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1 September 2016

The Commissioner
Anti-Dumping Commission
Industry House
10 Binara Street
Canberra
Australian Capital Territory 2600

Attention: Mr S Sharma
Manager

By email

Dear Mr Sharma

Government of China
Alleged subsidisation of rod-in-coil and steel reinforcing bar
Comments in response to the Statement of Essential Facts

We write on behalf of our client the Government of the People's Republic of China ("the GOC") concerning the "combined" Statement of Essential Facts No. 322 and No.331 ("the SEF").

This letter addresses the following topics:

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1. The Commission's proposed recommendation

At the outset, the GOC advises that it welcomes the Commission's proposed recommendation that the Minister not impose countervailing duty against the steel reinforcing bar and rod in coils exported from China (hereinafter "rebar" and "RIC" respectively and collectively "the goods"), by reason of the finding that:

> *the injury caused by subsidisation cannot be isolated, and when considered with injury caused by dumping of the goods, has been remedied by the publication of a dumping duty notice with respect to the goods.*

However, the GOC's support for this recommendation relates only to the outcome.

The GOC should not be considered to support or agree with the Commission's previous decisions to impose anti-dumping measures against its exporters of rebar and rod in coil. The GOC's support of the decision to terminate the present investigations relates simply to the outcome proposed in light of the legal "fact" that dumping duties are in place in respect of the goods and should not be interpreted otherwise.

As will be made clear in this letter, the GOC remains disappointed and concerned about the findings and approach adopted in the SEF in relation to alleged subsidisation. The GOC strongly disagrees with many aspects of those subsidisation findings, and it is to those matters that this letter is directed.

The GOC is further disappointed to note that the two letters from the GOC to the Commission dated 21 July 2016 and 3 August 2016 have not been taken into account, on the basis that *"to do so would, in the Commissioner's opinion, prevent the timely placement of the SEF on the public record*". The SEF was not published until 8 August, and for the most part the contents of those two letters only recap matters that have already been expressed in previous communications, including in the GOC's response to the Government Questionnaire ("the GQ"). Accordingly, in this letter we draw the Commission's attention to those GOC submissions again.

We now address those SEF issues in turn. In so doing, our client urges the Commission and ultimately the Minister to consider the GOC's submissions carefully, bearing in mind both Australia's WTO obligations and the importance of the China-Australia trade relationship.

2. Integrated SIE rebar/rod in coil manufacturers cannot confer a benefit on themselves in the form of steel billet at less than adequate remuneration

The GOC rejects the SEF's finding that all responding exporters of the goods who are SIEs have received a subsidy benefit in the course of producing their own steel billet:

> *The Commission noted that all Cooperative [sic.] exporters of rebar and rod in coils were fully integrated[1] and self-produced billets that was [sic.] then used to produce rebar or rod in coils.*
>
> *…*
>
> *Based on the above information, the Commission considers that this program involves a financial contribution that involves the provision of billets by SIEs (i.e. billets self-produced and self-supplied by the integrated SIE's [sic.]), being public bodies, at less than adequate remuneration.*
>
> *The benefit amounts are equal to the amount of the difference between the purchased price [sic.] and the adequate remuneration.*

Where exporters of rebar and rod in coils during the investigation period received a financial contribution of billets under this program, it [sic.] would therefore confer a benefit in relation to rebar and rod in coils, and the financial contribution would meet the definition of a subsidy under s.269T of the Act.

…

Given that billet is a key input in the manufacture of downstream products (including rebar and rod in coils) it is clear that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration.

For this reason the subsidy is determined to be specific.

____

1 The integrated producers manufacture rebar and rod in coils using self- produced billets.

As already advised to the Commission in our letter dated 1 August 2016, the GOC completely disagrees with this position. *A company cannot give itself a subsidy, and any finding as such by the Commission would be a significant breach of China's WTO rights.*[1]

The GOC considers that this finding in the SEF bears no relationship to the disciplines set out in the SCM Agreement. Sadly, if the finding is allowed to stand it will represent a new low in the Commission's treatment of Chinese exporters.

In this letter, we would like to emphasise the following points and urge the Commission to replace the strangeness of its present position with a position of legality and honesty:

(a) The SIE producers are commercial entities with shareholding which is to some extent owned by the State. That does not make them public bodies, and they are not "government".

(b) The SIE producers cannot make and do not make any "provision" of steel billet at less than adequate remuneration to themselves. The responding exporters purchased the raw materials to produce that billet, produced that billet, and then used that billet in the production of their own rebar and rod-in-coil. They did not have it provided to them. They did not provide it to themselves in the relevant sense of a financial contribution. No economic entity remunerated another economic entity for the provision of billet such that a judgement could be made as to whether that remuneration was less than adequate. A single economic actor cannot confer a benefit on itself.

(c) The SEF finding regarding the alleged Program 1 is not only illogical but also contradictory to the Commission's own previously announced views. The Commission has itself advised that the alleged Program 1 cannot be applicable to an integrated producer of the goods:

> *The Chinese companies referred to by the applicant are vertically integrated in producing billet that is then used to produce rebar. However to the extent that not all Chinese producers of rebar are vertically integrated, the provision of billet at less than adequate remuneration from SIE producers of billet may be a countervailable subsidy….*[2]

The same sentiment appeared in the Consideration Report for rod in coil:

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[1] Letter dated 1 August 2016.

[2] *Consideration Report No. 322 – Application for a Countervailing Duty Notice in Relation to Steel Reinforcing Bar Exported from China*, page 23.

> *Programs for provision of billet at less than adequate remuneration may only be applicable to rod in coil producers that purchase billet, not integrated producers of billet and rod in coil.*[3]

This point was also specifically addressed in the GOC's response to the GQs in both investigations:

> *The GOC considers that the allegation that a fully integrated [rebar/rod in coil] producer could somehow be subsidised by itself, by way of producing and fully costing its steel billet, as a stage in the production of rod in coil, is plainly illogical.*
>
> *The GOC respectfully disagrees with the Commission's decision to initiate any investigation concerning the alleged "Program 1", in light of the fact that the allegation does not achieve any reasonable prima facie threshold for initiation. In this regard the GOC notes the allegation in the application is that all of the Chinese exporters of [rebar/rod in coil] identified in the application are "integrated" steel producers that produce steel billet, and that three out of the four rebar exporters claimed by the Applicant are SIEs. The Application does not provide any evidence that any Chinese [rebar/rod in coil] exporters that exported [rebar/rod in coil] during the investigation period were not integrated producers of [rebar/rod in coil]. Nor was any evidence provided to demonstrate whether any of the [rebar/rod in coil] exported from China to Australia during the investigation period was indeed made from steel billet supplied by SIEs. Accordingly, the Application contained no evidence of the prima facie existence of the alleged Program 1 subsidy in so far as it concerns "non-integrated" Chinese rebar producers who exported [rebar/rod in coil] to Australia during the investigation period.*

An exporter cannot subsidise itself. It is simply the case that an economic entity cannot "provide" itself with goods or services in the sense that is meant by the SCM Agreement's use of those terms. Moreover, such "self-provision" could not be for "less than adequate remuneration". This is because the steel billet is an intermediate cost point in the course of production. The cost is recorded in the financial records of the exporters. It is not a price. The self-produced billet is not something that is transferred for consideration between two economic entities at a consideration which could be thought of as not representing adequate remuneration for a conferring entity. There is no sale, no transfer of ownership and, therefore, no "remuneration". Even if the cost of the billet in the financial records of the integrated producers was considered to be "remuneration" it could not be considered to be less than adequate, unless it was shown to be recorded at less than the actual cost incurred in the production of the billet. Based on the Commission's logic, anything and everything generated and transferred within an integrated exporter might be considered a subsidy.

The GOC views the SEF's finding in relation the alleged Program 1 to be terminally flawed and completely at odds with the terms and purpose of the WTO SCM Agreement. The finding must be reversed and withdrawn from the Commission's final recommendation to the Minister.

3. Chinese SIEs are not vested with, nor do they exercise, government authority and therefore cannot be considered to be "public bodies"

The GOC takes note of the finding that, for the alleged subsidies involving provision of raw materials at less than adequate remuneration (the "LTAR subsidies") the SEF has found that *"SIEs that produce and supply raw materials to manufacturers of rebar and rod in coils are public bodies"*.[4] This finding is based upon a continued misunderstanding of WTO jurisprudence, or a continued denial of that

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[3] *Consideration Report No. 331 – Application for a Countervailing Duty Notice – Rod in Coils Exported from the People's Republic of China*, page 26

[4] SEF, Appendix 5, page 15.

jurisprudence, as well as a misinterpretation of the evidence before the Commission. Upon a proper, objective examination of the information before the Commission, no such finding can be maintained.

The GOC recalls that the key question in determining whether an entity is a public body is whether that entity has been vested with "government authority". WTO jurisprudence is consistent in citing this requirement.[5] The Commission has accepted this, at least implicitly, as evidenced by its summary of the "three indicia" used to ascertain whether an entity is a public body:

- ***Indicia 1*** *- where a statute or other legal instrument expressly* *<u>vests government authority</u>* *in the entity concerned;*

- ***Indicia 2*** *- 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* *<u>governmental authority</u>**; and*

- ***Indicia 3*** *- 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* *<u>possesses governmental authority</u>* *and exercises such authority in the performance of governmental functions.*[6] [emphasis added]

The SEF's finding that SIEs are public bodies purports to rely upon indicia 3, being that which refers to the relevance of evidence of "meaningful control". However, in order to satisfy indicia 3, it is not sufficient to find that the GOC has some form of control over an entity. The key things to remember are that the control must be "meaningful", and that the evidence of that control must go to the proposition that the relevant entity possesses and exercises government authority. In other words, the control evidenced must establish that the entity possesses government authority. This is why the Appellate Body in DS379 found that *"mere formal links between an entity and government",* such as ownership, are not sufficient to establish that an entity is a public body.[7] Such formal links simply do not evidence that an entity possesses government authority. If an entity is not found to be vested with, or exercise, government authority, it cannot be found to be a public body.

The SEF's decision as to whether the SIEs concerned are public bodies is primarily based upon Articles 13 to 19 of the *Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises* ("the Interim Regulations"). These Articles essentially relate to the appointment and remuneration of "responsible persons" by the State-Owned Assets Supervision and Administration Commission ("SASAC"). The SEF considers this is relevant to the question of whether an SIE is a public body, because of findings that the Commission strategically refers to as having been made by the *"WTO Dispute Settlement Body"* in DS436. These are characterised in the SEF as follows:

- *'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';*

- *'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'; and*

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[5] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* ("WT/DS379/AB/R") paras 310, 317 and 318, Panel Report, *US – Countervailing Measures on Certain Products (China)* ("WT/DS437/R"), para 7.66; and Appellate Body Report , *US – Countervailing Measures on Certain Hot-Rolled Carbon Flat Steel Products (India)* ("WT/DS436/AB/R"), para 4.9.

[6] SEF, Appendix 5, Page 11.

[7] WT/DS379/AB/R, para 318.

- *'in the context of government ownership and government involvement in the appointment of directors, such evidence provides additional support for a finding that an entity is under the "meaningful" control of the government.'*[8]

The GOC understands this to be the SEF's assessment of the *Panel* decision in DS436. However, DS436 was appealed to the *Appellate Body*, which rejected the Panel's reasoning. In reversing the Panel's decision, the Appellate Body specifically addressed the question of 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. <u>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</u>. 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 a public body.*[9] [our underlining]

The GOC notes that the Consideration Report for the rod in coil investigation specifically notes that in DS436 the Appellate Body overturned the Panel decision *"that relied too heavily on the 'meaningful control' indicia as one of three indicia to be considered in assessing whether an entity possesses, exercises or is vested with governmental authority*."[10] Thus, it is clear that the Commission is aware of the Appellate Body finding - what is unclear is why the Commission has not referenced or applied that finding in the SEF.

The Interim Regulations merely indicate "formal indicia of control" which, according to the Appellate Body, is not sufficient to establish that an entity is a public body. This is in line with the finding of the Appellate Body in DS379 which confirmed that mere formal links between an entity and government were not sufficient to establish that an entity was "meaningfully controlled". The Appellate Body in DS436 expressly indicated that in order to establish that an entity was a public body an investigating authority needed evidence that the government *in fact* exercised control over that entity. The Appellate Body was of the view that even if the potential existed for some form of control to be applied, this was not sufficient to establish that an entity was in fact being meaningfully controlled by a government. "Meaningful control" means control that could plausibly establish the proposition that the entity concerned was vested with, or possessed, and exercised government authority and thereby could be said to be a public body.[11] Again, the SIEs to which the SEF refers are not public bodies - they are commercial entities.

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 explicitly 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 evidence of "meaningful" control. SIEs do not have governmental authority. SASAC is expressly prevented from performing any government functions by Article 7 of the Interim Regulations.

The GOC's role as a shareholder in any SIE is carefully confined and separated from governmental functions, in law and practice. The GOC holds the same rights as other shareholders. SIEs that

8 SEF, Appendix 5, page 14.
9 WT/DS436/AB/R, para 4.43.
10 Page 25.
11 WT/DS436/AB/R, paras 4.36 – 4.37.

produce raw materials used in the production of rebar and rod in coil are commercial bodies that manufacture and sell raw materials used in the production of rebar and rod in coil. They are not vested with government authority, and therefore cannot be found to be public bodies.

Finally, the GOC is compelled to comment on the continuing practice whereby the Commission makes a blanket finding that all SIEs are public bodies. WTO jurisprudence holds that such a practice is not permissible. In DS436 the Appellate Body emphasises that any public body determination needs to be undertaken by *"evaluating the core features of the entity and relationship to government*".[12] The SEF does not deal directly with the Appellate Body finding in DS436.[13] However similar comments were made by the Panel in DS437, a decision that the SEF quotes a number of times.[14]

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 open to an investigating authority 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. Generalisation like this do not constitute a positive basis for determining that an entity has been vested with government authority.

Indeed, such a blanket finding is essentially an *ersatz* finding that an entity is a public body only because of its government ownership. Without analysing each individual entity, the only connective tissue between one SIE and another is its government ownership, and the only criterion for determining an SIE is a public body is its government ownership.

In summary, the SEF:

- contains no evidence that SIEs are meaningfully controlled such as would allow them to be found to be public bodies; and
- has failed to evaluate the core features of each entity the Commission considers may be a public body, and its relationship to government.

Accordingly, the finding that SIEs that produce and supply raw materials to manufacturers of rebar and rod in coils are public bodies is not a finding that is permissible on the basis of the information included in the SEF.

4. The Commission's consideration of whether billet was provided for less than adequate remuneration is flawed, both legally and factually

In order to establish that "Program 1" exists, the SEF needed to establish the "government" or a "public body" was providing steel billet to produces of rod in coil and rebar for "less than adequate remuneration".

We have already pointed out the contradictions evident in the idea that a fully integrated entity would be "subsidising" itself. How is it possible that an entity can provide itself goods or services for less than adequate remuneration? How could this so-called provision of billet confer a "benefit" on the entity? Such a finding requires massive contortions and ultimately incorrect interpretations of the terms "provision", "remuneration", "conferral" and "benefit". The set of facts before the Commission

[12] *Ibid*. para 4.52.

[13] Noting although that the drafters of the Consideration Report for the rod in coil investigation clearly and expressly were aware of the Appellate Body finding in DS436, as discussed above.

[14] Noting the statement at para 7.66 that an investigating authority must *evaluate the core features of the entity in question and its relationship to government…*

do not allow a finding that a subsidy exists as that concept is defined by Sections 269T and Section 269TACC of the Act.

Secondly, to the extent that the Commission intends to determine the existence of such subsidy in relation to non-integrated producers of rebar/rod in coil, the GOC does not accept that there is a basis for bypassing private prices of billet sold in China to assess adequacy of remuneration. The GOC notes that in determining the benchmark billet price in Report 300 and Report 301, the Commission adjusted the benchmark price by the *"average rate of profit for billet sales the Chinese exporters realized for the sale of billets in their domestic market"*.[15] Thus, on the Commission's own findings and on the Commission's own admission, the relevant exporters made a profit on domestic sales of billet. This confirms that prices in the domestic market for billet were at, or exceeded, adequate remuneration, as they covered the costs associated with the production and sale of the billet. Accordingly, we see no basis for the SEF to now seek to find a higher "benchmark" price, as it has clearly established, as a matter of fact, that billet prices in China were at adequate remuneration.[16]

That said, the GOC does have significant concerns regarding the methodology through which a "benefit" was determined, and is compelled to address those concerns to the Commission. The SEF has used *"Latin American prices at the FOB level"* on the purported basis that they constitute *"the best available information for the competitive market costs of steel billet"*. This was the same benchmark used by the Commission in the rebar and rod in coil anti-dumping investigations. The reason for selecting this data as the price benchmark was proclaimed by the Commission to be as follows:

> *Based on the depth of the market, and the geographic distance from China minimising the potential distortions of GOC billet prices impacting on the Latin American billet export prices, the Commission considers that the Latin American export billet prices in FOB terms represent the best available information for competitive market costs of steel billets.*[17]

The GOC also notes the following explanation as to why South East Asian prices were considered inappropriate:

> *…the evidence before the Commission strongly suggests that, despite the existence of export tax on steel billets in China, there are significant volumes of Chinese steel billets being traded in East Asia and Turkey. It is highly likely that Chinese billet prices have distorted steel billet prices in both the East Asia and Turkey steel billet indexes. Consequently, the Commission considers that East Asian steel billet prices do not constitute an appropriate benchmark for competitive market costs of steel billets in China as the index itself appear [sic.] to be affected by Chinese steel billet prices. For the same reasons, the Commission does not consider Turkish import or export steel billet price indexes as appropriate benchmarks for competitive market costs of steel billets in China either.*[18]

Clearly then, the SEF's intent in selecting Latin American export billet prices was to find a benchmark that did not reflect prevailing market conditions in China in any way, shape or form. Indeed, the SEF leads one to believe that if astronomical prices from Mars were available, they would have been selected in preference to the price at which any other rebar or rod in coil manufacturer on this planet could obtain its steel billet.

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[15] *Report No. 300 – Alleged Dumping of Steel Reinforcing Bar Exported from the People's Republic of China* ("Report 300"), page 24.

[16] As the GOC pointed out in its GQ responses, given that RIC/rebar is typically produced in an integrated process, each manufacturer produces their own steel billet as a semi-finished feed material for RIC/rebar. It would be illogical and unrealistic for an integrated producer to sell steel billet to its RIC/rebar competitors at less than its own costs, or in any form which would render its own RIC/rebar to be less competitive in the market.

[17] Report 300, Page 22. Similar comments were made at page 17 of *Report No. 301 – Alleged Dumping of Steel Rod in Coils from the People's Republic of China* ("Report 301").

[18] Report 300, page 21.

Accordingly, the SEF plainly and overtly fails to apply the requirements of Article 14(d) of the SCM Agreement, which provides that:

> *…the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased*

Note that the requirement is that the adequacy of remuneration – being remuneration for the supposedly "subsidised" goods or services concerned – be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased. This requirement is included in Australian law at Section 269TACC(6) of the Act.

The GOC reminds the Commission that the Appellate Body has defined the requirement in Article 14(d) as follows:

> *When an investigating authority resorts, in such a situation, to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).*[19]

And:

> *We agree with the submissions of the participants and third participants that alternative methods for determining the adequacy of remuneration could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs. We emphasize, however, that where an investigating authority proceeds in this manner, it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).*[20][our underlining]

The SEF selects a benchmark on the basis that it has no connection to prevailing market conditions for billet in China. Insofar as the benchmark does not relate, refer to, or is not connected to Chinese market conditions, it is incapable of being used to determine whether the "price" of billet reflects adequate remuneration. Accordingly, the SEF does not establish that Program 1 "benefits" the goods under consideration, and therefore does not establish that a subsidy exists within the definition of that term in Section 269T of the Act.

5. The Commission's consideration of whether coking coal was provided for less than adequate remuneration is flawed, both legally and factually

The GOC has already addressed whether SIEs producing coking coal are public bodies. They are not.

However the GOC is compelled to address certain aspects of *Appendix 3 – Assessment of Adequate Remuneration for Coke in China*. Appendix 3 simply adopts a benchmark for coking coal based upon the decision in *Investigation 316 – grinding balls from China*. In following with the decision in that

19 See Appellate Body Report, *US – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber (Canada)* ("WT/DS257/AB/R"), para 103.

20 *Ibid.* para 106.

investigation, the SEF uses the *Platts Australian low volume premium HCC FOB Export price* as the benchmark for determining whether coking coal was provided for less than adequate remuneration.[21]

The GOC does not accept that there is a basis to adopt a benchmark price for coking coal in China other than private prices for such coking coal. As the GOC has explained to the Commission, China accounts for over 50% of total world production of coking coal, and 60% of total world consumption of coking coal, and is the largest importer of coking coal.[22] The significant level of imports indicates that the level of demand for coking coal in China significantly outweighed local production. The excess demand over supply indicates that prices for coking coal would be *higher* than they otherwise would be. The Commission has not asked for any additional information regarding coking coal, nor has it indicated any concerns about the fidelity of the information provided by the GOC. And yet, this information is not referred to at all in the SEF.

More significantly, the decision to reject private domestic prices for coking coal is premised on findings in Report 300 and Report 301 – the anti-dumping investigations relating to these products – which, according to the SEF, found that private prices of coking coal were *"affected by government influence* and as a result were *not suitable"*.[23] The GOC has reviewed REP 300 and REP 301. These Reports refer to the existence of *"export taxes and export quotas on a number of key inputs in the steel making process including coking coal, coke, iron ore and scrap steel"*, and concludes that these factors would have reduced the price of coke below *"what would have prevailed under normal market conditions"*.[24]

Firstly, this is not a finding that private prices are not appropriate for use in determining a benchmark in a subsidy investigation.

Secondly, as the GQs lodged by the GOC in these investigations attest:

- the operational import tariff for coking coal has been 3% since 15 October 2014;[25]
- the operational export tariff on coking coal has been 3% since January 2015; [26] and
- no raw materials specifically mentioned in those GQs, including coking coal, are subject to export quotas.[27]

Accordingly, the GOC does not consider that Report 300, Report 301 or the SEF provide any substantive basis for determining that private domestic prices of coking coal within China are not appropriate for use in determining whether a "benefit" has been conferred in relation to the goods under consideration.

The GOC also has very deep concerns regarding the benchmark "price" actually used in the SEF. The GOC notes that the same benchmark was used in Investigation 316.[28] However, the subsidy portion of that investigation was terminated, thus there was no need for interested parties to make any substantive submissions regarding the benchmark adopted in that case. That said, the GOC did dispute the use of an Australian export price-based benchmark in Investigation 193, because

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[21] SEF, Appendix 3, page 2.
[22] See, China Resources Quarterly 2016, at page 16. http://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/crq/China-Resources-Quarterly-Sourthern-summer-Northern-winter-2016.pdf
[23] Appendix 4, page 6.
[24] Report 300, page 99 and 100, with similar findings in Report 301.
[25] Rebar GQ, page 18.
[26] Rebar GQ, page 18.
[27] Rebar GQ, page 19.
[28] Noting that the ultimate finding in this investigation was that "*the available evidence does not support a finding that Program 33 is countervailable at this time. The Commission has not been presented with evidence that suggests the grinding balls industry receives preferential pricing for coke*".

Australian coking coal is higher quality, and therefore achieves a higher price, than the coking coal produced within China. This is acknowledged in Investigation 316.[29] In that case the Commission concluded, based on a comparison of the benchmark price to actual prices of the only cooperative exporter, that the use of an Australian benchmark did not disadvantage that exporter in the circumstances of that investigation.[30]

To be clear, the fact that a particular benchmark did not disadvantage the exporter in Investigation 316 is not a ringing endorsement of the suitability of that benchmark for determining the adequacy of remuneration in this investigation. That the choice of benchmark in Investigation 316 was not challenged is most likely because the subsidy investigation in that case was terminated. The GOC reminds the Commission that any benchmark used needs to relate, refer to, or be connected with the prevailing market conditions in China. Private market prices for coking coal in China are suitable for use as a benchmark, and the SEF does not attempt to relate the benchmark to market prices for coking coal in China.

For example, the benchmark information used is described in Report 316 as being a "low volume" benchmark. As the GOC revealed in the GQs for the relevant investigations, China is the largest consumer, producer and importer of coking coal in the world.[31] In no way is it appropriate or accurate to use a "low volume" export price and to consider that export price to reflect or be connected to prevailing market conditions in China.[32]

In part, the Commission appears to base its decision regarding the benchmark on some perceived deficiencies in the GQ response. However, the Commission appears to be ignorant of the fact that the GOC provided both import and export data for coking coal in its GQ response in both the rebar investigation and the rod in coil investigation. The GOC specifically refers the Commission to Attachments 2 and 3 of the GQ responses for those investigations, which include import and export data for coking coal in 2014 and 2015. The GOC notes that in Investigation 193 the export price of coking coal from China was adopted as the appropriate benchmark.

In summary, the Commission has selected a benchmark that has no connection to prevailing market conditions for coking coal in China. Insofar as the benchmark does not relate to, or refer to, or is not connected to Chinese market conditions, it cannot be used to determine whether the "price" of coking coal reflects adequate remuneration. Accordingly, the Commission has not established that Program 2 "benefits" the goods under consideration, and therefore has not established that a subsidy exists within the definition of that term in Section 269T of the Act.

6. The Commission's consideration of whether coke was provided for less than adequate remuneration is flawed, both legally and factually

The GOC has already addressed whether SIEs producing coke are public bodies. They are not, and have not been evidenced by the Commission to be so.

The GOC notes that the Commission proposes using *Platts Daily Metallurgical CFR Indian Prices* as a benchmark price for coke in the investigation period. The Commission considers this to be the *"best information available"*.[33]

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29 *Termination Report 316 – Alleged Dumping and Subsidisation of Grinding Balls Exported from The People's Republic of China*, page79.

30 *Ibid.*

31 See page 18 of the RIC GQ.

32 The GOC has been unable to find any details regarding the *Platts Australian low volume premium HCC FOB Export price.* It is possible that the Commission is actually using a "low volatility" price. If this is the case, then the GOC's concerns are more than justified, as the implication would be that the Commission has adopted a price index without understanding what that price index relates to, and with no consideration as to how that price index relates to or is connected with the prevailing market conditions in China.

33 SEF, Appendix 4, page 6.

The GOC does not accept that there is a basis to adopt a benchmark price other than private prices for coke in China. As the GOC has already explained to the Commission, NBS data indicates that over 80% of coke producers operating within China in 2015 were non-SIEs and that they accounted for over 60% of the total coke production volume.[34] The GOC does not understand how the Commission can conclude that private prices for coke are affected by "government" influence in the face of these statistics. The Commission has not asked for any additional information in this regard, nor has it indicated any concerns about the fidelity of the information provided by the GOC. And yet, this information is not referred to at all in the SEF.

More significantly, the decision to reject private domestic prices for coke is premised on findings in Report 300 and Report 301 – the anti-dumping investigations relating to these products – which, according to the SEF, found that private prices of coke were *"affected by government influence"* and as a result were *"not suitable"*.[35] The GOC has reviewed Report 300 and Report 301. These Reports refer to the existence of *"export taxes and export quotas on a number of key inputs in the steel making process including coking coal, coke, iron ore and scrap steel",* and conclude that these factors would have reduced the price of coke below *"what would have prevailed under normal market conditions"*.[36]

Firstly, this is not a finding that private prices are not appropriate for use in determining a benchmark in a subsidy investigation.

Secondly, as the GQ in these investigations attest:

- the operational import and export tariff for coke has been 0% since 1 January 2013;[37] and
- no raw materials specifically mentioned in the GQ, including coke, are subject to export quotas.[38]

So, the information the SEF relies upon in Report 300 and Report 301 has been superseded by the information provided by the GOC in response to the GQs in these investigations. There is, therefore, no basis for finding that private prices for coke were not suitable for use in determining whether coke was provided by SIEs for less than adequate remuneration.

Even if that were not the case, and there were appropriate factual circumstances to allow the adoption of a benchmark other than private prices in China, the choice of benchmark is not appropriate. The GOC submitted information regarding export and import volumes and values of coke in 2014 and 2015. The only reasoning in the SEF as to why this information was not adopted was that the Commission was unable to compare the GOC's information with *"any other major supplier of the coke in the international market*.[39] What this means is entirely unclear.

Resultantly, the GOC is uncertain as to why the Commission does not consider that it can rely upon the GOC's data. The Commission's reasoning for not considering that data is not said to be based upon some perceived fault with the data the GOC has provided. Indeed, the Commission has never raised any concerns about the reliability of this data with the GOC. The Supplementary Government Questionnaire issued in the relevant investigations do not ask for further information regarding the volumes of coke exported and imported from China. The Commission is not empowered to simply reject data without reason.

There is no reason why the GOC's information would not be considered to be the best information available, as it actually relates to prevailing market conditions for coke in China. Conversely, there are

[34] Page 18 RIC GQ response, supported by Attachment 11.
[35] SEF, Appendix 4, page 6.
[36] Report 300, page 99 and 100 [check for 301]
[37] Rebar GQ, page 18.
[38] Rebar GQ, page 19.
[39] *Ibid.*

clear and obvious reasons as to why Indian coke prices are not an appropriate benchmark. For example, in Investigation 193 the Commission used the GOC's coke export data to establish a benchmark price for coke. Further, in that investigation the Commission expressly rejected the idea of using Indian prices as a benchmark, for the following reason:

> *However, based on ACBPS's research the appetite for coke production, importation and consumption in India does not closely resemble China's. For example, during the investigation period China imported 94,000 tonnes of coke while India imported 2.1 million tonnes of coke. China produced 443.2 million tonnes of coke in 2012, while India produced 20.5 million tonnes of coke in the same period.*[40]

The SEF does not justify why the Commission has now decided that it may rely upon Indian prices as a benchmark for Chinese remuneration, when the previous finding was that Indian prices had no relationship to the prevailing market conditions in China. The SEF says nothing about this sudden contradiction at all.

Ultimately, the Commission has selected a benchmark that has no connection to prevailing market conditions for coke in China. Insofar as the benchmark does not relate to or refer to, or is not connected to Chinese market conditions, it is incapable of being used to determine whether the "price" of coke reflects adequate remuneration. Accordingly, the Commission has not established that Program 2 "benefits" the goods under consideration, and therefore has not established that a subsidy exists within the definition of that term in Section 269T of the Act.

7. Chinese banks are not public bodies and do not provide alleged interest rate subsidies

The GOC notes that in relation to Program 46 the SEF characterises State-owned Chinese banks ("SOCBs") and privately owned banks as "public bodies". This is a blanket finding. Approximately 4,091 banks operated in China during the POI.[41] As the GOC has already explained, WTO jurisprudence requires an individual analysis of an entity alleged to have provided a financial contribution to a recipient in order to determine whether or not that entity is a public body. That has not been done. The SEF contains little analysis, and even less evidence, to support the conclusion that all banks in China are public bodies.

The SEF refers in this regard to the findings in its Appendix 5. The GOC reminds the Commission that the finding in Appendix 5 relates to *"SIEs that produce and supply raw materials to manufacturers of rebar and rod in coils are public bodies"*. Why and how such a finding is relevant to or can be extended to both SOCBs and private banks is not articulated in any substantive manner. This is particularly concerning in the case of private banks, because they have no links to SASAC and therefore would not be impacted by the Interim Regulations, which are the only form of evidence the SEF cites in support of its public body finding. In any case, we have addressed the flaws in the analysis and findings in Appendix 5 above.

Secondly, the SEF relies upon two extracts from the *Trade Policy Review* report relating to China as prepared by the Secretariat of the WTO as released in May 2014. As a starting point, we draw the Commission's attention to the fact that the review was published prior to the beginning of the period of investigation. More importantly, the information relied upon by the Commission reveals nothing about the *core features* of every Chinese bank irrespective of their level of State-ownership and their *relationship to government.* According to DS436, such an analysis is a clear requirement of a "public body" determination. The SEF does not provide any information about the "government authority" that SOCBs and private banks are supposedly vested with or that they exercise. We again remind the

[40] Report 193 – page 165

[41] Rebar GQ, page 53.

Commission that this is the ultimate question and is the key to determining whether an entity is a public body, as identified in DS379.

With regard to the "benefit" calculation for Program 46, the GOC notes that the Commission has used the interest rate provided by the People's Bank of China ("PBC") as the benchmark, and compared this to the actual interest rate on the loan. In this regard we note the following sentiment from the *Trade Policy Review* quoted in the SEF:

> *…financial institutions may set lending rates independently.*

There are many factors that can influence the interest rate agreed to between a bank and a borrower. These include the term of the loan, whether the interest is fixed or variable, whether the loan is secure and the credit rating of both the borrower and the lender. In other words, the fact that the interest rates on a given loan may be below the PBC rate does not indicate that the borrower is able to *"repay a lesser amount than would be required for a comparable commercial loan",* as is required by Section 269TACC(3)(b) of the Act. Given the small differences between the PBC and the actual interest rate charged by the various commercial banks in China, any difference would be due to the terms and circumstances of the loans and fluctuation of the interest rates itself rather than any form of subsidisation.

In conclusion, the SEF does not establish that Chinese banks are public bodies, and has failed properly to apply the test for "benefit" under Section 269TACC(3)(b) and (c) of the Act. The GOC reiterates that these alleged subsidies do not exist, and trusts that the final recommendations to the Minister will reflect this fact.

8. The Commission's consideration of whether there was a loan guarantee subsidy is flawed, both legally and factually

With regard to Programs 177 and 263, the Commission has calculated the supposed benefit conferred to be *"equal to the full value of the loan*.[42] The SEF justifies this by stating that without the GOC (in the guise of an alleged "public body") as the guarantor, no loan would have been received by the relevant exporter. The evidence, if there is any, to support such an extreme position is not revealed.

Section 269TACC(3)(c) of the Act defines when a benefit may be found to have been conferred by a loan guarantee, specifically stating that:

> *the guarantee of a loan by a government or body referred to in subsection (2) does not confer a benefit unless the enterprise receiving the guarantee is required to repay on the loan a lesser amount than would be required for a comparable commercial loan without that guarantee;*

There is no consideration of whether the putative loan guarantee has resulted in the exporter being required to pay a lesser amount on the loan than would otherwise be the case than for a commercial loan without that guarantee.

Additionally, there is no consideration as to whether the entity providing the guarantee was indeed a public body. The GOC understands that the entity that provided the loan guarantee was not a bank or a financial institution, nor was it a provider of raw materials used in the production of rebar/rod in coil. Therefore none of the "public body" analysis – faulty though that was - could be applied to the guarantor. There is simply no evidence to suggest that the entity is a public body.

[42] SEF, Appendix 1, Page 40.

Finally, with regard to "specificity", the GOC also takes notice of the SEF's consideration expressed as follows:

> *As detailed above, the WTO Review Panel found that Chinese financial institutions were guided to extend credit support to a range of industries, including steel. This finding is consistent with:*
>
> - *Decision No. 40, being an Order from the State Council, which categorises the steel industry as an "encouraged industry", and identifies "encouraged investment projects" as being eligible for special privileges and incentives, such as financial support; and*
>
> - *Order No. 35 - Policies for the development of Iron and Steel Industry, in particular Articles 24 and 25, which limit the provision of loans to those companies complying with the national development policies for the Iron and steel industry.*
>
> *Taking these policies into consideration, the Commission is satisfied that the GOC (SIE's) [sic.] only allows financial institutions to provide loan guarantee [sic.] to a limited number of industries/companies which comply with the development policies of the GOC.*
>
> *As such the subsidy is determined to be specific and countervailable.*

As the Commission is aware, the provider of the guarantee is not a financial institution – therefore the above statement is not relevant and is incorrect.

There is no evidence that Programs 177 and 273 are subsidies, as there has not been a proper consideration as to whether such programs are provided by a public body, confer a benefit or are specific.

9. The Commission has no evidence for the existence of other alleged subsidy programs

The GOC notes that there are a number of programs that the Commission has found to exist, despite finding no evidence as to their existence during this investigation, including:

- Program 60 – Project: Water Reuse Project;
- Program 160 – Transformation and upgrading of special funds to guide the transformation of energy saving projects;
- Program 176 - Infrastructure development grant;
- Program 48 – Technology Development Grants; and
- Program 57 – Environmental Protection Project Grants.

In each case, the basis for these grants is said to be findings made *in Investigation 177 – Certain Hollow Structural Sections Exported from the People's Republic of China, the republic of Korea, Malaysia., Taiwan and the Kingdom of Thailand*.

The GOC notes that this investigation was completed in June 2012, and related to the period 1 July 2010 to 30 June 2011. That period is a full four years prior to the current period of investigation. The GOC questions what relevance any findings made so long ago could have to the current investigation.

That said, the GOC has reviewed the relevant reports arising from the hollow structural sections investigation, and cannot find any mention of the above referred "programs". Accordingly the GOC

considers that there is no evidence to suggest the programs exist, and that the reference back to Investigation 177 in the SEF is fanciful and self-serving.

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In a letter dated 1 August 2016, the Deputy Director General of the Trade Remedy & Investigation Bureau of the Ministry of Commerce directly raised the GOC's deep concerns with systemic administrative practices that the Commission adopts against Chinese exporters. Specifically highlighted were the following:

1. *The repeated failure on the part of the applicants and the Commission to justify the accusation that Chinese State-invested enterprises possess, exercise or are vested with government authority.*

2. *The failure of the Commission to recognise repeated findings of the Anti-Dumping Review Panel ("ADRP") where State-invested enterprises have not been found to be "public bodies".*

3. *The emerging – and absolutely incorrect – concept that a company can grant a financial contribution to itself and therefore subsidise itself.*

4. *The search for an utilisation of so-called benchmark values, for the purposes of benefit analysis, from countries and regions that have no relationship or connection with the Chinese economy or its market conditions.*

Those concerns have not been addressed in the SEF. Indeed the findings in the SEF are suggestive of an intent to find the highest subsidy margin possible without concern for law, evidence or logic.

In this letter we have drawn the Commission's attention to multiple examples of evidentiary deficiencies in the SEF, of contrary information to that relied upon in the SEF that was submitted by the GOC, and of flawed reasoning in both logical and legal terms.

If the Commission wishes to be further informed or directed by the GOC, or to have any points of view clarified, we trust that you will contact us as soon as possible for those purposes.

Yours sincerely

Alistair Bridges
Associate

Charles Zhan
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