Canberra
6/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia

Telephone +61 2 6163 1000
Facsimile +61 2 6162 0606
Email: info@moulislegal.com
www.moulislegal.com

7 June 2013

Ms Joanne Reid
Director, Operations
International Trade Remedies Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

moulislegal
commercial+international

By email

Dear Ms Reid

Alleged subsidisation of coated steel
Government of China - Statement of Essential Facts No.193

As you know, we represent the Government of China ("GOC') in relation to the countervailing investigations concerning aluminium zinc coated steel and galvanised steel from China.

On 15 May 2013 the Australian Customs and Border Protection Service ("Customs") published Statement of Essential Facts 193 ("SEF 193").The GOC wishes to address a number of findings that have been made in the course of the investigation, as explained in SEF 193.

A "Public body" finding generally

1 Introductory comments

The GOC notes that the finding that State-invested enterprises ("SIEs") supplying hot rolled coil ("HRC") to coated steel producers were public bodies was based wholly on the outcome of the reinvestigation which Customs conducted in relation to the alleged dumping and subsidisation of certain hollow structural sections exported from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan (REP 203").[1] SEF 193 notes:

> *[Customs] also considers that the evidence and reasons set out in REP 203, while made in relation to consideration of HRC producers and suppliers, are equally applicable to SIE producers and suppliers of coking coal and/or coke. For example, the analysis of Indicia 3 from DS 379 refers to various documents and policies that indicate the GOC's control over SIEs generally…*
>
> *Because coking coal and coke producers are part of the iron and steel industry in China [Customs] preliminary [sic] considers that SIE producers and suppliers of coking coal and coke*

[1] *International Trade Remedies Report No. 203*

in China should be considered public bodies.[2]

The GOC submits that REP 203 contains major flaws of evidence and of logic in relation to the ultimate finding that SIE's are public bodies. Those flaws – factual and legal – mean that the conclusion of REP 203 cannot stand. The GOC asks Customs to carefully reconsider its position.

Section 269T of the *Customs Act 1901* ("the Act") provides that a subsidy, in respect of certain goods exported to Australia, means:

> *(a) a financial contribution:*
>
> *…*
>
> *(ii) by a public body of that country or of which the government is a member; or*
>
> *…*
>
> *that is made in connection with the production, manufacture or export of those goods, and involves:*
>
> *…*
>
> *(vii) the provision by that government or body of goods or services to that enterprise otherwise then in the course of providing normal infrastructure.*
>
> *if that financial contribution or income or price support confers a benefit in relation to those goods.*

Such a financial contribution will only be a "subsidy" if the goods or services concerned are provided for less than adequate remuneration.[3]

In order to find that a subsidy exists, all of the elements of the definition must be met, including of course that the financial contribution was provided by a public body. Subsidies relate to actions by governments - private bodies may provide goods and services at any level of remuneration they choose, whether that level might be considered adequate, less than adequate or more than adequate.

The term *"public body"* is not defined in the Act. However it is absolutely clear that the definition of subsidy in the Act is based upon the WTO's *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement"). The meaning of the term in the SCM Agreement has been discussed by the WTO Appellate Body in a number of contexts, including in its report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ("DS 379").[4]

DS 379 provides that:

> *We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.*[5]

---

2 SEF 193, page 149.
3 *Customs Act* 1901, Section 269TACC(4)(d).
4 WT/DS379/AB/R (11 March 2011).
5 *Ibid*, para 317.

In this regard, REP 203 notes:

> *The original investigation concluded that significant evidence exists to suggest that Chinese iron and steel industry SIEs, including those that produce HRC and/or narrow strip play a leading role in implementing GOC policies and plans for the development of the iron and steel industry. This development is considered to be a 'government function', and it is therefore considered these SIEs are in fact exercising government functions.*
>
> *After considering the information in the original investigation, the reinvestigation is of the view that in implementing the GOC's policies and plans for the Chinese economy SIEs are also carrying out government functions. In addition SIEs are controlling other market participants to act in certain ways.*

This outcome is incorrect and disappointing. The terminology used in REP 203 indicates a view on the part of Customs that SIEs implement GOC policies as a matter of course. This is not accurate, as the Trade Measures Review Officer ("TMRO") noted when he reviewed the original investigation:

> *The evidence analysed by Customs indicates that certain producers of HRC 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.*[6]

The GOC notes that REP 203 does not address this material point made by the TMRO which is that behaviour of an enterprise which in some or other instance may coincide or comply with governmental policies or with law and regulation does not equate to the exercise of governmental functions or authority by that enterprise. Nor does REP 203 discuss the TMRO's view that the *"significant evidence"* that was relied upon to establish the exercise of a government function did not evidence any such thing. The GOC considers that Customs has shown a clear disregard for the TMRO's views. Rather than considering those views and either agreeing with them or rationalising a contrary view, in a way which would pay deference to the TMRO and to his role, Customs just denies the correctness and the credibility of those views and reinstalls the finding it has previously arrived at using different words. No deference or respect is shown to the well-considered views of the TMRO, whose job it is to review Customs' decisions and to recommend that matters be reinvestigated in order that the TMRO's views can be taken into account.

To be explicit, the GOC does not consider the "development" of the iron and steel industry to be a government function. It is in the interest of every entity in the iron and steel industry that that industry continues to develop smoothly and in response to national economic needs. That development may occur in a way which replicates the GOC's predictions and aspirations, because those predictions and aspirations make good sense in an environmental, economic and social context. Commerce must reflect the conditions of the market in which the commerce takes place. Regulation in environmental, revenue-raising and efficiency contexts will be consistent with government policies in any economy, and will undoubtedly shape the business decisions of entrepreneurs in that economy. The development of the iron and steel industry in China is occurring in ways which sometimes accords with government policies, and which sometimes does not. SIEs are not consistent in their behaviour. This is because although they exist within the framework of the national iron and steel industry and therefore can be expected to behave in a way which has regard to that framework, they are at all times free to make their own business decisions about how they participate in that industry. The belief that all SIEs *"play a leading role in implementing*

---

6 TMRO Report, para 245.

GOC policies and plans for the development of the iron and steel industry" is not only incorrect, but would not itself lead to the conclusion that SIEs are public bodies.

The root of Customs' *non-sequiter* in this regard is the view that the development of the iron and steel industry in China is a government function. The government cannot and does not control the commercial development of the iron and steel industry. The GOC believes that the strange behaviour of Customs in labelling Chinese SIEs as public bodies that carry out a government function – in the face of consistent legal reversal of that label - can only be explained by a policy instruction from the Australian Government to "backtrack" on the recognition of China's full market economy status for anti-dumping purposes.

Furthermore, the GOC would advise Customs to consider, in a clear and objective manner, the evidence that "suggests" that SIEs play a leading role in implementing GOC policies and plans for the development of the iron and steel industry. This so-called evidence is lacking in materiality and does not show what REP 203 contends it does. The GOC also wishes to emphasise – as will be made clear below – that Customs' reliance on its "Indicia 2 and 3" does not accord with – and is an abuse of - WTO authority.

On the basis of the discussion of the Appellate Body in DS 379, Customs has synthesized "three indicia" which it believes can indicate whether an entity can be considered to be a public body. These are:

- Indicia 1 – the existence of a "statute or other legal instrument" which expressly vests government authority in the entity concerned;
- Indicia 2 – evidence that an entity is, in fact, exercising governmental functions; and
- Indicia 3 – evidence that a government exercises meaningful control over an entity and its conduct.

It is through this framework that Customs continues to analyse evidence to determine whether an entity is a public body. The GOC structures its criticisms of Customs' findings based on this framework in A3, A4 and A5 below.

But before doing so the GOC wishes to expose - in A2 below - the misunderstandings of DS 379 that Customs' previous reports on the question of whether Chinese SIEs are public bodies have been based.

2 Indicia 2 and 3 are not tests that are determinative of the vesting of government authority

In A3, A4 and A5 below, we explain why it is that none of the evidence relied upon in the SEF and in REP 203 establishes that SIEs carry out government functions, or that they are meaningfully controlled by the GOC. However the GOC also submits that the way in which Customs has construed and applied its Indicia 2 and 3 as a means for determining whether an SIE is a "public body" is wrong.

First of all, these indicia are not separate tests which each provide a way to "prove" an entity is a public body. Instead, these are "indicia" which may demonstrate the possession and exercising of government authority – which is the only relevant question to be asked in determining the public body issue. As the WTO Appellate Body states in DS 379:

> *In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its*

> *ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.* [underlining supplied]

The first of Customs' indicia – whether a statute or other legal instrument expressly vests governmental authority in the entity concerned – would be clear and reliable evidence of the possession of governmental authority. In relation to this indicia, Customs' previous reports have made it clear that there is no such statute or other legal instrument. The other two of Customs' indicia, said to be derived from DS 379, are:

- evidence that an entity is, in fact, exercising governmental functions ("Indicia 2"): and
- evidence that a government exercises meaningful control over an entity and its conduct ("Indicia 3").

In REP 203, it is stated that these two indicia were satisfied, and that they were the basis to conclude that SIEs are public bodies:

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

The GOC maintains that the approach taken by Customs is a material misinterpretation of the Appellate Body's report in DS 379. That report does not support the public body tests applied by Customs in the form of "Indicia 2" and "Indicia 3", because the report does not say that the satisfaction of these indicia will demonstrate that a private entity is a public body.

Paragraph 318 of the report – which was quoted by REP 203 as the source of its approach - states:

> *What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority… 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. It follows, in our view, that 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.* [underlining supplied]

Noticeably, the DS 379 report specifically pointed out that the key question to ask is *"whether an entity is vested with authority to exercise governmental functions"*. The evidence used by Customs as "Indicia 2" in relation to the question of whether an entity is, in fact, exercising governmental functions cannot in and of itself lead to a conclusion that that entity is a public body. To the contrary, it *"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"*.

The same applies in the case of Customs' Indicia 3, which is also not a separate test for determining whether an entity is a "public body" or "governmental authority". Instead, the Appellate Body only considers that such evidence *"may serve, in certain circumstances, as evidence that the relevant entity*

possesses governmental authority and exercises such authority in the performance of governmental functions".

Evidence which goes towards a satisfaction of Customs' "Indicia 2 and 3" does not justify a conclusion that an entity is a public body. Such evidence can be used for the purpose of determining the only question which is ultimately relevant to whether an entity can be considered to be a public body, viz "w*hether an entity is vested with authority to exercise governmental functions"*.

In finding that Customs had not established that SIEs supplying HRC to HSS manufacturers were "public bodies", the TMRO did two things. First, he denied that the evidence established that SIEs exercised governmental functions. Secondly, he ruled that even if meaningful control by the GOC over SIEs was demonstrated, it would not establish the essential element of an exercise of governmental authority by those SIEs. In other words, the TMRO was not satisfied of the proposition that SIEs were vested with, or possessed, government authority. The TMRO correctly stated:

> 245. *The Appellate Body in decision DS 379 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 HRC 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. <u>It does not evidence the essential element of exercising a power of government over third persons.</u>*
>
> 246. *Customs substantially relied on s 36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies. But in my view this section requires no more than compliance with the policies of the Government of China. <u>It falls short of establishing that State-Invested HRC producers are invested with the power to control, compel, direct or command private bodies and persons.</u>*
>
> 247. *Accordingly I consider that Customs had no basis to conclude that the second limb of the Appellate Body test was met.*
>
> 248. *Moreover, even if it were accepted that the Government of China exercises meaningful control over State-Invested HRC-producers, the third test drawn from DS 379 would again not be met in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority*. [underlining supplied]

Consistently with the Appellate Body in the DS 379 report, the TMRO correctly pointed out that the issue at hand is whether a private entity can be regarded as "government" because government authority has been vested in it. This authority must be both possessed and exercised. REP 203 and its predecessors have not addressed this key question. The incorrect focus on Customs' own "indicia" as a pathway to a public bodies finding has led to a neglect of the real question that needs to be asked, and of the real issue that needs to be determined.

The GOC again states that SIEs are not vested with, nor do they possess, governmental authority.

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

The GOC notes that much of the information discussed in this section and in A4 and A5 below comes from the annual reports of a number of Chinese steel producers. In identifying and addressing the information in this submission, the GOC would underline that it has had no conversations with those steel producers. Indeed, as Customs should now be aware, the GOC has no means to compel entities, whether SIEs or otherwise, to provide information in relation to a dumping or countervailing investigation. These are matters for the entities to handle themselves. The following comments are made only on the basis of the GOC's review of the evidence relied upon in REP 203, and should not be considered to be statements made by or on behalf of any Chinese steel producer.

The original HSS investigation, the TMRO review of that investigation, and the subsequent reinvestigation did not find any evidence to suggest that SIEs have been vested with government authority. This should have been the end of the consideration in that regard. However REP 203 goes on to look at a number of documents and laws that do not vest government authority in SIEs.

This further discussion is somewhat beneficial, as it is apparent that Customs has finally accepted that under Chinese law the capital contributor is prevented from exercising any government authority; is required to act as a market participant; and is expressly prevented from exercising government functions in the performance of its duties.[7]

However, REP 203 goes on to pontificate that:

> *…the reinvestigation considers that the legislative provisions relate to the role of the capital contributor, and do not expressly prevent SIEs themselves from being vested with government authority or exercising government functions...*

With respect, the GOC considers this to be a rather bizarre position to adopt. As Customs is well aware, the capital contributor is the shareholder, which exercises the functions of a shareholder. Is Customs somehow suggesting that an SIE can act independently of its capital contributors, or that a prohibition on the way that the shareholders may behave in their stewardship of the company as shareholders will not be reflected and observed in the way that the company itself behaves? For example, if the majority shareholder of an SIE must not exercise government authority in its position as shareholder, and must act as a market participant, how is it said that the company can then exercise government authority and not act as a market participant? We are of course aware that a company has a separate legal personality, however it does seem a bit far-fetched to suggest that the company must carry out government functions when the capital contributor is prevented from doing so in its position as a major shareholder.

The only distinction between SIEs and private companies is the fact that SIEs have a degree of GOC investment. The governmental capital contributors of SIEs are expressly prevented from exercising government functions. If the capital contributor – ie, the one link to the government – cannot exercise government authority, then why does Customs believe that SIEs would still exercise government functions? There seems little point in telling the capital contributor what it must not do, but then to vest government authority in the enterprise concerned for it to do the opposite.

The fact that there is no statute or legal instrument expressly vesting government authority itself is sufficient evidence that no entity can exercise governmental authority. This is because, according to the basic Chinese legal principle of "administration by law" any authority of a governmental nature can only

[7] REP 203, page 51.

be exercised if such governmental authority is expressly vested or granted by law.[8] Further, it must be exercised in accordance with the legal procedures established in the relevant laws. Accordingly, no entity can carry out an action with the nature of governmental authority without expressly being vested with relevant governmental authority to do so. In other words, like most modern jurisdictions, the possession or exercise of governmental authority calls for a positive and express vesting or granting of such authority by law. It necessarily follows that it is presumed that the possession or exercise of governmental authority without express legal authorisation is prohibited. There is no need for such a prohibition to be expressly stated in law.

The GOC wishes to emphasise again that SIEs and their component parts – whether the capital contributor or any other organs – are not vested with and do not exercise any form of government authority.

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

First and foremost, the GOC rejects the views stated in REP 203 that the development of the Chinese iron and steel industry is a government function, and that business activity in line with government industrial policy is the performance of a government function.

The GOC is puzzled to note that REP 203 finds that compliance with administrative regulations that have a punitive element *does not* evidence the exercise of a government function, but that private entities acting in line with non-compulsory aspirational policies *does* amount to the exercise of a government function.[9] In other words, REP 203 suggests that an entity that voluntarily supports a government policy when the policy is not binding would be exercising a government function, and somehow will be considered as a "public body". The GOC disagrees with such view, and does not believe that any government in the world would hold such an opinion.

The GOC is also concerned to note the following statement in REP 203:

> *Therefore, given their market dominance, the decisions of SIE's [sic.] to implement or give effect to the GOC's objectives for structural reform in the steel industry are likely to significantly impact downstream producers of manufactured steel goods.*
>
> *For example, the elimination of iron smelting and steel smelting production capacity by SIE's [sic.] is expected to directly impact on the available supply of key raw material inputs to downstream producers. As a consequence, downstream producers of processed goods may be required to curb their own production, reinvest in new technology or merge with other similar enterprises. The reinvestigation notes that evidence gathered during the original investigation showed that relevant HSS producers contributed to the GOC's objectives.*
>
> *To that extent, the reinvestigation considers that it is reasonable to conclude that SIE's [sic.] producing HRC and/or narrow strip have indirect control over private enterprises that are engaged in the manufacture of HSS and other processed goods.*

---

[8] See also GQ Attachment 12, at Articles 3 and 4, which provide that *"administrative compulsion must be set and implemented according to the statutory authority, extent, conditions and procedures (as set in this law)"*. Furthermore, GQ Attachment 42, at Article 6 clearly delineates the different functions among various entities, ie those possessed by government (public administration) and those of SIEs (independent business operation). "Independent business operation" is not an exercise of government authority, and at law independent business operation must not be interfered with by a government body.

[9] REP 203, page 53.

> *In the Chinese market, the consolidation of large SIE steel manufacturers forces other steel manufacturers to develop methods to become more competitive. Similarly, significant investment in research and development by SIEs require that other companies also invest in research and development or risk becoming obsolete.*[10]

None of the above statements bears any relevance to the question at issue, which is whether SIEs are public bodies, and whether they are vested with governmental authority. If anything, the above statements demonstrate the existence of a market; the functioning of that market; and the effect of market forces – not government power. In that context, the GOC finds the statement in REP 203, that:

> *SIEs producing HRC… have indirect control over private enterprises that are engaged in the manufacture of HSS and other processed goods.*

to be simply absurd.

REP 203 points to the Twelfth Five-Year Plan as evidence to establish that SIEs are, in fact, exercising government functions. The particular concern seems to arise from an excerpt from the 2010 Annual Report of Maanshan Iron & Steel Company Limited ("Maanshan") which states:

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

This is seen to be evidence of the "implementation" of GOC policy because *"the aims listed in the company's Twelfth Five-year plan are in keeping with those listed in the government's plan"*.[11]There is no elucidation of this point. Reading the Annual Report more carefully reveals that the company's Twelfth Five-year plan is not mandated by the GOC at all, and that in aiming to advance the company in different fields Maanshan is not even carrying out the GOC's policies.

Extracts from Maanshan's Annual Report that were not quoted by Customs bear this out. We draw attention to these extracts:

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

and:

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

These particular excerpts are from pages 30 and 31 of Maanshan's Annual Report, under the heading *Long-Term Strategies of the Company*. We do not see anything unusual about a company taking into account the macroeconomic policies of its government in order to strategize. Furthermore, we note that there is no cross-over between the related industries which Maanshan is exploring and the development "priority uses of steel". Secondly, even if there was an identicality between Maanshan's description of its

---

10 REP 203, page 54.

11 REP 203, page 52.

related industries, or if there were strong similarities, Maanshan is not exploring them in order to carry out a government function. It is exploring those industries with a view to "extending assets" and finding "new income bases". This is a commercial strategy – it is not the carrying out of government functions.

Perhaps the contentious point in Customs' mind is that Maanshan has a development strategy and plan that covers the same period as the GOC's Twelfth Five-Year plan, and that it is called the company's "Twelfth Five-Year plan".Firstly, the GOC would emphasise that the relevant extract from Maanshan's Annual Report discusses how it has determined its corporate positioning and development objectives over a given period. The fact that the period is named as the same forward period to which the GOC's Twelfth Five-Year Plan applies does not support a finding that Maanshan is thereby exercising a government function. As Customs is well aware, the Five-Year plans set out the broad and aspirational macroeconomic goals of the GOC for a five year period. Much as an Australian industry would be conscience of the implications, whether positive or negative, of Australian government policy, and would position itself with regard to those policies, Chinese companies may take GOC policies into consideration when planning ahead. Indeed it would be prudent to do so.

However, before Customs take this to be "evidence" or an admission that companies in China implement GOC policy, we would hasten to add that there is a distinction between being aware of policy and reacting to it on the one hand, and actually imposing or enforcing that policy in a way that might suggest a vesting of government authority. Indeed, if regard is had to the full sentence from the Maanshan Annual Report, we can see that the interpretation that REP 203 tries to construct is not in fact open on the text. The full sentence reads:

> *To determine its corporate positioning and development objectives, the Company has developed a "Twelfth Five-year" development strategy and plan, taking into account the current development situations and trends in the domestic and international iron and steel industries as well as the actual situations of the Company.*[12]

The GOC does not know why the half-sentence extracted in REP 203 was presented as a full sentence, thereby omitting the very explanation that disproves that Maanshan has actually implemented the GOC's policy, but prefers to consider it a quirk in formatting rather than an attempt to distort Maanshan's position. It should be clear that there is a distinction between an entity adopting a strategy which takes account of government policy, and an entity actually implementing that policy in a way which suggests it has been vested with some kind of government authority. The full extract from Maanshan's 2010 Annual Report advises shareholders that it is positioning itself and its development objectives in line with the current development situations and trends in the domestic and international iron and steel industries, as well as in accordance with the actual company situation, by developing a "development strategy plan". This does not indicate the exercise of any governmental function, or indeed, that Maanshan is implementing any form of government policy, blindly or otherwise.

The GOC notes that Customs accepts that the GOC's five-year plans are aspirational documents. The GOC considers that this must extend to other documents that it has previously explained are aspirational. But despite making the finding that there is no compulsion to follow those policies, REP 203 still persists with the suggestion that the policies are still implemented by SIEs. REP 203 states that while such polices are not enforceable:

> *SIEs are market leaders in their implementation as demonstrated by the quote from Maanshan's annual report above. This indicates that SIE's actions are not simply those of companies seeking to comply with relevant legislation but that they are acting with a purpose. [Customs] considers*

---

[12] *Maanshan Iron & Steel Company Limited - 2010 Annual Report*, page 30.

> *that purpose is to fulfil government functions.*[13]

Again, the GOC would point out that the extract from Maanshan's Annual Report does not establish that Maanshan implements government policy. However, even if it did, the extension of an errant half-sentence from a 353 page report about one SIE to cover and characterise the behaviour of all SIEs in China is hyperbolic and disproportionate. It could not constitute evidence proving that every other SIE in China follows GOC policies – it is just too weak for that.

REP 203 also suggests that an extract from the Baoshan Iron and Steel Co., Ltd. 2010 Annual Report is evidence of Indicia 2. Again, the use of this extract is characterised by only a selective understanding of it. The relevant extract is taken from Page 20 of the Annual Report, which notes:

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

We note that this is just a general statement, which provides no information regarding the scope of these activities, or indeed the time period over which these activities took place. The GOC considers that this in no way proves the exercise of any government function by Baosteel or any other entity, whether during the period of investigation or otherwise. However, before addressing the specifics of this extract in the context of the whole Annual Report, we note that this extract was also referred to in the original investigation in support of the Indicia 2 analysis. In that regard, the TMRO noted:

> *The evidence analysed by Customs indicates that certain producers of HRC 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]

As a starting point, no reason was given in REP 203 as to why this extract was still relied upon for the purpose of the public bodies determination. Nothing in REP 203 indicates why Customs gives the extract more weight than the TMRO considered it deserved, or why it should still be considered relevant or dispositive to the finding that SIEs in fact possess and exercise government authority.

However, even if the extract was relevant to the issue at hand, it is clear that REP 203 has read and understood it without reference to other information in the Annual Report. The extract is taken from the section of the Annual Report named *"Horizontal competition & related transactions"*, specifically under the heading *"Commitments made in Issuance Prospectus by Baosteel Group"*. The Baosteel Group is a holding company, which is the majority shareholder in Baoshan Iron and Steel Co., Ltd. The former is referred to as the Baosteel Group, or simply, Baosteel, throughout the Annual Report, whereas the latter is referred to as "the Company". The Annual Report is relevant to the Company, not the Baosteel Group.

It should be clear, however, that the Baosteel Group is the "Baosteel" referenced in the extract from the Annual Report, because Baoshan is referred to as the Company throughout that report.

The Baosteel Group established the Company in 2000. The Annual Report makes it clear that the

---

13 REP 203, page 53.

14 TMRO Report, para 245.

Baosteel Group has undertaken certain commitments to the shareholders of the Company in the Issuance Prospectus, being:

> *a) The Company has the right to acquire, at any time it thinks appropriate, Baosteel Group's assets and businesses which may be in competition with the Company;*
>
> *b) The Company shall enjoy the priority of similar business opportunities acquired by Baosteel Group, who will not invest until the Company gives up the commercial opportunities;*[15]

The Annual Report goes on to note that:

> *In the long run, the Company will choose to acquire, at appropriate time, high-quality iron and steel assets that are under the control of Baosteel Group and have undergone reorganization and cultivation. By the end of 2005, all iron and steel assets originally belonging to Baosteel Group have been fully integrated into the Company. Baosteel will continue to carry out reorganization of domestic iron and steel assets according to this principle, so as to reduce horizontal competition in the same business and increase operation efficiency. It is under the guidance of this principle that Baosteel has been appropriately handling the temporary non-substantial competition with the Company, through following standard procedures, protecting the interest of medium and small investors, and ensuring full disclosure of information. The specific measures taken for this purpose include that the controlling shareholders consults with the related parties and makes commitments of non-competition, and allows the listed company to reserve the right to acquire, at any time it thinks appropriate, Baosteel Group's assets and business which may be in competition with the Company.*[16]

There are two important things to note in this regard. Firstly, the corporate policy indicated is to avoid competition between the Baosteel Group and the Company, which is referred to as *"horizontal competition in the same business"*. Secondly, the "reorganisation" considered is the increased commercialisation and efficiency of the Baosteel Group. This, by its nature, involves the transfer of iron and steel assets from the Baosteel Group to the Company. However, lest it be considered that such transfers are non-commercial, the Annual Report goes on to note:

> *a) After obtaining business opportunities such as investment and M&A in the iron and steel industry, the Company will submit the issue to the Board of Directors for deliberation. The directors with conflicting interests will withdraw from the voting process.*
>
> *b) The Company will continue to closely observe the investment by Baosteel Group that is similar to the business of the Company. When potential substantial competition arises, and when the business in competition coincides with the objectives and interest of the Company, the Company will acquire this business or assets from Baosteel Group at a fair price according to the standard procedures stipulated by the Articles of Association. The directors/shareholders with conflicting interests will withdraw from the voting process of the proposal in the Board meeting/shareholder's general meeting.*[17] [underlining added]

Therefore, it can be seen that the extract quoted by Customs refers to the transfer of steel assets from within the Baosteel Group to the publicly traded company, which is an aspect of the reorganisation of the Group, and which is to take place at a fair price. This is not evidence of the exercise of any government function, or of the implementation of any government policies, and certainly not of the vesting of any

---

15 *Baoshan Iron and Steel Co., Ltd - Annual Report 2010*, page 21.

16 *Ibid.*

17 *Ibid.*

government authority in either the Baosteel Group or the Company.

The GOC notes the reference to a "significant body" of evidence to suggest that SIEs play an integral and leading role in the implementation of GOC policies and plans in relation to the iron and steel industry. Without any explanation of what constitutes this significant body of evidence, the GOC cannot address it at length. However, on the basis of the clear misapprehension of the two pieces of "evidence" quoted in REP 203, the GOC would counsel Customs to seriously consider the strength and probative quality of that evidence, whatever it is. The GOC also makes this comment in the context of the TMRO report which notes, in relation to indicia 2, that:

> *Customs had no basis to conclude that the second limb of the Appellate Body test was met.*[18]

Finally, REP 203 refers to Article 14 of the *Interim Provisions on Supervision and Management of State-owned Assets of Enterprises* ("SOA Provisions") as indicia 2 evidence. This is based on the translated SOA Provisions provided by the GOC during the investigation. The relevant article of the SOA Provisions was interpreted to mean that one of the main obligations of the State-owned assets supervision and administration authority is to:

> *maintain and improve the controlling power and competitive power of the State economy in areas which have a vital bearing on the lifeline of the national economy and State security, and improve the overall quality of the State economy;*

REP 203 takes this to be evidence that SIEs are required to maintain the controlling power of the State economy and that this obligation *"must also apply to the iron and steel industry, which is considered to be a key part of the state economy"*.[19] No evidence is provided in support of this assumption, and the GOC would submit that this application is based on a material misunderstanding of the surrounding law.

Specifically, as REP 203 helpfully points out, Article 14 of the SOA Provisions explains the obligations of the State-owned assets supervision and administration authority. The State-owned assets supervision and administration authority take on the role of the capital contributor and, again, as pointed out by REP 203, in that capacity the authority is expressly prevented from exercising government authority.[20] Therefore, if REP 203's interpretation of Article 14 of the SOA Provisions was correct, it would be in breach of Articles 6 and 15 of the *Law of the People's Republic of China on the State-Owned Assets of Enterprises* ("SOA Law"). If such a conflict were to arise, it would be resolved in favour of the SOA Law, because the SOA Law is actually a law, whereas the SOA Provisions are administrative regulations.

However, we further note that the SOA Law was adopted by the 5th Session of the Standing Committee of the 11th National People's Congress of the People's Republic of China on 28 October 2008, and came into force on 1 May 2009, whereas the SOA Provisions was discussed by the State Council on 13 May 2003 and published and given effect on 27 May 2003. In the case of conflict, preference would be given to the document that was published more recently.

The GOC therefore submits that there is no evidence to establish that any individual SIE, or SIEs generally, actually exercise any government function. REP 203 was incorrect in coming to that conclusion, and the current countervailing investigation would be incorrect in adopting that reasoning. REP 203 simply shows that Baosteel and Maanshan are aware of the GOC's aspirational policies, and that they consider those policies as part of their business planning. This proposition is not one which could satisfy a finding that SIEs carry out government functions, or that following on from that they are vested with government

---

18 TMRO Report, para 247.

19 REP 203, page 53.

20 REP 203, page 51.

authority. Key market concepts - of fair value, business rationalisation and competitiveness - are embedded in Baosteel's and Maanshan's behaviours. These things must not be ignored by Customs in its evaluation of their status.

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

As we have pointed out, it is important to understand what is meant by "meaningful control" in the context of a "public body" determination. In that regard, the Appellate Body in DS 379 noted:

> *…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.*[21]

It is important to note that the exercise of "meaningful control" – if it exists – must be over an entity and its conduct, and that if it exists it is only evidence *"in certain circumstances"* that an entity might possess governmental authority, and might exercise such authority in the performance of government functions.

These numerous, cumulative requirements present a "high bar" to a public body finding, and for good reason. The Appellate Body ruled that government shareholding in an entity does not vest government authority in that entity. Therefore, the idea that "meaningful control" might lead to a finding that an entity was a public body needed to be handled by the Appellate Body with special care.

In REP 203 Customs does not consider indicia 3 from the starting point of government ownership. The approach that REP 203 takes for the purposes of establishing that indicia 3 exists is to identify various GOC policies and regulations about the structure of industries and their operation within China – whether related to the steel industry or not – and then to try to match the behaviour of an enterprise (in this case, Baosteel) with the behaviours described in those policies and regulations. Having achieved some of these matches, REP 203 concludes that the GOC exercises "meaningful control" over SIEs and their conduct in the iron and steel sector.

The GOC submits that this conclusion is not supported by evidence; is not based on logic; and cannot hurdle the high bar that the Appellate Body set for arriving at a public body finding using the rationale of "meaningful control".

The "policies" in question are said to be:

> *the Directory Catalogue on Readjustment of Industrial Structure, which categorises certain industries into encourage, restricted and eliminate investment industries;*
>
> *the Decision of the State Council on Promulgating the 'Interim Provisions on Promoting Industrial Structure Adjustment for Implementation', which outlines how the GOC promotes and restricts the development of industries in the categories listed above. For example, investments is prohibited in restricted and eliminated industries;*
>
> *the Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities which outlines the penalties for non-compliance with the GOC's plans for eliminating certain production capacities. This can include the revocation of the production licence; and*
>
> *the Standard Conditions of Production and Operation of the Iron and Steel Industry, which*

[21] DS 379, para 318.

> *outlines the requirements for iron and steel producers in China including certain production size requirements. Companies that do not meet these requirements can be prevented from getting credit and new production licences.*[22]

The *Directory Catalogue on Readjustment of Industrial Structure* ("the Directory Catalogue") and the *Decision of the State Council on Promulgating the 'Interim Provisions on Promoting Industrial Structure Adjustment for Implementation'* ("the Interim Provisions") are part of the same policy. The Interim Provisions sets out the criteria under which certain production processes may be classified as "encouraged", "restricted", or "eliminated", and how GOC agencies may deal with such processes. The Directory Catalogue identifies what production processes actually fall within these categories.

The GOC emphasises that there is nothing unusual or untoward regarding a government proscribing certain unsafe, unclean or otherwise harmful production processes, or indeed encouraging investment in more up to date technologies. As the TMRO noted, this is simply an ordinary function of government,[23] the obeisance to which or the enforcement of which cannot be characterised as "meaningful control".

The GOC would further note that neither the Directory Catalogue nor the Interim Measures purport to have any effect on the overall commercial decision-making of individual SIEs or on manufacturers of HRC. The GOC therefore does not understand what the relevance of these documents is to the charge that the GOC "meaningfully controls" SIEs producing HRC, and even if it did, that such control was relevant to the allegation that SIEs provide HRC for less than adequate remuneration. A regulation that deals with restrictions on outdated technologies which pollute the environment to an unacceptable degree, or which are unacceptable in terms of proper standards of occupational health or safety, is not an instrument of "meaningful control" over the behaviour of an enterprise. It can still conduct its business without the interference of the GOC and without being controlled by the GOC.

The term "backward production" as used in the *Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities* relates to out-dated production techniques, equipment and products which do not conform to relevant regulations and laws. Backward production capacities are the same as production processes which fall into the "eliminated category" of the Interim Provisions. Again, these processes are considered to be "backward" because they seriously waste resources, especially energy resources, and are considered to be too environmentally damaging or do not meet work safety conditions. Again, we would note that the Notice does not impose any special requirements on SIEs nor does it discuss HRC. Again, the GOC must ask why this document is considered to be relevant to an accusation that SIEs are under GOC control.

The *Standard Conditions of Production and Operation of the Iron and Steel Industry* sets out certain industry standards of the iron and steel industry, including standards of product quality, environmental protection, energy consumption, workmanship and equipment, production scale, safety, sanitation and social responsibility. More to the point, the Standard Conditions simply collate existing regulations – such as the Interim Provisions - and have no additional binding force themselves. For example, the Workmanship and Equipment standards relate to production processes that are "restricted" under the Directory Catalogue, or backward production capacity (which as noted above, is the same as the "eliminated" category in the Directory Catalogue). Again, the GOC considers that there is nothing unusual about the publication of industry standards, or about the reprimanding of those who operate outside of those standards.

REP 203 considers that these regulations:

---

22 REP 203, pages 55-56.

23 TMRO Report, para 85.

> *…demonstrate that the GOC exercises meaningful control over iron and steel producing SIEs. The ability of the GOC to revoke licenses or block credit if companies do not undertake certain action shows government control over SIEs.*[24]

The GOC notes that these two factors arise only in relation to the Standard Conditions. The GOC would firstly note that the revocation of a license where an entity acts outside of its prescribed limits – ie the conditions upon which the license was originally granted - is not an unusual act of government, and does not indicate any unusual form of control. Secondly, the idea that the GOC "blocks credit", and that this is a way of controlling an enterprise that is non-compliant with the Standard Conditions, is a very strange interpretation of the Standard Conditions.

What the text says is that the GOC:

> *…shall not provide credit and finance support.*

This is not to say that the GOC provides financial support or credit to enterprises that are compliant with the Standard Conditions, or that it has to provide financial support if an enterprise is compliant. The statement is an express recognition that the GOC would not issue a policy that allows for the provision of credit or financial support to an entity that operates outside of the Standard Conditions. The GOC does not consider this to be untoward.

The GOC notes that the Australian government has adopted policies that clearly can impact upon the behaviour of Australia's own steel industry. For example, the *Steel Transformation Plan 2012* is a legislative instrument that facilitates payments of financial assistance ("STP Payments") under the *Steel Transformation Plan Act* to eligible corporations ("STP Participants"). In order to be an STP Participant, a corporation must be registered. However, clause 2.12 provides that registration can be revoked at any time for a number of reasons, including:

> *(2) The Secretary may deregister an STP participant if, at any time the Secretary is satisfied that the STP participant is not likely, or has failed, to comply with a condition of registration in Division 2.5.*

The conditions of registration include that the STP Participant complies with the requirements of the STP Act and Plan and meets the definition of an "eligible corporation". An eligible corporation is one that meets the following definition:

> *eligible corporation: a corporation is an eligible corporation at a particular time if:*
>
> *(a) at that time, the corporation is a constitutional corporation that manufactures steel in Australia using either of the following methods:*
>
> *(i) integrated iron and steel manufacturing that involves the physical and chemical transformation of iron ore into crude carbon steel;*
>
> *(ii) a method that involves the physical and chemical transformation of cold ferrous feed into crude carbon steel; and*
>
> *(b) the corporation produced at least 500,000 tonnes of crude carbon steel in Australia using either of those methods:*
>
> *(i) in the financial year that ended most recently before that time; and*

[24] REP 203, page 56.

(ii) in the 2009-2010 financial year.

The GOC notes that in order to gain the benefit of Australian government financial assistance, the STP participant is required to produce steel through two prescribed methods, and must maintain a production minimum of 500,000 tonnes in crude steel.

The point is that there would not seem to be any difference between the measures that Customs considers are sufficient to characterise steel-producing SIEs as public bodies in this case, and those set for STP participants in Australia. In fact one would have to say that the provision of free money to a lawfully operating enterprise subject to compliance with operational conditions, such as is achieved through the STP, is clearly a method of "controlling" an enterprise, and that the Chinese prohibition on providing credit to an enterprise that is unlawful is clearly not.

The underlying point is that governments may impose laws and regulations that require production standards to be met, or that prevent the use of harmful production technology, and that impose sanctions where those standards are not met, or where prohibited technology is used. This is not unusual and does not indicate that the entities that are the subject to such regulation perform a government function. A Chinese law about compliance with industry standards certainly does not prove that an enterprise possesses or is vested with government authority which - as we have explained – is the ultimate end point that must be arrived at in any "public body" analysis.

The GOC therefore submits that none of the above mentioned regulations evidence that the GOC exercises meaningful control over SIEs that produce HRC or narrow strip. They merely evidence that, like any other government, the GOC will regulate its industries to ensure that overly-harmful technologies are not used. This is not meaningful control which evidences that SIEs exercise government authority. The regulations do not make any specific provision for SIEs, or SIEs that produce HRC or narrow strip. Therefore, the conclusion drawn by REP 203 is not supported by evidence. In fact, it is not even inferred or intimated by evidence. The conclusion is baseless.

We reiterate, in terms of DS 379, that any "meaningful control" only evidences the possession and exercise of governmental authority in certain circumstances. When enterprises simply go about their normal commercial business in a normal regulatory environment, we do not accept that they can be said to be "possessing" and "exercising" government authority. That kind of behaviour is not indicative of the vesting of government authority in any shape or form.

REP 203 reiterates extracts from various Baosteel Annual Reports that are said to intimate that Baosteel is in some way involved in the implementation of GOC policies generally. However these extracts do no such thing.

Firstly, the GOC notes that the extract from Baosteel's 2010 Annual Report is the same as that discussed above. It is merely a general statement and does not evidence that Baoshan Steel, the company that produces steel, implements any government policy. The same criticism can be made of the extract from the 2008 Annual Report. Both are irrelevant to the question of whether the GOC exercises meaningful control over Baosteel, or SIEs generally, which would evidence those SIEs exercise government authority.

The same could be said about the extract from Baosteel's 2006 Annual Report that is quoted in REP 203. However, having reviewed the relevant report, the GOC has not found those words contained therein. The GOC does not believe that the relevant extract actually came from Baosteel's 2006 Annual Report or, indeed, any of its recent annual reports. Therefore, not only does the extract not support the conclusion that the GOC exercises meaningful control over SIEs that would evidence that those SIEs possess government authority, the credibility of the statement itself must be questioned, as it has not been

referenced in a manner that would allow for scrutiny of its source.

Again, the GOC reiterates the findings of the TMRO that:

> *The evidence analysed by Customs indicates that certain producers of HRC 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.*[25]

and that:

> *Moreover, even if it were accepted that the Government of China exercises meaningful control over State-Invested HRC-producers, the third test drawn from DS 379 would again not be met in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority.*[26]

These sentiments are entirely correct. Compliance by an enterprise with industrial regulations promulgated by a government do not indicate "meaningful control" of the entity such as would provide evidence of the carrying out of a government function. The regulations cited by REP 203 are legally binding upon many entities - SIEs, foreign-invested enterprise and other forms of enterprises. Conforming with them is what an enterprise is supposed to do. China has been schooled by the West to implement the rule of law, and to ensure transparency and equality of treatment of enterprises. Having done that, it is now accused by the Australian Government of vesting government authority in Chinese enterprises.

Even if the said compliance with law, regulation and policy amounted to "meaningful control", such "meaningful control" goes no further than to evidence the ordinary and proper functioning of a government such as the GOC. This cannot serve as evidence that SIEs themselves possess or exercise government authority in performing governmental function. No government authority is being exercised by the SIEs, and no governmental function is being performed by the SIEs.

The GOC notes that businesses in Australia, when supplying goods or services, must collect "GST" (goods and services tax) on behalf of the Australian Government, and then remit it to the Australian Taxation Office. According to the reasoning stated in REP 203 and SEF 193, the mandatory legislation directing entities to perform the governmental function of tax collection and to conduct their business in such a way as to make that possible would amount to "meaningful control" by the Australian Government. Does that constitute every Australian business which complies with that law a public body? We would be surprised if Customs thought this to be the case. If such evidence cannot serve as evidence that a private entity in Australia is exercising governmental authority in performing a government function, then a Chinese SIE cannot be said to be a public body simply because of its compliance with industrial regulation or because it acts in ways which are contemplated by industrial policy.

Lastly, REP 203 states that:

> *However, further evidence exists to show that these entities are still constrained by, and abiding by, GOC policies, plans and measures. In doing so, SIEs are controlling the decisions of other*

---

25 TMRO Report, para 245.

26 *Ibid*, para 248.

parties to also adhere to these policies.[27]

The GOC requests to be informed what that evidence is.

The situation is absurd. The GOC submits that there is no or insufficient evidence to support the public bodies finding in REP 203, and that there continues to be no or insufficient evidence to make that finding in the current investigation.

B "Public body" finding pertaining to coke and coking coal SIEs

The GOC submits that the alleged Programs 2 and 3 do not exist. This, in itself, is supported by the absolute lack of evidence to support the existence of the Programs. For example, SIEs that produce coke and coking coal were said to be "public bodies" because:

…coking coal and coke producers are part of the iron and steel industry in China…[28]

On this basis, the SEF considers the evidence and reasons set out in REP 203 are equally applicable to SIE producers and suppliers of coking coal and coke.

This is facile.

Ignoring the lack of an evidentiary method or a legal basis for REP 203's public body determination, the GOC would firstly point out that REP 203 made no finding in relation to SIEs in the iron and steel industry. Rather, REP 203 made a finding that SIEs that produce HRC and/or narrow strip were public bodies. While SEF 193 may be of the opinion that this is equally applicable to coke and coking SIEs, there is no evidence referenced to show why this may be the case. Therefore, the SEF establishes no basis for the finding - preliminary or otherwise - that SIEs that produce coke and coking coal are public bodies.

Secondly, the GOC would question the finding that coke and coking coal producers form part of the iron and steel industry. Certainly, coke and coking coal is sold to the iron and steel industry, but they are themselves not iron or steel, and have uses beyond those of the iron and steel industry. The GOC discussed this in response to Question 1 of Section A of its response to the Government Questionnaire. The coking coal industry is an extractive industry. Coking coal can be produced by iron and steel enterprises as part of an integrated steel-making process, or not.

It appears that the only basis for this conclusion is that coke and coking coal is an input to the production of iron and steel. The GOC requests that Customs explain what the bounds of the "iron and steel industry" are. Does it extend to every input used in the production of iron and steel? Without such a definition, the GOC considers that the concept of an iron and steel industry will be used to mean whatever it has to mean to support the findings of these non-existent subsidies.

The GOC submits that there is no evidence that SIEs involved in the production or supply of coking coal and coke are public bodies. Therefore, Programs 2 and 3 cannot exist.

C Adequacy of remuneration for HRC

The SEF concludes that HRC is provided by SIEs for less than adequate remuneration. In doing so, the SEF considers that it is reasonable to determine that the remuneration received for HRC is inadequate because:

---

27 REP 203, page 57.

28 SEF 193, page 149.

> *[Customs] considers it reasonable to determine that the benchmark established to determine adequate remuneration for HRC in China is also suitable to determine competitive market costs for those goods.*
>
> *In the circumstances of HRC in China, a competitive market cost is considered to be adequate remuneration for those goods and vice versa. Consequently the same amount has been applied by [Customs] in each context.*[29]

The reference to "a competitive market cost" relates to a finding made in the conterminously running dumping investigation of coated steel. In the Statement of Essential Facts in that dumping investigation ("SEF 190"), it was preliminarily concluded that *"HRC prices are affected by GOC influences and do not reasonably reflect competitive market costs"*.[30] This finding is relevant to the reliance on the reported costs to make and sell of Chinese producers of coated steel because, insofar as these costs are considered not to reasonably reflect competitive market costs as required by clause 180(2) of *Customs Regulations 1926*, Customs substitutes a proxy "competitive market cost" in order to construct a normal value. In SEF 190, the proxy cost was:

> *…the weighted average domestic HRC price paid by cooperating exporters of galvanised steel and aluminium zinc coated steel from Korea and Taiwan, at comparable terms of trade and conditions of purchase to those observed in China.*[31]

There are numerous criticisms that the GOC could make about this approach. Indeed, the GOC has made it clear on several occasions that Australia's Regulation 180(2) is not consistent with the WTO obligation that it purports to apply.[32] The GOC would also point out that no evidence is tendered to support the finding that the costs of HRC reported by Chinese producers of coated steel are not competitive market costs. It may be inferred from SEF 190 that this finding is based solely upon the finding of the existence of a "particular market situation" in the Chinese market for coated steel, and of an ambiguous concept of "government influence" - however, this is not clear from the text. In any regard, that finding itself is lacking in merit, as discussed at length in the GOC's submission to the coated steel dumping investigation dated 17 April 2013.

More relevant to the current submission is that, upon the GOC's review, it is apparent that the SEF's finding that prices of HRC provided by SIEs do not represent adequate remuneration completely ignores certain elements that both the SCM Agreement and the Act require be satisfied before a subsidy can be found to exist. It is an entirely non-contentious position to state that without the identification of a benefit, no subsidy can be found to exist. This much is made clear in Article 1.1(b) of the SCM Agreement and the definition of the term "subsidy" in Section 269T of the Act. Relevant to the scenario where it is alleged that a public body is involved in the administration of a subsidy through the provision of goods, Article 14(d) of the SCM Agreement provides that:

> *the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).*

---

29 SEF 193, page 150.
30 SEF 190, page 51.
31 *Ibid,* page 52.
32 *Anti-Dumping Agreement*, Article 2.2.1.1.

The same requirements have been implemented in Australian law through Section 269TACC(5) of the Act. There are two important considerations that need to be looked at: the idea of *"adequate remuneration"* and the requirement that such adequacy is determined *"in relation to prevailing market conditions for the good or service in the country or provision or purchase"*. The GOC submits that Customs has failed to address both these concepts correctly.

"Adequate remuneration" has been defined to mean:

> *the term "adequate" in this context means "sufficient, satisfactory". "Remuneration" is defined as "reward, recompense; payment, pay". Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods.*[33]

As noted above, the SEF concluded that, because a previous finding has been made as to what a competitive market cost for HRC is, any purchases of HRC for less than that cost cannot be considered to have been made for adequate remuneration. Without rehashing the inadequacies of Customs' "competitive market cost" finding, the GOC would note that equating that "competitive market cost" with "less than adequate remuneration" is not what is considered by the relevant law.

First, the idea that there is a singular price derived by a competitive market, and that any deviation from that price is not "competitive" is contrary to reason and expectation. The GOC expects that a great deal of variation in the HRC costs would have been demonstrated to Customs in the course of its investigations, both between different coated steel producers and over time. The idea that these costs were not competitive because they fell below some static price-point that Customs considered represents the lower bounds of what a competitive market pricing mechanism would discover is ridiculous.

The idea that some government influence will lead to a situation where prices represent inadequate remuneration has been expressly addressed by the WTO Appellate Body. Specifically, the GOC would refer to the following sentiment of the Appellate Body:

> *Turning first to the text of Article 14(d), we consider the submission of the United States that the term "market conditions" necessarily implies a market undistorted by the government's financial contribution. In our view, the United States' approach goes too far. We agree with the Panel that "[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark … [a]s such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'." This is confirmed by the Spanish and French versions of Article 14(d), neither of which supports the contention that the term "market" qualifies the term "conditions" so as to exclude situations in which there is government involvement. This is confirmed by the Spanish and French versions of Article 14(d), neither of which supports the contention that the term "market" qualifies the term "conditions" so as to exclude situations in which there is government involvement.*[34]

The GOC agrees with the Appellate Body in this regard, and submits that this prevents the conflation of the concept of "competitive market costs" on the one hand and the concept of "adequate remuneration" on the other. The earlier finding made by Customs does not permit the latter finding as a matter of course. What needs to be determined is whether, in the context of the prevailing market conditions of the domestic market, the price paid for the allegedly subsidised goods was insufficient compensation for those goods. The SEF has not made this determination. In the context of a provision which describes

---

[33] *Report of the Appellate Body: United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (WT/DS257/AB/R) 19 January 2004 ("Softwood Lumber IV"), para 84.

[34] *Ibid*, para 87.

when a sale or purchase is a "subsidy", the words "adequate remuneration" connote that a price which is less than a singular idealised "competitive market cost" is not automatically excluded from consideration in a benefit analysis. The GOC would therefore submit that the finding that the cost of HRC did not represent adequate remuneration is materially flawed.

Furthermore, the SEF has not had regard to the prevailing market conditions of the Chinese market when determining the adequacy of remuneration. Rather, the SEF has used a benchmark that is based on prices from outside the Chinese market to determine whether the remuneration received for the sale of HRC within the Chinese market is adequate. There are two relevant issues that impact the legitimacy of this approach.

First, the GOC is aware of no legislative basis under which Customs is able to have reference to an external benchmark for determining benefit. The *chapeau* to Article 14 of the SCM Agreement provides that:

> *For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained.*

Nowhere in the Act or the Regulations is the use of an *external benchmark* contemplated, mentioned or explained. The GOC submits that reliance on such a benchmark is lacking in transparency, is beyond Customs' powers under Australian law, and is at odds with Australia's WTO obligations.

While the GOC notes that the WTO's Appellate Body has indicated reference may – in certain limited circumstances – be had to an external benchmark, Australia must still act in accordance with the obligations of the *chapeau* to Article 14 of the SCM Agreement. Moreover, the circumstances under which Customs has determined that the use of an external benchmark is appropriate, and indeed the calculation of the benchmark itself, are not consistent with what has been envisaged by the Appellate Body as being acceptable in any given circumstance. As the Appellate Body has noted:

> *…the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited. We agree with the United States that "[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted". Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.*[35] [underlining supplied]

We note that the only finding made in the SEF was that "*HRC prices are affected by GOC prices and do not reasonably reflect competitive market costs".*[36] This is below what the Appellate Body considered to be a relevant situation on which one could disregard private prices in China. The only reason offered by the SEF as to why private prices could be disregarded was because they were *"equally affected by government influence".*[37] However the GOC submits that there is no indication that SIEs have been providing HRC at a level of remuneration that is inadequate in light of the prevailing market conditions. All the SEF finds is that prices of HRC are low in China generally, and that some HRC is provided by private

35 Softwood Lumber IV, para 102.
36 SEF 193, page 151
37 *Ibid*

enterprises at the same price as it is provided by SIEs. These are not grounds which the Appellate Body considered appropriate to dismiss private prices as a benchmark for determining the adequacy of remuneration.

Secondly, the GOC would emphasise the Appellate Body's warning that where an investigating authority used an external benchmark:

> *…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).*[38]

The GOC struggles to see how the benchmark adopted in the SEF had any regard to the prevailing market conditions in China. Indeed, there is no mention of *"prevailing market conditions"* in relation to the benchmark. The concept appears to be mentioned in the SEF only when referring to the requirements of Section 269TACC(5) and Article 14(d) of the SCM Agreement.

Chinese enterprises are by far the biggest producers and consumers of HRC in the world. It cannot be contended that a benchmark "price" based on the weighted average of domestic HRC prices paid by cooperating exporters of coated steel from Korea and Taiwan would not have to be adjusted in order to have regard to the prevailing conditions in the HRC market in China. The chosen benchmark does not reflect price, quality, availability, marketability or the other conditions of purchase or sale as required by Article 14(d). Adjusting for these factors is not a mere suggestion of the Appellate Body - rather, the Appellate Body has indicated that an investigating authority is under an obligation to ensure that any determination of the adequacy of remuneration is made by reference to these features of the domestic market.[39] In the absence of such a determination, it cannot be shown that sales of HRC were made at less than adequate remuneration in that market.

In summary, the GOC submits that the finding that HRC was provided by SIEs for less than adequate remuneration cannot legally be asserted, insofar as it:

- does not make a finding that remuneration received for HRC is inadequate;
- relies on an external benchmark which is not provided for by the Act;
- does not determine the adequacy of remuneration having regard to the prevailing market conditions in China.

Therefore, the GOC submits that no finding of "benefit" has been made, on which the existence of Program 1 could be based, and that any resulting countervailing measures imposed would be unlawful.

D Conclusion and request

The GOC submits that:

- the SEF has not identified the vesting of government authority in SIEs, or the possession of government authority by SIEs, which could characterise them as "public bodies";
- when given its proper interpretation, the evidence adduced to support the contention that SIEs

[38] Softwood Lumber IV, para 106

[39] *Ibid*, para 120.

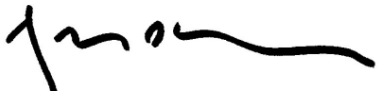
are vested with government authority shows no such thing;

- the finding that coke and coking coal producers are part of the "iron and steel industry" is not supported by evidence, nor logic;
- there is no evidence that SIEs that produce coke and coking coal are public bodies;
- there has been no finding that HRC is provided by SIEs at less than adequate remuneration within the meaning of that concept as it is used in Article 14(d) of the SCM Agreement and Section 269TACC(5) of the Act;
- Customs does not have the power to determine the adequacy of remuneration through the use of a single benchmark based on what Customs considers to be "competitive market cost";
- the benchmark adopted in the SEF fails to ensure that the adequacy of remuneration has been determined having regard to the prevailing market conditions for HRC in China, as required by Section 269TACC(5).

On this basis, the GOC submits that it is not open for Customs to legally assert that Programs 1, 2 and 3 exist or provide a benefit to Chinese coated steel producers.

The GOC requests that Customs recommend to the Minster for Home Affairs that he cannot impose countervailing duties on coated steel exported from China.

Yours sincerely



Daniel Moulis
Principal