyclopædia Britannica demonstrate that the range of functions, tasks and activities that governments perform is quite broad (including not only regulation of the economy but also the provision of goods and services) and depend on how the State actually operates. Furthermore, in US – Anti-Dumping and Countervailing Duties (China), the Appellate Body stated that: "the performance of governmental functions or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body". In our view, governments, either directly themselves or through entities that are established, owned, controlled, managed, run or funded by the government, commonly exercise or conduct many functions or responsibilities that go beyond "the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct". Such entities can include SOEs (including banks and other financial institutions); universities, libraries and other academic institutions; scientific research and development centres; hospitals and other healthcare institutions; scientific research and development centres; hospitals and other healthcare institutions; museums, orchestras, and other cultural organizations; sports organizations; and many others*[19]. [footnotes omitted]

All that the Panel was saying here is that governmental functions can go beyond the "regulation", "restraint", "supervision" or "control" of the conduct of private citizens. However, this statement relates to what can be considered to be "government functions", and accordingly, neither adds nor takes away from the rule in DS379. The substantive question – the only question of relevance to whether an entity can be deemed to be a public body- is whether an entity possesses, exercises or is vested with

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[18] Report 238, page 165; *Report No. 237 – Alleged Dumping of Silicon Metal Exported from the People's Republic of China and Alleged Subsidisation of Silicon Metal from the People's Republic of China* ("Report 237"), page 97.

[19] *United States – Countervailing Duty Measures on Certain Products from China – Report of the Panel* (WTDS437/R), para 7.69.

government authority.[20]

Furthermore, the Commission has failed to acknowledge the following sentiment from the Appellate Body's finding on appeal in the same dispute:

> 7.71. *The Appellate Body specifically rejected the idea that an entity can be found to be a public body based on a notion of control in the sense of the "everyday financial concept of a 'controlling interest' in a company". In our view, other than "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority, it is not self-evident that all activities that involve a government in fact constitute "governmental functions". For instance, government ownership or control may be temporary and purely circumstantial — for example where a government takes over an enterprise temporarily in order to save it from going bankrupt, to avoid a strike or to guarantee continuity in the provision of certain services (such as air traffic control services).*[21] [footnotes omitted, our emphasis]

Paragraph 7.69 of the DS437 Panel report merely lists functions that can be undertaken by entities that are established by governments, however, in accordance with the statement at paragraph 7.71 of the DS437 Appellate Body report it is not evident that all activities or functions of such entities, other than the *"effective power to regulate, control or supervise individuals, or otherwise restrain their conduct through the exercise of lawful authority"* will be government functions. This is in line with the TMRO's view that government functions were concerned with "*the power to control, compel, direct or command private bodies".*

In any case, the focus on "government functions" is misleading. Again, it is clear from the finding of the Appellate Body in DS379 that the substantive question for determining whether an entity is a public body is that the entity must possess, exercise, or be vested with governmental authority.[22] This question is to be answered by the investigating authority conducting a proper evaluation of the core features of the entity concerned, and its relationship with the government in a narrow sense.[23]

The Appellate Body in DS379 identified three bases on which an entity could be determined to possess, exercise or be vested with government authority. The Commission has come to refer to these as the

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[20] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body* (WT/DS379/AB/R), para 317.

[21] *United States – Countervailing Duty Measures on Certain Products from China – Report of the Panel* (WTDS437/R), para 7.72.

[22] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body* (WT/DS379/AB/R), para 317.

[23] *Ibid.*

"three indicia". To reiterate, the Appellate Body suggested the following:

- when a statute expressly vests [government] authority in the entity concerned;
- evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice; and
- 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.[24]

In each instance, the "indicia" needs to point to the entity as possessing, exercising or being vested with "governmental authority". It is clear that the exercise of a governmental function may serve as evidence that an entity is vested with government authority, but that is not necessarily the case.[25] Particularly in the circumstances where the "government functions" in question do not form part of *"the effective power to regulate, control, or supervise individuals, or otherwise restrain conduct through the exercise of lawful authority"* it is reasonable to ask whether the functions that the entity does have do actually evidence that the entity is vested with or is exercising government authority. Whether or not a certain function exercised by an entity could be cleanly identified as a governmental function is not dispositive of whether that entity is meaningfully controlled by the government, nor whether it in fact possesses or has been vested with a government function.

Accordingly, the GOC does not consider that the comment of the Panel in DS437 that has been cited by the Commission in its recent pronouncements on what constitutes a "public body" has any impact on the task before the Commission in determining whether an entity is a public body. DS437 does not conflict with the TMRO's finding in the review of the original investigation. The substantive question – the question that the "indicia" are targeted at answering - was, and remains, whether the entity in question possesses, exercises or is vested with government authority.

2 Meaningful control – evidence of government authority

Following on from its practice in the ARW reinvestigation, the two subsequent instances where the

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24 *Ibid.* para 318.

25 *Ibid.* para 297.

Commission has found SIE's to have been public bodies – in the silicon metals investigation and in the deep drawn stainless steel sinks Investigation – have been based on the third indicia from DS379. That indicia states that evidence of meaningful control by a government over an entity and its conduct may serve as evidence that the entity possesses governmental authority and exercises such authority in the performance of governmental functions.

In the GOC's view, the Commission's findings in this regard have not been persuasive, and have not been based on evidence that the entities in question – SIEs generally – are *in fact* meaningfully controlled by the GOC.

First of all, it is clear that any form of government "control" will generally not be sufficient to find that an entity is a public body. The government must have *meaningful* control over the entity and its conduct.[26] If the forms of "control" identified do not indicate that the entity exercises governmental authority, then it cannot be meaningful. As noted in DS379, "the existence of mere formal links between the entity and a government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.[27] What is required is evidence that the government has *in fact* meaningfully controlled the entity, in the sense that such evidence establishes that the relevant entity possessed, exercised or was vested with governmental authority, and is therefore a public body.[28]

This is an important concept, and it is one that the GOC respectfully submits that the Commission has failed to grasp in its previous decisions. For example, in its deep drawn stainless steel sinks investigation, the Commission pointed to Articles from the *Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises* ("Interim Regulations") as being evidence of meaningful control. Specifically, the Commission concluded that:

> *The Commission has not relied solely on the fact that Guangdong Metals is 100% owned by SASAC in its assessment but looked to guidance materials that set out the functions of SASAC in its role as shareholder. The Commissioner considers that these functions, such as the power to appoint persons to key management positions, evidence a greater role in the management of*

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[26] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body* (WT/DS436/AB/R), para 4.37

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

[28] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body* (WT/DS436/AB/R), para 4.37

enterprises than mere shareholder.[29]

In the GOC's view, this conclusion echoes the following passage from DS436, and therefore it may be that the Commission has used this as being supportive of its views about the share custodianship exercised by SASAC:

> *7.85. We disagree with India. In our view, government involvement in the appointment of an entity's directors (involving both nomination and direct appointment) is extremely relevant to the issue of whether that entity is meaningfully controlled by the government, because government involvement in the appointment of an entity's directors suggests that the relationship between the government and that entity is closer than it would be if the government simply held a shareholding in that entity. While a government shareholding indicates that there are formal links between the government and the relevant entity, government involvement in the appointment of individuals – including serving government officials – to the governing board of an entity suggests that the links between the government and the entity are more substantive, or "meaningful", in nature. Indeed, we observe that in US – Anti-Dumping and Countervailing Duties (China) the Appellate Body implicitly accepted that an investigating authority's determination that certain entities constitute public bodies could be based on evidence indicating that the chief executives of those entities were "government appointed", and "the party retain[ed] significant influence in their choice".*[30] [footnotes omitted]

However, the Panel's decision in DS436 was the subject of appeal to the Appellate Body, which overturned the Panel's finding with regard to the existence of a "public body". Because of that reversal, the Commission's reliance on the above passage to continue to find that the power of a government to appoint directors evidences meaningful control for the purposes of finding that an entity is a public body is incorrect. In reversing the Panel's decision, the Appellate Body specifically addressed whether ownership and the ability to appoint office holders could be evidence of "meaningful control". Relevantly, the Appellate Body stated as follows:

> *…The Panel failed to evaluate whether the USDOC had properly considered the relationship between the NMDC and the GOI within the Indian legal order, or the extent to which the GOI in fact "exercised" meaningful control over the NMDC as an entity and over its conduct. Instead, the Panel examined evidence that would, in our view, more properly be seen as evidence of mere "formal indicia of control", such as the GOI's ownership interest in the NMDC, the GOI's power to appoint and nominate directors, and the reference on the NMDC's website indicating that the NMDC is under "administrative control" of the GOI. Those indicia, insofar as they were discussed by the USDOC in its determinations, are certainly relevant to the question at issue. Yet, without further evidence and analysis, they do not provide a sufficient basis for a finding that the NMDC is*

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29 Report 238, page 168.

30 *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Panel* (WT/DS436/ R), para 7.78.

a public body.[31] [emphasis added]

Accordingly, the articles in the Interim Regulations which were used to deem SIEs as public bodies in the deep drawn stainless steel sinks Investigation are merely "formal indicia of control", and are therefore not a sufficient basis to determine that SIEs are public bodies without further evidence that the control is meaningful and has in fact been exercised in the performance of a government function. Persisting with that view would be contrary to WTO law.

The GOC submits that, even if there was evidence that SACAC had appointed directors to any particular entities, it cannot be found to be "meaningful" control, *because Article 7 of the Interim Regulations prevents SASAC from performing any government functions*. The GOC submits that even if the ability to appoint persons to key management positions could be considered to be evidence of control, such control could not be considered to be "meaningful" or evidence that SIEs have governmental authority, because SASAC is expressly prevented from performing any government functions by Article 7 of the Interim Regulations.

More generally, the GOC submits that the GOC's role as shareholder in SIEs is carefully confined and separated from governmental functions, in law and practice. The GOC holds the same rights as other shareholders. SIEs operating within the aluminium/aluminium alloy industries are commercial bodies. They manufacture and sell aluminium or aluminium alloy. They do not carry out governmental functions.

Finally, the GOC notes the emphasis that the Appellate Body places on *"evaluating the core features of the entity and relationship to government"*.[32] It is apparent from the Appellate Body's decision in DS436 that an analysis of whether an entity is a public body on the basis of "meaningful control" must be done on an entity-by-entity basis. It is not sufficient for the Commission to find that one entity has been meaningfully controlled, and then to generalise that finding to all other entities that can be classed in the same group. Such an approach does not allow for a proper evaluation of the core features of each of the entities and their relationships to government, nor does such an approach allow for a positive finding that such entities are meaningfully controlled by the government. Such generalisation cannot form a positive basis for determining that an entity has been vested with government authority. The GOC sees this as another example of the unwillingness of the Australian investigating authorities to recognise and

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[31] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body* (WT/DS436/AB/R), para 4.43.

[32] *Ibid.* para 4.52.

respect China's rights as a full WTO Member. Persistent misuse of the countervailing duty instrument in this way appears to the GOC to be an egregious act of trade protection or, worse still, an attempt to force system change in China contrary to the fact that it has been accepted by Australia and by 161 other countries into the market-based world trading system as a full WTO Member.

F Conclusion

The GOC has been entirely cooperative with the Commission in its ARW review undertaking.

The same input costs are incurred by Chinese exporters of ARWs whether they sell their products domestically or for export. Accordingly, the input costs cannot affect the comparison of the normal value with the export price. Accordingly they cannot qualify as a factor that could be creative of a PMS. They are irrelevant to any PMS considerations.

The GOC does not accept that a PMS can be found on the basis of allegedly "distorted" input costs. Overarching government policy and regulation cannot create a PMS. The input costs of ARW manufacturers are not distorted.

The views held by the Australian investigating authorities that Chinese environmental controls and investment approvals are formative of a PMS are hypocritical. Australia has its own approval systems and laws which are directed towards precisely the same objectives.

The GOC does not accept that there is any basis under the ADA or the Act to surrogate costs of production, because of some perceived flaw in the market in which that input is sold. Provided that the price in the market is set through the forces of supply and demand in the competitive market/s of a WTO Member, the cost of that input will reasonably reflect competitive market costs. Normal government influence – such as environmental regulation - cannot render such a market "uncompetitive" and cannot be a basis for rejecting the costs of the input.

The continued practice of surrogating costs of Chinese manufacturers, producers and exporters on the basis that their costs do not reasonably reflect competitive market costs is a poorly disguised justification for treating China as a NME, in contradiction of Australia's legal and diplomatic recognition of China's market economy status.

Aluminium alloy is a downstream processed product of aluminium billet. There is far greater diversity and intellectual property in its composition and use. Its production and sale is subject to a host of different considerations and market factors to that of aluminium billet.

The importance of aluminium alloy to ARWs, in terms of a percentage of the final cost of ARWs, is analogous to the importance of 304 SS CRC steel to the cost of deep drawn stainless steel sinks. In that investigation, the Commission determined that the proportion of the cost of the finished product constituted by 304 SS CRC steel and its differential to a proposed "benchmark" were insufficient to create a PMS. Thus, even if the Commission were to persist in its incorrect interpretation of the PMS law and its unlawful practice of price surrogation, the Commission's own administrative precedent does not allow for the identification of a PMS in the case of ARWs.

None of the information that the GOC has submitted to the Commission could be considered to be evidence that the GOC meaningfully controls the conduct of SIEs that operate in the primary aluminium or aluminium alloy industries. SIEs operate independently from the GOC and are not vested with, and do not possess or exercise, government authority. Their functions are purely commercial.

Any finding that SIEs are public bodies could not be based on evidence. Accordingly, the GOC requests that the Commission contact us if it considers to have found evidence that supports the conclusion that SIEs are vested with, possess or exercise a government function.

If the Commission needs any advice or guidance as to the interpretation of the evidence submitted in the GQ and the SGQ, the GOC would be happy to further discuss that evidence with the Commission.

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