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Australian Government
Australian Customs and
Border Protection Service

INVESTIGATION

**INTO THE ALLEGED DUMPING OF CERTAIN HOLLOW
STRUCTURAL SECTIONS EXPORTED FROM THE
PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF
KOREA, MALAYSIA, TAIWAN AND THE KINGDOM OF
THAILAND**

AND

**ALLEGED SUBSIDISATION OF HSS EXPORTED FROM
THE PEOPLE'S REPUBLIC OF CHINA**

**PRELIMINARY ASSESSMENT OF
COUNTERAVAILABLE SUBSIDIES**

16 APRIL 2012

THIS DOCUMENT IS PRELIMINARY AND ANY VIEWS OR RECOMMENDATIONS
CONTAINED THEREIN MAY NOT REFLECT CUSTOMS AND BORDER
PROTECTION'S FINAL POSITION

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1 INTRODUCTION

1.1 Background to the investigation

On 12 August 2011, OneSteel Australian Tube Mills Pty Ltd (ATM, the Applicant) lodged an application under s.269TB of the *Customs Act 1901* (the Act)¹ for the publication of a dumping duty notice in respect of certain hollow structural sections (HSS) exported to Australia from China, Korea, Malaysia, Taiwan and Thailand, and a countervailing duty notice in respect of HSS exported to Australia from China. Additional information was received from ATM on 26 August 2011 in support of its application.

This application alleged that HSS has been exported to Australia from the People's Republic of China (China), the Republic of Korea (Korea), Malaysia, Taiwan and the Kingdom of Thailand (Thailand) at prices lower than its normal value, and that HSS exported to Australia from China has received countervailable subsidies, and that this dumping and subsidisation has caused material injury to the Australian industry producing HSS.

Following consideration of the application and additional information, Customs and Border Protection initiated an investigation on 19 September 2011. Public notification of initiation of the investigation was made in *The Australian* newspaper on 19 September 2011. Australian Customs Dumping Notice (ACDN) No. 2011/43 provides further details of this investigation and is available at www.customs.gov.au.

The investigation period used to determine whether dumping and subsidisation has occurred, is from 1 July 2010 to 30 June 2011.

Customs and Border Protection is examining the Australian market and the economic condition of the Australian industry from 1 July 2007 for the purposes of injury analysis.

1.2 Purpose of report

This report preliminarily assess the countervailability of 20 alleged subsidy programs initially initiated upon by Customs and Border Protection (see Sections 1.3 and 1.4), resulting in a preliminary determination that 18 of these investigated programs are countervailable subsidies.

This report does not seek to report upon whether benefit was conferred on HSS exporters under these programs, and any associated subsidy margins for these exporters. This assessment will be made by Customs and Border Protection at a later stage in the investigation.

¹ A reference to a section or subsection in this report is a reference to a provision of the Act, unless otherwise specified.

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1.3 Subsidy allegations – original 20 programs

Within the application, ATM submits that Chinese producers of the goods have benefited from a range of countervailable subsidies.

In support of this, the Applicant relies on:

- the final determination of the Canada Border Services Agency (CBSA) in its 2008 subsidy investigation in respect of carbon steel welded pipe (CSWP) from China; and
- the 2010 findings of Customs and Border Protection from its investigation into certain aluminium extrusions exported to Australia from China (the findings of which are within Trade Measures Report No. 148 (REP148)).

In relying on these findings, ATM asserts:

- the Canadian subsidy investigation and its findings are relevant to its application and reliable, given the similarities of the products under investigation² and its understanding that common Chinese exporters are involved in exporting HSS into the Canadian and Australian markets; and
- countervailable subsidy programs identified and countervailed by Customs and Border Protection in REP148 have likely similarly provided benefits to Chinese exporters of HSS (noting that the GOC has recognised both the Chinese aluminium and steel industries as 'pillar' industries).

Further, the application includes "Business Credit Reports" completed in 2011 for four companies that the Applicant believes are exporters of HSS to Australia. The Applicant highlights that these reports show that three of these companies have previously been provided with awards and grants, and notes the tax paid by two companies appears to be significantly below the general taxation rate levied in China.

ATM also notes the reports indicate that a further company has relocated to a 'high technology investment zone', which the Applicant asserts provides income tax reductions and other financial incentives to businesses located in the zone.

Following consideration of ATM's claims, Customs and Border Protection initiated its investigation into the following, for which it considered the application contained reasonable grounds for publication of a countervailing duty notice in relation to HSS exported to Australia for the following programs:

Program 1 - Preferential Tax Policies for Enterprises with Foreign Investment Established in the Coastal Economic Open Areas and Economic and Technological Development Zones

Program 2 - One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'

² As CSWP is a sub-category of the HSS covered by this application.

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Program 3 - Provincial Scientific Development Plan Fund

Program 4 - Export Brand Development Fund

Program 5 - Matching Funds for International Market Development for Small and Medium Enterprises

Program 6 - Superstar Enterprise Grant

Program 7 - Research & Development (R&D) Assistance Grant

Program 8 - Patent Award of Guangdong Province

Program 9 - Training Program for Rural Surplus Labour Force Transfer Employment

Program 10 - Preferential Tax Policies for Foreign Invested Enterprises--
Reduced Tax Rate for Productive Foreign Invested Enterprises
scheduled to operate for a period of not less than 10 years

Program 11 - Preferential Tax Policies for Enterprises with Foreign
Investment Established in Special Economic Zones (excluding Shanghai
Pudong area)

Program 12 - Preferential Tax Policies for Enterprises with Foreign
Investment Established in Pudong area of Shanghai

Program 13 - Preferential Tax Policies in the Western Regions

Program 14 - Tariff and value-added tax (VAT) Exemptions on Imported
Materials and Equipments

Program 15 - Innovative Experimental Enterprise Grant

Program 16 - Special Support Fund for Non State-Owned Enterprises

Program 17 - Venture Investment Fund of Hi-Tech Industry

Program 18 - Grants for Encouraging the Establishment of Headquarters
and Regional Headquarters with Foreign Investment.

Program 19 - Grant for key enterprises in equipment manufacturing
industry of Zhongshan

Program 20 - Hot rolled steel provided by government at less than fair
market value

*Note: many of these programs have been investigated by Customs and
Border Protection during its investigation into aluminium extrusions from*

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China (REP144) and toilet paper from China and the Republic of Indonesia (Indonesia) (REP138 – though the countervailing part of this investigation was withdrawn prior to its conclusion and no final findings in relation to alleged subsidies made).

Details of the reasons behind Customs and Border Protection's initiation decision can be found within International Trade Remedies Consideration Report 177 (CON177).

As discussed in Section 1.2, this report focuses on a preliminary assessment of the countervailability of these 20 alleged subsidy programs.

Following the initiation of investigations into these programs, Customs and Border Protection forwarded the Government of China (GOC) a Government Questionnaire (GQ) that asked questions and requested documentation in relation to these 20 alleged programs,

The GOC provided a response to the GQ on 6 December 2017.

1.4 Additional allegations – original 20 programs

During a verification visit by Customs and Border Protection to a cooperating Chinese exporter, numerous other potentially countervailable subsidy programs were identified.

These are as follows:

Program 21: Water Conservancy Fund Deduction

Program 22: Wuxing District Freight Assistance

Program 23: Huzhou City Public Listing Grant

Program 24: Huzhou City Freight Assistance

Program 25: Wuxing District Patent Fee Assistance

Program 26: Zhejiang Industry New Product or Technology Award

Program 27: Huzhou City Quality Award

Program 28: Huzhou Industry Enterprise Transformation & Upgrade Development Fund

Program 29: Land Use Tax Deduction

Program 30: Wuxing District Public List Grant

Program 31: Anti-dumping Respondent Assistance

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Program 32: Technology Project Assistance

Program 33: City Level Patent Model Enterprise

Program 34: Balidian Town Public Listing Award

To assess these programs further, Customs and Border Protection sent the Government of China (GOC) the Second Supplementary Government Questionnaire (SSGQ)³ to pose questions and ask for documentation in relation to these new potential programs.

Note: the Supplementary Government Questionnaire (SGQ) was previously forwarded to gather further information in relation to the assessment of allegations of a particular market situation in the Chinese HSS market, and whether government-owned enterprises that produce HRC and/or narrow strip are 'public bodies' (see Chapter 3).

The GOC's response to the GQ informed the investigation that in accordance with the Law of the People's Republic of China on State-Owned Assets in Enterprises (Law (on State-Owned Assets) a government-owned enterprise in China can be categorised as:

- (a) a wholly state-owned enterprise,*
- (b) a wholly state-owned company,*
- (c) a majority state-holding company, and*
- (d) a minority state-holding company.*

The GOC noted in its Questionnaire Response that the current terminology used to describe all four categories of state-owned enterprises is 'state invested enterprise' or SIE. This term will be adopted throughout this report.

The countervailability of these alleged programs will be assessed by Customs and Border Protection at a later date.

1.5 The Act

S.269T of the Act defines a 'subsidy' as follows:

"subsidy", in respect of goods that are exported to Australia, means:

- (a) a financial contribution:*
 - (i) by a government of the country of export or country of origin of those goods; or*

³ A Supplementary Government Questionnaire (SGQ) was previously forwarded to gather further information in relation to the assessment of allegations of a particular market situation in the Chinese HSS market.

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(ii) by a public body of that country or of which that government is a member; or

(iii) by a private body entrusted or directed by that government or public body to carry out a governmental function;

that is made in connection with the production, manufacture or export of those goods and that involves:

(iv) a direct transfer of funds from that government or body to the enterprise by whom the goods are produced, manufactured or exported; or

(v) a direct transfer of funds from that government or body to that enterprise contingent upon particular circumstances occurring; or

(vi) the acceptance of liabilities, whether actual or potential, of that enterprise by that government or body; or

(vii) the forgoing, or non-collection, of revenue (other than an allowable exemption or remission) due to that government or body by that enterprise; or

(viii) the provision by that government or body of goods or services to that enterprise otherwise than in the course of providing normal infrastructure; or

(ix) the purchase by that government or body of goods provided by that enterprise; or

(b) any form of income or price support as referred to in Article XVI of the General Agreement on Tariffs and Trade 1994 that is received from such a government or body;

if that financial contribution or income or price support confers a benefit in relation to those goods.

s.2691 AAC defines a countervailable subsidy as follows:

(1) For the purposes of this Part, a subsidy is a countervailable subsidy if it is specific.

(2) Without limiting the generality of the circumstances in which a subsidy is specific, a subsidy is specific:

(a) if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or

(b) if, subject to subsection (3), access is limited to particular enterprises carrying on business within a designated

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geographical region that is within the jurisdiction of the subsidising authority; or

(c) if the subsidy is contingent, in fact or in law, and whether solely or as one of several conditions, on export performance; or

(d) if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.

(3) Subject to subsection (4), a subsidy is not specific if access to the subsidy:

(a) is established by objective criteria or conditions set out in primary or subordinate legislation or other official documents that are capable of verification; and

(b) those criteria or conditions do not favour particular enterprises over others and are economic in nature; and

(c) those criteria or conditions are strictly adhered to in the administration of the subsidy.

(4) Despite the fact that access to a subsidy is established by objective criteria, the Minister may, having regard to:

(a) the fact that the subsidy program benefits a limited number of particular enterprises; or

(b) the fact that the subsidy program predominantly benefits particular enterprises; or

(c) the fact that particular enterprises have access to disproportionately large amounts of the subsidy; or

(d) the manner in which a discretion to grant access to the subsidy has been exercised;

determine that the subsidy is specific.

S.269T ACC of the Act directs how it is to be determined whether benefits have been conferred by a subsidy and the amount of this benefit.

Customs and Border Protection makes references to these Provisions throughout this report.

1.6 Information relied upon

In addition to the information contained within ATM's application for this investigation, Customs and Border Protection has had regard to the following in arriving at the preliminary conclusions in this report:

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- the responses from the GOC to the GQ, Supplementary Government Questionnaire (SGQ) and Second Supplementary Government Questionnaire (SSGQ);
- Customs and Border Protection's analysis and findings in REP144 (aluminium extrusions) and analysis during the investigation into toilet paper from China. .

Customs and Border Protection has decided for this investigation not to undertake a visit to the GOC to verify information contained in its GQ, SGQ and SSGQ. Customs and Border Protection considers the responses of the GOC contain limited information that is by nature 'verifiable', and primarily consists of written responses and documentation that does not lend itself to verification. It is considered that it is more practicable in the context of the HSS investigation to pose additional questions to the GOC in the form of supplementary government questionnaires or requests for comment, rather than during face-to-face meetings with GOC officials.

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2 ASSESSMENT OF COUNTERVAILABILITY OF SUBSIDIES

2.1 Income tax reduction for foreign-invested enterprises (FIEs) based on location (Programs 1, 11, and 12)

2.1.1 Background

The application alleges that HSS producers/exporters are likely to have benefited from exemptions to income tax based upon the location of the industry in the particular province or locality.

These programs apply to certain industries with operations in certain designated zones and certain specific geographic locations. They reduce the normal foreign invested enterprise (FIE) tax payable rate of 25% variously depending on the particular location.

2.1.2 Legal Basis

The income tax reductions under programs 1, 11 and 12 are provided for in the *Foreign Invested Enterprise and Foreign Enterprise Income Tax law 1991* (the FIE Income Tax Law) which came into effect on 1 July 1991. The program is administered by the State Administration of Taxation (SAT) and its local Branch Offices or Bureaus. It is administered in accordance with the *Implementing Rules of the Foreign Investment Enterprise and Foreign Enterprise Income Tax Law* (the FIE Tax Regulations).

The FIE Income Tax Law and the FIE Tax Regulations were repealed with the introduction of the *Enterprise Income Tax Law 2008* (the EITL). Transitional arrangements extend the operation of this program and other preferential tax programs in accordance with the *Notice of the State Council on the Implementation of the Transitional Preferential Policies in respect of Enterprise Income Tax* (State Council Notice No 39 of 2007). This program ceased operation in December 2007. Transitional provisions are now in operation until 2012.

2.1.3 World Trade Organisation (WTO) Notification

The GOC notified the following programs to the WTO in WTO document G/SCM/N/123/CHN dated 13 April 2006:

- Preferential tax policies enterprises with foreign investment established in special economic zones (excluding Shanghai Pudong area) (Notification No. X)
- Preferential tax policies enterprises with foreign investment established in the coastal economic open areas and in the economic and technological development zones (Notification No. XI)
- Preferential tax policies enterprises with foreign investment established in Pudong area of Shanghai (Notification No. XII)

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2.1.4 Is there a subsidy?

Based on the information above, Customs and Border Protection considers that the laws governing these programs mandate a financial contribution by the GOC, to the extent that it is made in connection with the production/manufacture of HSS from China, which involves the foregoing, or non-collection, of revenue due to the GOC by eligible enterprises in China.

This financial contribution is considered to confer a benefit in relation to eligible production orientated FIEs because of the tax savings realized.

Where exporters of HSS during the investigation period received tax savings under the programs in connection with the production, manufacture or export of those goods it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under s.269T.

2.1.5 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(2)(b) a subsidy is specific if access to the subsidy is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority.

A subsidy is also considered specific if access to the subsidy is explicitly limited to particular enterprises (s.269TAAC(2)(a)).

Previous estimates by the GOC indicate that FIEs constitute approximately 3.2% of all enterprises in China. This means that the preferential tax treatments explicitly limited to FIEs are not available to approximately 97% of enterprises⁴ in China.

1. Program 11

FIEs located in a special economic zone (SEZ) designated geographical region are eligible for the subsidy.

As the criteria or conditions providing access to the subsidy favours particular enterprises, being those enterprises located in the SEZ and FIEs, over all other enterprises (being those enterprises located outside the SEZ and not FIEs) the specificity of the subsidy is not excepted by reference to s.269TAAC(3)

For these reasons Customs and Border Protection finds that the SEZ subsidies are specific.

⁴ It should be noted that the limitation to particular enterprises is further pronounced as not all FIEs are eligible for the program only production orientated FIEs.

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2. Program 1 and Program 12

For enterprises located in economic and technological development zones (EDTZs), the Coastal Economic Open Areas and the Pudong Area of Shanghai, only FIEs are eligible for the subsidy. Other companies in designated geographical region (being domestic invested enterprises or DIES) are not eligible for the subsidy.

As the criteria or conditions providing access to the subsidy favours particular enterprises, being those eligible production orientated FIEs, and those located in the particular regions, over other enterprises the specificity of subsidy is not excepted by reference to s.269TAAC(3).

For these reasons Customs and Border Protection finds that these subsidies are specific.

Based on the available information, Customs and Border Protection concludes that the following programs constitute countervailable subsidies:

- Program 1 - Preferential tax policies for enterprises with foreign investment established in the coastal economic open areas and economic and technological development zones
- Program 11 - Preferential tax policies for enterprises with foreign investment established in Special Economic Zones (excluding Shanghai Pudong area); and
- Program 12 - Preferential tax policies for enterprises with foreign investment established in Pudong area of Shanghai

2.2 Program 13 - Preferential Tax Policies in the Western Regions

2.2.1 Background

The application alleges that HSS producers/exporters are likely to have benefited from exemptions to income tax based upon the location of the industry in the Western Regions of China.

2.2.2 Legal Basis

Established pursuant to the *Circular of the Ministry of Finance, the State Administration of Taxation, the General Administration of Customs on Issues of Incentive Policies on Taxation for the Strategy of the Development in the Western Areas* (Cai Shui (2001) No.202). From January 2011, Program 13 will be administered in accordance with the *Circular on Deepening the Implementation of Tax Policy concerning Development of Western Regions* (Cai Shui [2011] No.58).

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2.2.3 WTO Notification

The GOC notified this program to the WTO in WTO document G/SCM/N/123/CHN (Notification No. XIV).

2.2.4 Is there a subsidy?

Customs and Border Protection considers that the laws governing this program mandate a financial contribution by the GOC, to the extent that it is made in connection with the production/manufacture of HSS from China, which involves the foregoing, or non-collection, of revenue due to the GOC by eligible enterprises in China.

Where exporters of HSS during the investigation period received tax savings under the programs in connection with the production, manufacture or export of those goods it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under s.269T.

2.2.5 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(2)(b) a subsidy is specific if access to the subsidy is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority.

A subsidy is also considered specific if access to the subsidy is explicitly limited to particular enterprises (s.269TAAC(2)(a)). For enterprises located in the Western Regions, only those industries which are 'encouraged' are eligible for the subsidy. Other companies in the designated geographical region (being those enterprises which are not 'encouraged') are not eligible for the subsidy.

As the criteria or conditions providing access to the subsidy favours particular enterprises, being those 'encouraged' enterprises, over all other enterprises the specificity of subsidy is not excepted by reference to s.269TAAC(3).

For these reasons Customs and Border Protection finds that the Western Region subsidy is specific.

Based on the available information, Custom and Border Protection concludes that the program constitutes and countervailable subsidy.

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2.3 Preferential Tax Policies for Foreign Invested Enterprises – Reduced Tax Rate for Productive FIEs scheduled to operate for a period of not less than 10 years (Program 10)

2.3.1 Background

The Applicant has alleged that Chinese exporters of HSS have benefited from a further preferential tax policy for FIEs which are provided under the FIE Income Tax Law.

The Applicant alleged that this program exempts FIEs from income tax in their first two profitable years and requires them to pay half of their applicable tax rate for the following three years.

2.3.2 Legal Basis

The income tax reduction and exemption for FIEs under this program is provided for in Article 8 of the FIE Income Tax Law.

The program is administered by the State Administration of Taxation and its local Branch Offices or Bureaus. It is administered in accordance with the FIE Tax Regulations.

As noted in Section 2.1, the FIE Income Tax Law and the FIE Tax Regulations were replaced by the EITL in 2009. However transnational arrangements for this program until end 2012 are also included in the State Council Notice No 39 of 2007.

2.3.3 WTO Notification

The GOC notified this program to the WTO in WTO document G/SCM/N/123/CHN dated 13 April 2006 (Notification No. I).

2.3.4 Effect of the program

During the investigation period (July 2010 – June 2011) the prevailing income tax rate for FIEs in China was 25%.

Under this program, from the year an FIE begins to make a profit, they may receive a full exemption from income tax in the first and second years and a 50% reduction in income tax in the third, fourth, and fifth years.

A benefit to the FIE is conferred in the amount of the tax saving.

2.3.5 Eligibility Criteria

Under Article 8 of the FIE Income Tax Law, to be eligible for this program the enterprise must be:

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- an FIE;
- 'production orientated';
- an enterprise which has an anticipated term of operation of at least 10 years; and
- an enterprise that has had a financial year in which it made a profit.

To be categorised as an FIE the enterprise must be a Chinese-Foreign equity joint venture, a Chinese-Foreign cooperative joint venture or a wholly foreign owned enterprise established in China.

This program begins in the first profitable year and concludes at the end of the fifth subsequent year. There is no deferral of the exemption or reduction for subsequent years where the enterprise does not make a profit.

In accordance with State Council Notice No 39 of 2007, transitional arrangements are now in place in respect of this program. As of 1 January 2008, enterprises that previously enjoyed a 2-year exemption and 3-year half payment of the enterprise income tax and other preferential treatments (including periodic tax deductions and exemptions) may continue to enjoy any preferential treatments previously enjoyed until the expiration of the transitional time period.

For enterprises that previously had not enjoyed preferential treatment, the preferential time period shall be calculated from 2008.

2.3.6 Is there a subsidy?

Based on the information above, Customs and Border Protection considers that the program is a financial contribution by the GOC, to the extent that it was made in connection with the production/manufacture of HSS from China, that involves the foregoing, or non-collection, of revenue due to the GOC by eligible production oriented FIEs in China.

This financial contribution is considered to confer a benefit in relation to eligible production orientated FIE manufacturers of HSS because of the tax savings realized.

Where exporters of HSS during the investigation period received tax savings under the program in connection with the production, manufacture or export of those goods it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under s.269T.

2.3.7 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(2)(a) a subsidy is specific if access to the subsidy is explicitly limited by law to particular enterprises.

Only FIEs are eligible for the subsidy. Other companies in China (being domestic invested enterprises or DIEs) are not eligible for the subsidy.

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Further, only production-oriented FIEs are eligible for the subsidy (i.e. FIEs that are not production-oriented are not eligible for the program).

As the criteria or conditions providing access to the subsidy favours particular enterprises, being those eligible production orientated FIEs, over all other enterprises in China the specificity of subsidy is not excepted by reference to s.269TAAC(3).

For these reasons Customs and Border Protection finds that the subsidy is specific.

2.4 Tariff and VAT Exemptions on Imported Materials and Equipments (Program 14)

2.4.1 Background

The Applicant has alleged that Chinese producers of HSS are likely to have benefited from this program, under which the GOC provides an exemption of VAT and tariffs on imported equipment used as 'productive' assets.

2.4.2 Legal Basis

- *Notice of the State Council Concerning the Adjustment of Taxation Policies for Imported Equipment* (Guo Fa [1997] No. 37)
- *Catalogue of Industries for Guiding Foreign Investment.*
- *Catalogue of Industry, Product and Technology Key Supported by the State at Present (2004).*
- *State Council's Import Goods Not Exempted from Taxation for Foreign Investment Projects Catalogue.*
- *Import Goods Not Exempted from Taxation for Domestic Investment projects catalogue.*

2.4.3 WTO Notification

The GOC notified this program to the WTO in WTO document G/SCMN/123/CHN dated 13 April 2006 (Notification No. LX).

2.4.4 Eligibility Criteria

Under Articles 1 and 2 of the *Notice of the State Council Concerning the Adjustment of Taxation Policies for Imported Equipment* (Guo Fa [1997] No. 37) to be eligible for this program:

- the enterprise must be an FIE which falls in the 'encouraged' or 'restricted' categories in the *Catalogue of Industries for Guiding Foreign Investment (2004)* (until 30 November 2007) or the *Catalogue of Industries for Guiding Foreign Investment (2007)* (after 1 December 2007) and the imported equipment must be for the enterprise's own use and not fall within the *State Council's Import*

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Goods Not Exempted from Taxation for Foreign Investment Projects Catalogue, and

- the total value of the purchase must not exceed the investment 'cap';

or

- the enterprise must be a domestic invested enterprise (DIE) which falls in *Catalogue of Industry, Product and Technology Key Supported by the State at Present (2004)* and the imported equipment must be for the enterprises own use and not fall within the *Import Goods Not Exempted from Taxation for Domestic Investment projects catalogue*, and
- the total value of the purchase must not exceed the investment 'cap'.

2.4.5 Is there a subsidy?

Based on the information above, Customs and Border Protection considers this program is a financial contribution by the GOC, to the extent that it was made in connection with the production/manufacture of HSS from China that involves the foregoing, or non-collection, of revenue due to the GOC by eligible encouraged FIEs and DIEs in China.

This financial contribution is considered to confer a benefit in relation to eligible FIE and DIE manufacturers of HSS because of the tax and duty savings realized.

If exporters of HSS during the investigation period received tax savings under the program in connection with the production, manufacture or export of those goods it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under s.269T.

2.4.6 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(2)(a) a subsidy is specific if access to the subsidy is explicitly limited by law to particular enterprises.

FIEs that fall within the category of 'encouraged' or restricted' enterprises of the FIE catalogues noted in Section 2.4.4 are eligible for the subsidy, or DIEs that fall under the DIE catalogue noted in Section 2.4.4 are eligible for the subsidy.

For these reasons Customs and Border Protection finds that the subsidy is specific.

Based on the available information, Customs and Border Protection concludes that the VAT and Tariff Exemptions on Imported Equipment program constitutes a countervailable subsidy.

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2.5 Financial Grants (Programs 2, 4, 5, 6, 7, 8, 15, 16, 17, 18 and 19)

2.5.1 Background

The application alleges that Chinese producers of HSS are likely to have benefited from the following grant programs:

- Program 2 - One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China';
- Program 4 - Export Brand Development Fund;
- Program 5 - Matching Funds for International Market Development for small and medium size enterprises (SMEs);
- Program 6 - Superstar Enterprise Grant;
- Program 7 - Research & Development (R&D) Assistance Grant
- Program 8 - Patent Award of Guangdong Province;
- Program 15 - Innovative Experimental Enterprise Grant;
- Program 16 – Special Support Fund for Non-State-Owned Enterprises
- Program 17 - Venture Investment Fund of Hi-Tech Industry, and
- Program 18 - Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment
- Program 19 – Grant for Key Enterprises in Equipment Manufacturing Industry of Zhongshan

2.5.2 Legal Basis

Program 2 - One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'

- *Decision Concerning Commending and/ or Awarding to Enterprises of Guangdong Province Whose Products Qualify for the Title of "China Worldwide Famous Brand", "China Famous Brand", or "China Well-Known Brand"*

Program 4 - Export Brand Development Fund

- *Circular on Guiding Suggestions on Supporting the Development of Exporting Famous Brands*
- *The information provided by the GOC on this program indicates that this program has been changed to the International Famous Brands pursuant to the 'Circular on Guiding Suggestions on Supporting the Development of International Famous Brands'.*

Program 5 - Matching Funds for International Market Development for SMEs

- *Measures for Administration of International Market Developing Funds of Small and Medium Sized Enterprises*

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Program 6 - Superstar Enterprise Grant

- *Measures for Assessment and Encouragement of Superstar Enterprises and Excellent Enterprises*
- *Notice of Huzhou Government Office Concerning Announcement of Criteria for Superstar Enterprises, Excellent Enterprises and Backbone Enterprises*

Program 7 - Research & Development (R&D) Assistance Grant

- *Notice of the Office of People's Government of Wuxing District on Publishing and Issuing the Management Measures on Three Types of Science and Technology Expenses of Wuxing District.*

Program 8 - Patent Award of Guangdong Province

- *2009 Guangdong Patent Award Implementation Proposal*

Program 15 - Innovative Experimental Enterprise Grant

- *Work Implementation Scheme of Zhejiang Province on Setting Up Innovative Enterprises*

Program 16 - Special Support Fund for Non-State-Owned Enterprises

- *Notions concerning accelerating the growth of the non-state-owned economy*

Program 17 - Venture Investment Fund of Hi-Tech Industry

- *Circular of Chongqing People's Government Office on Temporary Administration Measures on Venture Investment Fund of Hi-tech Industry in Chongqing*

Program 18 - Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment

- *Provisions of Guangzhou Municipality on Encouraging Foreign Investors to Set up Headquarters and Regional Headquarters*

Program 19 - Grant for Key Enterprises in Equipment Manufacturing Industry of Zhongshan

- *Notice of Issuing "Method for Determination of Key Enterprises in Equipment Manufacturing Industry of Zhongshan," Zhong Fu (2005) No.127*

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2.5.3 WTO Notification

Customs and Border Protection is not aware of any WTO notification in respect of these programs.

2.5.4 The effect of the programs

Under these programs certain enterprises are eligible for cash grants provided by the GOC⁵. Benefits are conferred to these enterprises in the amount of funds provided.

For each these programs, Customs and Border Protection sought information from the GOC about the total amount of funds provided during the investigation period.

In each instance the GOC advised that no such statistics were available.

2.5.5 Eligibility Criteria

Program 2 - One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'

- enterprises whose products qualify for the title of 'China Worldwide famous Brand'; and
- enterprises whose products qualify for the title of 'China well-known brand' and/or 'famous trademark (China famous Trademark)'.

Program 4 - Export Brand Development Fund

Unknown.

However the title of the program indicates that entities must in fact export to be eligible for the grant.

Program 5 - Matching Funds for International Market Development for SMEs

SME enterprises meeting the following criteria:

- have a legal personality according to law;
- have the capacity to manage an import or export business;
- made exports in the previous year of 15,000,000 (before 2010) or 45,000,000 (after 2010) US dollars or less;
- have sound financial management systems and records;
- have employees who specialise in foreign trade and economic business who possess the basic skills of foreign trade and economics; and
- have a solid market development plan.

⁵ Either centrally or through provincial and local government.

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Program 6 - Superstar Enterprise Grant

An enterprise located in Huzhou city that satisfies following criteria may apply for this program.

- (a) The output scale of the enterprise must meet one of the following criteria:
- had business income of the current year not exceeding RMB 3.5 billion and sales;
 - have revenue within the city exceeding RMB 2 billion;
 - have sales revenue within the city exceeding RMB 2.5 billion;
 - have sales revenue within the city exceeding RMB 1.5 billion where the increase of sales revenue between 2007 and 2008 was more than 30% and the increased paid up tax between 2007 and 2008 was more than RMB 10 million; or
 - their revenue from self-export of current year is more than USD150 million.
- (b) The enterprises accumulated industrial input between 2006 to 2008 must have exceeded RMB 150 million.
- (c) The enterprise must be profitable, and its paid up VAT, consumption tax, income tax, business tax, city construction tax and education supplementary tax must exceed RMB 30 million.
- (d) The enterprise must not have suffered environmental or unsafe production accidents (or other illegal incidents) in the current year.
- (e) If the enterprise is not a SOE, it must have passed the 'Five- Good Enterprises' assessment conducted by county or district.

Program 7 - Research & Development (R&D) Assistance Grant

Emphasis is placed on selecting enterprises with research projects addressing scientific and technological problems, technology innovation projects, projects aimed at innovation in science and technology in the agricultural sector, as well as some high and new technology industries.

Program 8 - Patent Award of Guangdong Province

An application under the innovations and utility models patent category must establish that:

- the product in question is skilfully constructed and innovative with high creation and technical level;
- the product contributes to technical improvement and creation;
- the patent has created or has the potential to bring significant economic or social benefit; and

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- the patent holder has significantly protected the patent.

An application under the industrial design category must establish that:

- the industrial design has reached high level at shape, pattern and colour;
- application of this industrial design has brought or has the potential to bring significant economic or social benefit; and
- the patent holder has significantly protected the patent.

Program 15 - Innovative Experimental Enterprise Grant

Eligible enterprises located in Zhejiang Province are those that are:

- independent economic entities with reasonable asset-liability ratios, consistent earnings over the past 3 years, with an increasing market share;
- well placed to undertake research and development activities with a provincial or new and high-tech technology centre available and proven relationships with colleges and scientific research centres;
- investing at least 5% of annual sales income;
- using intellectual property rights to protect major products; and
- strongly committed to technological innovation and protection with previous technological achievements.

Program 16 - Special Support Fund for Non-State-Owned Enterprises

- Non-SOEs located in Yunnan Province

Program 17 - Venture Investment Fund of Hi-Tech Industry

High-tech programs of the venture investment fund must be located in the High-Tech Zone or the High-Tech Park of the new Northern District. In addition, the program must meet the following conditions:

- have a leading technological position in its field, and sufficient experience to enter the industrialisation development phase (industrialisation programs with intellectual property rights are given priority);
- the product must be of high quality and have potential economic benefit to the collective development of the Chongqing High-Tech Industry Zone;
- the department supporting the program must have good credit, excellent operation mechanisms and strong innovation abilities;
- the enterprise must have good legal standing; and
- the total investment must be RMB 100 million or more.

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Program 18 - Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment

This program is available to enterprises established in the Guangzhou Municipality by a foreign investor.

To qualify as 'Headquarters' the facility must control all the operations and management of any enterprises it is invested in both in China and internationally. Only one enterprise Headquarters is permitted in the Guangzhou Municipality.

To qualify as 'Regional Headquarters' the facility that control operations and management of some or all enterprises it is invested in within a certain area of China. Headquarters or Regional headquarters may investment companies, management companies, research and development centres and production enterprises.

Program 19 - Grant for Key Enterprises in Equipment Manufacturing Industry of Zhongshan

To be eligible for this program:

- the enterprise must be established, registered and carrying out business in Zhongshan City;
- the enterprise's primary product must be part of the equipment manufacturing industry and comply with the relevant industrial policies;
- the enterprise must have assets over RMB 30 million, annual sales income of over RMB 50 million and annual paid-in tax of over RMB 3 million or, alternatively, the enterprise's main economic and technical indices must be at the forefront of the equipment manufacturing industry in the country or province, and have potential for additional development;
- the enterprise must have implemented a brand strategy, established a technical centre for research and development and be comparatively strong in its capacity for independent development and technical innovation; and
- the enterprise must have a good credit standing.

2.5.6 Is there a subsidy?

Based on the information above, Customs and Border Protection considers that the grants provided under these grant programs are financial contributions by the GOC, to the extent that they were made in connection with the production/manufacture of HSS from China, which involves a direct transfer of funds by GOC to the recipient enterprises in China.

This financial contribution is considered to confer a benefit to recipient manufacturers of HSS because of receipt of the respective funds from the GOC. If exporters of HSS during the investigation period received monies

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under the programs in connection with the production, manufacture or export of those goods it would confer a benefit in relation to those goods and the financial contribution would meet the definition of subsidy under s.269T.

2.5.7 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(2)(a) a subsidy is specific if access to the subsidy is explicitly limited by law to particular enterprises.

In accordance with the above-listed eligibility criteria, each grant is limited to specific enterprises either by location, enterprise type, product manufacture, the possession of patents, trading focus (export oriented) or other criteria.

As the criteria or conditions providing access to the subsidies favours particular enterprises over all other enterprises in China, the specificity of the subsidies is not excepted by reference to s.269TAAC(3).

Based on the available information, Customs and Border Protection concludes that the following programs constitute countervailable subsidies:

- Program 2 - One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China';
- Program 4 - Export Brand Development Fund;
- Program 5 - Matching Funds for International Market Development for SMEs;
- Program 6 - Superstar Enterprise Grant;
- Program 7 - Research & Development (R&D) Assistance Grant
- Program 8 - Patent Award of Guangdong Province;
- Program 15 - Innovative Experimental Enterprise Grant;
- Program 16 - Special Support Fund for Non-State-Owned Enterprises
- Program 17 - Venture Investment Fund of Hi-Tech Industry,
- Program 18 - Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment, and
- Program 19 - Grant for Key Enterprises in Equipment Manufacturing Industry of Zhongshan

2.6 Hot Rolled Steel at Less Than Adequate Remuneration (Program 20)

2.6.1 Background

The Applicant has alleged that Chinese exporters of HSS have benefited from the provision of raw material (in the form of hot rolled steel (including hot rolled coil (HRC) and narrow steel strip) by the GOC at less than adequate remuneration.

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In particular it was claimed that HRC and/or narrow strip, the main raw materials used in the manufacture of HSS, was being produced and supplied by SIEs in China at less than adequate remuneration.

The definition of a subsidy under section 269T(a)(ii) includes reference to 'a financial contribution by a government or any public body'.

The application alleges that Chinese SIEs that produce HRC and/or narrow strip are public bodies, and that a financial contribution in the form of provision of raw material inputs (HRC and/or narrow strip) at less than adequate remuneration by these SIEs to HSS producers constitutes a countervailable subsidy.

Customs and Border Protection's assessment of whether SIEs producing HRC and/or narrow strip constitute a public body within the meaning of section 269T(a)(ii) is discussed separately at Chapter 3 of this report. This assessment preliminarily concludes that these Chinese SIEs that produce HRC and/or narrow strip are 'public bodies' for the purposes of s.269T, and the remainder of this section continues on the basis of this preliminary finding.⁶

2.6.2 Legal Basis

Customs and Border Protection has not identified any specific legal basis for this program (i.e. no specific law, regulation, or other GOC document has been identified that provides for its establishment).

2.6.3 WTO Notification

Customs and Border Protection is not aware of any WTO notification in respect of this program.

2.6.4 Effect of the program

Under this program, a benefit to exported HSS is conferred by HRC and/or narrow strip being provided by the GOC (through SIEs) at an amount reflecting less than adequate remuneration, having regard to prevailing market conditions in China.

Customs and Border Protection's assessment of what constitutes 'adequate remuneration' for HRC and/or narrow strip in China is contained in Chapter 4 of this report.

Customs and Border Protection requested information from all Chinese exporters in relation to their purchases of HRC and/or narrow strip during the investigation period.

For each supplier of HRC and/or narrow strip, the Chinese exporters were required to identify whether the supplier was a trader or manufacturer of the

⁶ If it were to be determined that these SIEs are not 'public bodies', this program would not meet the definition of a 'subsidy' in s.269T.

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goods. Where the supplier was not the manufacturer of the goods, each exporter was asked to identify the manufacturer.

As well as identifying the manufacturers of all purchased HRC and/or narrow strip, the exporters were also asked to indicate whether these enterprises were SIEs.

Information presented by these exporters showed that SIEs were significant suppliers of HRC and/or narrow strip to HSS exporters. This is further supported by information provided by the GOC in response to the GQ and Supplementary GQ, which showed the share of total domestic HRC and/or narrow strip production in China by SIEs to be significant.⁷

2.6.5 Eligibility Criteria

There are no articulated eligibility criteria for enterprises receiving HRC and/or narrow strip at less than adequate remuneration.

2.6.6 Is there a subsidy?

Based on the information above, Customs and Border Protection considers that this program involves a financial contribution to the extent that it was made in connection with the production of HSS from China that involves the provision of goods (HRC and/or narrow strip) by SIEs, being public bodies, at less than adequate remuneration. Refer to Chapter 4 for an assessment of what is preliminarily considered to be 'adequate remuneration'.

Where the financial contribution involves a direct transaction between the public bodies and the exporters of HSS, Customs and Border Protection considers that this financial contribution confers a direct benefit to the extent that the goods were provided at less than adequate remuneration, as determined by Customs and Border Protection.

Where the financial contribution involves the provision of HRC and/or narrow strip by public bodies to private intermediaries that then trade those inputs to the exporters of HSS, Customs and Border Protection considers, in accordance with s.269T(2AC)(a), that an indirect benefit is conferred in relation to the exported goods to the extent that the benefits conferred to the private intermediaries are passed-through to the exporters of HSS by way of HRC and/or narrow strip being provided at less than adequate remuneration.

Where exporters of HSS during the investigation period purchased HRC and/or narrow strip at less than adequate remuneration under the program in connection with the production, manufacture or export of those goods, it would confer a benefit in relation to those goods equal to the amount of the difference between the purchased price and the adequate remuneration, and the financial contribution would meet the definition of subsidy under s.269T.

⁷ GOC SGQ Confidential Attachment 138 '2010 and 2011 Hot Rolled Narrow Strip Production by Ownership'

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2.6.7 Is the subsidy a countervailable subsidy?

As provided for in s.269TAAC(4)(a), the Minister may determine that a subsidy is specific, having regard to the fact that the subsidy program benefits a limited number of particular enterprises.

Given that HRC and/or narrow strip is a key input in the manufacture of downstream semi-fabricated (e.g. flat-rolled products such as sheet and plate) and other steel products, it is clear that only enterprises engaged in the manufacture of these fabricated 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.

2.7 Program 9 - Training Program for Rural Surplus Labour Force Transfer Employment

Following consideration of all relevant supporting documents and information provided the GOC, the Applicant and selected exporters, Customs and Border Protection has determined that alleged *Program 9 - Training Program for Rural Surplus Labour Force Transfer Employment* did not constitute a countervailable subsidy with respect to the goods during the investigation period.

Customs and Border Protection is satisfied that this program ceased to operate in 2009.

Customs and Border Protection is satisfied that any benefit conferred under this program prior to its cessation was not applicable to the goods during the investigation period. This determination is due to the nature of the benefit conferred under the program, that is, a subsidy for the training of staff, which is likely to be expensed in the year the benefit was conferred.

2.8 Program 3 - Provincial Scientific Development Fund

Customs and Border Protection observes the *Notice of Terminating Administrative Measures on Special Fund for Developing Trade through Science and Technology of Guangdong Province* provided by the GOC and is satisfied that this program was terminated in accordance with this notice in April 2009.

Customs and Border Protection considers that the nature of this program, that is a grant given in connection with development and export of high technology products, is likely to be expensed in the year the benefit was conferred, and therefore is satisfied that any benefit conferred under the program prior to its cessation was not applicable to the goods during the investigation period.

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3 DO HOT ROLLED COIL/NARROW STRIP-PRODUCING SIEs QUALIFY AS 'PUBLIC BODIES' UNDER THE ACT?

As outlined in Section 1.5, the definition of a subsidy under section 269 of the Act includes reference to 'a financial contribution by a government or any public body'.

The application alleges that Chinese SIEs that produce HRC and/or narrow strip are public bodies, such that a financial contribution in the form of less than adequate remuneration for raw material inputs of HRC and/or narrow strip supplied by these SIEs constitutes a countervailable subsidy.

3.1 Prevalence of HRC and/or narrow strip SIEs in China

To assess the prevalence of these HRC and/or narrow strip SIEs in the Chinese market, Question B4 of the GQ requested the GOC to provide a list of all enterprises in China which produced HRC and/or narrow strip during the investigation period, and to identify the ownership structure of the business (i.e. state-owned, private enterprise, FIE, etc).

Note: within the GQ, HRC and/or narrow strip were referred to collectively as 'hot-rolled steel' or HRS.

In response, the GOC provided a list of major HRS enterprises (i.e. those with an annual production value of over a certain threshold) as Attachment 5, which was revised with further translations of entity names at Attachment 137 of the SGQ. This listing identifies, by a 'holding status code', whether each listed entity is:

- a state holding enterprise/company;
- a collective holding enterprise /company;
- a private capital holding enterprise/company;
- a Hong Kong, Macao, or Taiwan investment holding enterprise/company
- a FIE; or
- an other holding enterprise/company.

The GOC submitted (in response to Question 4(b) of the SGQ) that it was unable to indicate in this listing whether these entities produce HRC, narrow strip, or both.

Additionally, the GOC provided (at Attachment 139 to the SGQ) a listing of the top 15 producers in China of 'Hot-roll narrow strip' in 2010. Customs and Border Protection observes that, in requesting this information, that it desired the GOC to indicate:

...the top 15 HRS producers in China during the investigation period, and the total volume of their production of HRC and/or narrow strip.

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From the title of Attachment 139, there is some confusion as to whether this listing refers to both HRC and/or narrow strip as requested.

Further, as stated at Section 2.6, Chinese exporters of HSS provided Customs and Border Protection with data to identify the manufacturer of HRC and/or narrow strip purchased by that exporter, and whether these entities were SIEs or private enterprises.

This data indicates that HSS producers in China have purchased both HRC and/or narrow strip manufactured by SIEs during the investigation period, and that a significant proportion of these purchases were from SIEs.

From this data, and the information provided by the GOC, Customs and Border Protection notes that a significant proportion of HRC and/or narrow strip in China is produced by SIEs.

3.2 What are 'public bodies'?

3.2.1 Definition

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

However, the WTO Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, dispute (DS379), recently considered the meaning of 'public body' within Article 1.1(a)(1) of the SCM Agreement. The Report of the Appellate Body⁸ (the Appellate Body Report), circulated 11 March 2011, outlines its findings in relation to this matter.

In ACDN 2011/27, Customs and Border Protection announced that its countervailing investigations involving allegations of subsidies being granted by public bodies would be conducted in accordance with the findings of the Appellate Body in DS379.

The assessment of public bodies in this report therefore takes account of the DS379 findings in arriving at its preliminary conclusions.

3.2.2 DS379 findings

In its findings report, the Appellate Body stated:

... the determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense. That assessment must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority.⁹

⁸ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R

⁹ Appellate Body Report, at 345

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[Emphasis added]

The Appellate Body provided further guidance on this point as to how it can be ascertained that an entity exercises, or is vested with government authority, outlining the following indicia that may help assess whether an entity is a public body (vested with or exercising governmental authority):¹⁰

- where a *statute or other legal instrument* expressly vests government authority in the entity concerned;
- where there is evidence that an entity is, *in fact, exercising governmental functions* may serve as evidence that it possesses or has been vested with governmental authority; and
- where there is evidence that a government exercises *meaningful control* over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.

The Appellate Body considered¹¹ that the existence of *mere formal links* (i.e. majority government ownership) between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority, because this does not automatically demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.

The Appellate Body further advised that in all cases, an investigating authority must give due consideration to all relevant characteristics of the entity and avoid focussing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant¹².

The Appellate Body went on to acknowledge (in the context of examining state-owned enterprises in China (referred to in this paper as SIEs):¹⁴

determining whether an entity is a public or private body may be a complex exercise, particularly where the same entity exhibits some characteristics that suggest it is a public body, and other characteristics that suggest that it is a private body.

3.3 SIEs in China generally

The GOC advised, in response to D2.1(b), that the main laws governing the establishment and operation of SIEs are:

¹⁰ Ibid at [318]

¹¹ Ibid

¹² Ibid at [319]

¹⁴ Ibid at 345

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1. the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* (GQ Attachment 15) for wholly-state-owned enterprises (the SOA Law); and
2. the *Company Law* (GQ Attachment 12) in relation to the other three categories of State-invested enterprises.

The GOC, as part of its GQ response, explained that the notion of the 'capital contributor' is equivalent to the term 'shareholder' of a company as used in *Company Law*. The GOC further explained that the term capital contributor is a legal notion that indicates the shareholding body comprising the State. The GOC stated that the National State-Owned Assets Supervision and Administration Commission (SASAC) and/ or the provincial or local equivalents perform the role of capital contributor on behalf of the State Council or local people's government respectively¹³. The GOC has asserted that the institutions performing contributors' functions are shareholders in the normal sense¹⁴.

The GOC has advised that SASAC is the main body responsible for the implementation of the system for the administration and supervision of state-owned assets in accordance with the *Law on State Owned Assets*¹⁵. As stated above, the responsibilities of SASAC include performing the capital contributor functions for SIEs.

In accordance with the *Company Law*, a Board of Supervisors may be established to undertake functions of scrutiny and supervision of the enterprise¹⁶. For a wholly state-owned enterprise, its board of supervisors shall be appointed by the agency performing the contributor's functions¹⁷. Hence SASAC for some SIEs shall appoint a board of supervisors. The responsibilities of the board of supervisors are set out in Article 54 of the *Company Law*.

3.4 The GQ and response

Customs and Border Protection sought extensive information in the GQ and SGQ concerning the core features of SIEs producing HRC and/or narrow strip and their relationship to the GOC, which it considered necessary to evaluate whether Chinese HRS SIEs are public bodies in light of the DS379 findings.

The GOC provided responses to both the GQ and SGQ, including multiple requested documents. However, Customs and Border Protection considers that the GOC did not provide detailed responses to several questions posed in the GQ and SGQ.

¹³ GOC GQ Response, response to question D2.11, pg.210

¹⁴ GOC GQ Response, response to question D2.7(b), pg. 207

¹⁵ GOC GQ Response, response to question D2.8, pg.208

¹⁶ GOC GQ Response, response to question D2.14, PG.214

¹⁷ Law on State Owned Assets, Article 19

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The GOC did respond to certain questions regarding the core features of the SIEs producing HRC and/or narrow strip in a general manner with reference to legislative and regulatory provisions.

3.4.1 Key information not provided

As part of the GQ, the GOC was requested to respond to a series of questions regarding:

- ownership;
- governance;
- performance and profits; and
- enterprise functions

of identified SIEs that produce HRC and/or narrow strip.

Included in the GQ was a request at Question D2.25 to describe the legal structure of the enterprise showing the percentage of ownership by the GOC and other entities; the ownership of all entities including subsidiaries and parent companies, and the ownership of these entities (also indicating the functions and roles of each associated entity including whether they are involved in the production of HRS, HSS or any other steel product). The GOC did not provide a detailed response to this question, stating:

HSS and HRC sectors are huge, diversified and dynamic, with a low concentration ratio. Unfortunately, the GOC has no systematic and comprehensive and statistical data to respond to the level of detail required by this question.

At Question D2.27 of the GQ, the GOC was further asked to identify any payments or injections of funds made by the GOC into HRC and/or narrow strip SIEs for a 10 year period. The GOC did not provide this information, stating:

...the GOC is not responsible or authorised to hold and provide such detailed information about individual enterprises.

Further, at C3.11, the GOC was requested to provide the annual reports of 11 identified iron and steel industry SIEs. The GOC provided the requested annual reports for 6 of these entities, only 5 of which were provided in English.

It is considered that this requested information, particularly the annual reports of these entities (which are at least in part owned by the GOC and it is therefore reasonably considered that the GOC would have access to these reports), would have assisted Customs and Border Protection in its analysis of this matter.

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3.4.2 GOC access to requested information

As discussed above, it is considered that the GOC, as an investor in SIEs, would have access to the annual reports of iron and steel industry SIEs as requested in the GQ, however not all requested annual reports were provided.

Further, as part of its response to the GQ, the GOC provided Customs and Border Protection with a translated copy of the *Interim Measures for the Administration of Comprehensive Performance Evaluation of Central Enterprises, Order of the State-owned Assets Supervision and Administration Commission of the State Council (No. 14)*.

It is noted that this instrument requires enterprises whose investment contribution duties are performed by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) to undertake comprehensive performance evaluations in respect of financial and management performance.

In response to question D2.19 of the GQ, the GOC indicated that there are SIEs in the steel sector in China for which SASAC performs the role of capital contributor.

Customs and Border Protection therefore considers that the GOC is in possession, for at least some SIEs in the steel sector, information relevant to the questions concerning ownership, governance, performance and profit, and enterprise functions.

3.5 Indicia of the Appellate Body in DS379

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

Customs and Border Protection is not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing HRC and/or narrow strip.

As discussed in Section 3.3, the GOC has submitted that the key pieces of legislation that governs Chinese SIEs are the SOA Law and the *Company Law*. Customs and Border Protection has not found provisions in these laws that expressly vest SIEs with government authority.

On the contrary, the GOC submitted that these enterprises operate in line with the general principle of separating government functions from enterprise management.

The GOC observed in response to Question D2.22:

The principle of separation of government functions from enterprise management requests strict separation of government

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

This was (sic) policy was first proposed and implemented mainly in the late 1980s and continued into the 1990s. After implementation of the policies explained in response to questions D2.21, the focus of State investment reform moved to "reform and restructuring"; "advanc[ing] the establishment of modern enterprise system"; and "improving corporate governance".

The GOC submitted this principle exists in the SOA Law, where Article 6 states that the capital contributors' functions in wholly-owned SIEs must be carried out:

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

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

Bodies performing the contributor's functions shall protect the rights legally enjoyed by the enterprises as the market participants, and shall not intervene in the business activities of enterprises except to legally perform the contributor's functions.

The evidence above indicates that the capital contributor is, expressly through legislative means, prevented from exercising government functions in the performance of its duties.

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

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

Customs and Border Protection has not encountered direct evidence to suggest that HRC and/or narrow strip-producing SIEs in China have expressly been granted the authority to exercise governmental functions (e.g. provided for in the entity's article of association, etc.).

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

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

[Emphasis added]

Customs and Border Protection considers this direction requiring SIEs to comply with national industrial policies, amounts to a direction that SIEs carry out a government function, namely the achievement of the GOC's national industrial policy objectives. Further evidence has been encountered that suggests this function is actively performed by SIEs (see below).

Additionally, Customs and Border Protection considers that there is a significant body of circumstantial evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the Steel Industry.

Broad GOC policies and plans

Customs and Border Protection has examined the various policies, plans and implementing measures of the GOC outlined in the following documents:

- the *Development Policies of the Iron and Steel Industry* (2005)¹⁸ (the 'National Steel Policy' or NSP);
- the *Blueprint for Steel Industry Adjustment and Revitalisation* (2009 – 2011)¹⁹ (the 'Revitalisation Plan');
- the *Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities* (No.2 [2010] of the State Council)²⁰ (the Backwards Capacity Notice);
- the *Directory Catalogue on Readjustment of Industrial Structure*²¹ (the Directory Catalogue), and the *Decision of the State Council on Promulgating the "Interim Provisions on Promoting Industrial Structure Adjustment" for Implementation*²² (the Interim Provisions)

¹⁸ GOC GQ Response Attachment A1

¹⁹ GOC GQ Response Attachment A12

²⁰ GOC SGQ Response Attachment 176

²¹ GOC GQ Response Attachments A6.1 and SGQ response Attachment 173

²² GOC SGQ Response Attachment A19

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- the *Circular of the State Council on Accelerating the Restructuring of the Sectors with Production Capacity Redundancy*²³ (the Redundancy Circular);
- *Notice of the State Council on Ratifying and Forwarding the Several Opinions of the National Development and Reform Commission and Other Departments on Curbing Overcapacity and Redundant Construction in Some Industries and Guiding the Sound Development of Industries*²⁴ (the 2009 Overcapacity Notice);
- the *Circular on Controlling Total (Capacity), Eliminating the Obsolete (Capacity) and Accelerating Structure Adjustment of Iron and Steel Industry* (the Steel Industry Capacity Circular);²⁵ and
- the *Standard Conditions of Production and Operation of the Iron and Steel Industry*²⁶ (the Steel Standard Conditions).

These policies, plans and implementing measures are discussed in detail in Customs and Border Protection's report, *Preliminary Assessment of Market Situation and Reasonableness of Exporters' Costs – China* (Preliminary Market Situation Report), available on the public record.

These GOC documents comprehensively outline the GOC's aims and objectives for the iron and steel industry²⁷ in China (including manufacturers of HRC and/or narrow strip). The overall aim of these policies, plans and measures is summarised within the NSP:

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

²³ GOC response to the GO, Attachment A20.

²⁴ GOC GO Response Attachment 150

²⁵ Not provided by the GOC although requested, but outlined by the CBSA in its CSWP Statement of Reasons.

²⁶ GOC GO Response Attachment 160

²⁷ The GOC's NSP defines the 'iron and steel industry' as 'the selection of iron mines, manganese mines and chromium mines and working techniques and relevant supporting techniques such as agglomeration, carbonization, iron alloy, carbon products, fire-resisting materials, iron smelting, steel rolling and metal products'. This is broad, and extends from raw material mining through to the production of steel products themselves (including HSS). However, in practice, the NSP and other GOC macroeconomic policies extend beyond those activities and products listed in the NSP definition to include further matters, including coking coal mining and coking and steelmaking and casting. The term 'iron and steel industry' and related terms is therefore used in this report in the broad sense that the GOC uses it – ranging from the mining of steel raw materials, through to the manufacture of HSS and other metal products.

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

Evidence of SIE role in policy compliance and implementation

Within its Preliminary Market Situation Report, Customs and Border Protection outlines evidence that the GOC actively implements and monitors the progress of its policies, plans and implementing measures. It is considered this activity is in line with Article 36 of the SOA Law.

Further evidence has been encountered that demonstrates that Chinese iron and steel industry SIEs (particularly Baosteel, China's largest steel producer and a known manufacturer of HRC) are in fact leading the implementation of these policies, particularly the merger and restructuring of the industry.

The evidence that indicates this is occurring is outlined in detail in the Preliminary Market Situation Report, however the below extract from Baosteel's 2010 Annual Report has been reproduced here as an example of this evidence:

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

[Emphasis added]

Further to the above, Customs and Border Protection observes the provisions of:

- the *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (SASAC Guiding Opinion);²⁸ and
- the *Interim Measures for the Supervision of and Administration of the Assets of State-Owned Enterprises* (the Interim Measures);²⁹

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

The GOC provided the SASAC Guiding Opinion in response to the GQ. The purpose of the SASAC Guiding Opinion is to further economic reform through the adjustment of state-owned capital, reorganisation of state-owned

²⁸ December 5, 2005, General Office of the State Council – GOC response to the GA Attachment XX

²⁹ *Interim Regulations on Supervision and Management of State-owned Assets of Enterprises*, Attachment 170

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enterprises as well as improvement of the mechanism of entry-withdrawal and rational movement of state-owned capital³⁰.

This document indicates that SIEs have played an integral role in implementing GOC policies and plans, particularly those in relation to *"executing the spirits of the Third and Fifth Plenary Sessions of the Sixteenth CPC Central Committee, and the Opinions of the State Council about Deepening the Economic System Reform, namely:*

- "...enhance the state-owned economy's controlling power, influence, driving force, bring the leading role of state-owned economy into play...";
- "...persist in strengthening supervision over state-owned assets, rigidly enforce the procedures for property right transactions and equity transfer, promote orderly flow, prevent the loss of state-owned assets and ensure the value maintenance and increase of state-owned assets";
- "...persist in safeguarding the legitimate rights and interests of workers, protect the workers' rights to enterprise reorganisation, restructuring and other kinds of reform, and fully mobilize and protect the initiatives of the vast majority of workers to participate in the reform and reorganisation of state-owned enterprises";
- "promote state-owned capital to concentrate on major industries and key fields relating to national security and national economic lifelines... and accelerate the formation of a batch of predominant enterprises with independent intellectual property rights, famous brands and strong international competitiveness";
- "enhancing the controlling power of state-owned economy, and bringing its leading role into play".

Further, the GOC has provided the Interim Measures in response to the GQ. The purpose of the Interim Measures is establish a State-owned assets supervision and management system that suits the needs of socialist market economy, to better run State-owned enterprises, push forward the strategic adjustment to the layout and structure of the State economy, develop and expand the State economy, and realise the preservation of and increase in the value of State-owned assets³¹.

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

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

³⁰ SASAC Guiding Opinion, preamble

³¹ Interim Measures, preamble

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[Emphasis added]

The sentiments of Article 14 reflect those of the SASAC Guiding Opinion, although it is acknowledged that this Article discusses the responsibilities of SASAC not SIEs.

In relation to the SASAC Guiding Opinion, the GOC has submitted that this is not a legally binding document (rather having the status of a research and discussion paper), and cannot override current law.

Further, the GOC has asserted that the current law, as outlined in Article 7 of the Interim Measures, which prevents SASAC from exercising any government functions of administrative public affairs. Article 7 states:

People's governments at all levels shall strictly abide by the laws and regulations on State-owned assets management, persist in the separation of government functions of social and public administration from the functions of investor of State-owned assets, persist in the separation of government functions from enterprise management and separation of ownership from management.

The State-owned assets supervision and administration authority shall not perform the functions of social and public administration assumed by the government. Other institutions and departments under the government shall not perform the responsibilities of investor of State-owned assets of enterprises.

The contradiction between Articles 7 and 14 of the Interim Measures is observed.

Conclusion – Indicia 2

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

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

It is noted that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g. annual reports of SIEs). Customs and Border Protection considers that further evidence of this indicia may have been observed within this omitted information.

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

Customs and Border Protection preliminarily considers that sufficient evidence exists to determine that the GOC is in fact exercising meaningful control over Chinese SIEs generally, and SIEs that produce HRC and/or narrow strip.

Iron and steel industry policy implementation

As discussed above, the GOC has issued a multitude of plans, policies and implementing measures aimed at realising its overall policies aims in relation to the Chinese iron and steel industry. Furthermore, evidence exists to demonstrate that SIEs are leaders in the implementation of these policies and plans.

In addition to this SIE-led implementation, significant further evidence exists that demonstrates the GOC itself (including provincial governments, the national government, and associated GOC bodies, agencies and ministries) actively implement and monitor the progress of these GOC policies and plans.

This is outlined in detail within Customs and Border Protection's Preliminary Market Situation Report. However, examples of this include:

- evidence of SIEs that the plans are in fact binding or restrictive in nature;³²
- reporting on the progress of industry consolidation and elimination of backwards capacity (such as the *significant progress concerning reorganization and integration* outlined in the Revitalization Plan); and
- statements by Chinese iron and steel enterprises that mergers have been GOC-directed.

Furthermore, the text of multiple GOC documents themselves indicate the binding nature of the policies and measures therein, such as the Interim Measures, which refer the Directory Catalogue and state in Article 19:

If any enterprise of the eliminated category refuses to eliminate the production technique, equipment or products, the local people's government at each level and the relevant administrative department shall, in accordance with the relevant laws and regulations of the state, order it to stop production or close it, and shall take appropriate measures to resettle the employees of the enterprise, and guarantee the safety of financial institutions' credit assets, etc. If its products are subject to the administration by permit for production, the relevant administrative department shall lawfully revoke its permit for production;

³² For example, the Baosteel 2006 Annual Report states "...in order to achieve the restrictive target of energy saving, consumption lowering and pollution reducing, the Chinese government has promulgated a series of policies and regulations, explicitly pointing out the direction and timetable for the structural adjustment and elimination of the outdated capacity of the steel industry, and it is becoming common understanding to realise the adjustment of industrial layout by replacing the outdated capacity with the advanced capacity." (Emphasis added)

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the administrative department for industry and commerce shall urge it to lawfully go through modification registration or nullification registration; the administrative department of environmental Protection shall revoke its permit for pollution discharge; and the electric power supply enterprise shall lawfully stop supplying electricity to it. If any enterprise violates the provisions, its persons directly held liable and the relevant leaders shall be subject to liabilities in accordance with the law.

[Emphasis added]

This indicates the GOC's ability and willingness to exercise meaningful control over enterprises to the extent of refusing access to permits registration, necessary resources, and even forced closure.

Evidence that the GOC is actively enforcing these provisions, or that the provisions are having the desired impact (backwards production capacity being eliminated and/or inefficient enterprises closing or merging before direct intervention is made), is discussed within the Preliminary Market Situation Report.

Additionally, the impact of GOC policies on iron and steel industry SIEs is further noted in the documents submitted by Hebei Iron and Steel Co., Ltd (an HRC-producing SIE) to the Shenzhen Stock Exchange on issuing public A type shares. In these, the enterprise makes note of the GOC's iron and steel industry policies, including the NSP, Revitalisation Plan and Notice on Curbing Overcapacity, and makes the following assessment;

"In the background of State macroeconomic control of the steel industry, if Hebei Iron and Steel Co., Ltd is not in accordance with the relevant policies in a timely manner to eliminate backward production capacity, optimize product structure and improve technological level, future development of Hebei Iron and Steel Co., Ltd would be subject to certain policy constraints"

The above extract further highlights to Customs and Border Protection the fact that GOC policies, plans and measures for the iron and steel industry places constraints on SIEs, and thus meaningful control is placed over the activities, decisions and conduct of enterprises within this industry by the GOC.

'Go Out' / 'Going Global' strategy implementation

Further to the above evidence of control through the implementation and monitoring of policies examined in the Preliminary Market Situation Report, evidence exists that the GOC's broad (i.e. not iron and steel-industry specific) 'Go Out' or 'Going Global' strategy is also implemented by the GOC and exercises control over the business decisions of Chinese iron and steel industry SIEs.

³³ Hebei Iron and Steel Co., Ltd, *Public Issuance of Type A Share Prospectus*, pg 22

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Customs and Border Protection requested the GOC provide documentation on the 'go out' policy as part of its GQ.

The GOC responded that it could not identify a document matching this description.

Regardless, it is understood that the 'go out' policy or 'going global' strategy involves a GOC initiative to encourage Chinese iron and steel enterprises to invest in foreign mineral companies so that they can have an input in ore pricing to help stabilise production costs and upgrade risk controls. This was outlined within a report by KPMG entitled *China's Iron and Steel Industry Amid the Financial Crisis*,³⁴ submitted by the GOC as Attachment 26 to its response to the GQ.

It is understood that this policy/ strategy is embodied in relation to the iron and steel industry in the following articles.

- Article 30 of the NSP:

We should, according to the principles of making their advantages complement each other and achieving the win-win situation, intensify the international cooperation regarding overseas mineral resources. We should support those large backbone enterprise groups to establish overseas production and supplying bases of iron mines, chrome ore mines, manganese mines, nickel ore mines, waste steel and coking coal, etc. by way of setting up solely-funded enterprises, joint-equity enterprises, contractual enterprises and purchase of mineral resources. For such important raw materials and auxiliary materials as bulk ores and coke as needed by the enterprises in coastal areas, the state encourages them to solve it by way of overseas market.

The iron and steel industrial association shall do a good job in the industrial self-discipline and coordination and stabilize the raw material market both at home and abroad. Where two or more domestic enterprises are engaged in vicious competition for overseas resources, the state may adopt administrative coordination to hold alliance or select one of them to make investment so as to avoid vicious competition. The relevant enterprises shall be subject to the administrative coordination of the state...

- Article 10 of the Revitalisation Plan:

Actively realize going global strategy

³⁴ At page 30.

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Further streamline scrutiny procedure for project of going abroad, rationalize accordingly the measures in terms of credit, foreign exchange, fiscal and taxation and border control. Raise access criteria for going abroad of resource exploitation enterprises, and support those key eligible enterprises going abroad to do exploitation, development, technical cooperation and M&A. Further improve management of assets abroad to avoid and mitigate risks thereof. Increase scale of export credit for metallurgical equipments. Rationalize insurance policy of export credit. Encourage steel enterprises to establish marketing network abroad, and stabilize market share for high end products. Support enterprise to realize strategy of going global to enhance capacity of ensuring resource safety by making full use of various funds.

In its above-mentioned report, KPMG makes the following assessment in respect of the 'go out'/'go global' strategy;

"... large steel enterprises emerging from restructuring continue to implement the existing overseas expansion strategy. Case studies of overseas mining investments by Wuhan Iron and Steel, Baosteel, Angang and Chinalco show that state-owned giants with a background in China will be the only choices to implement the strategy of 'go-out' and control resources. This is why they can easily get support for various aspects – including government policies and financial funding – and successfully acquire overseas resources".

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

Conclusion – Indicia 3

For the reasons outlined above, it is considered that the GOC is exercising meaningful control over HRC and/or narrow strip producers.

The impact of these GOC measures is assessed in the Preliminary Market Situation Report.

As with indicia 2, it is noted that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g. annual reports of SIEs). Customs and Border Protection considers that further evidence of this indicia may have been observed within this omitted information.

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3.6 Conclusion

It is considered that evidence exists to show that both Indicia 2 (evidence that an entity is, in fact, exercising governmental functions) and Indicia 3 (evidence that a government exercises meaningful control over an entity and its conduct) are satisfied in relation to Chinese HRC and/or narrow strip manufacturers, though insufficient evidence exists to satisfy the requirements of Indicia 1 (the existence of a "statute or other legal instrument" which "expressly vests government authority in the entity concerned").

It is further considered that the GOC was likely to be in possession of further information that may have assisted in Customs and Border Protection's analysis of these matters and provided further evidence of indicia 1 and 2 in particular (particularly the annual reports of identified SIEs), but that this information was not provided.

Although not all 3 indicia have been satisfied in this case, it is noted that the Appellate Body in DS379 stated that "where the evidence shows that the formal indicia of government control are manifold and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority".³⁵

The Appellate Body's statement at 345 of the Appellate Body Report is again acknowledged:

...determining whether an entity is a public or private body may be a complex exercise, particularly where the same entity exhibits some characteristics that suggest it is a public body, and other characteristics that suggest that it is a private body.

It is considered that the position of SIEs that produce HRC and/or narrow strip in China are examples of entities that exhibit some public body characteristics and some private body characteristics.

Notably, GOC submissions and evidence suggest there is a certain degree of separation and independence of SIEs from the GOC, and that they are given certain freedoms to behave relatively independently. However, further evidence exists to show that these entities are still constrained by, and abiding by, multiple GOC policies, plans and measures, and in some circumstances acting as an important means by which these GOC policies and plans are implemented.

In noting this, Customs and Border Protection considers 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

³⁵ Appellate Body Report, *ibid.*, at [318]

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and/or narrow strip should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

As such, Customs and Border Protection considers that these SIEs qualify as 'public bodies' under the Act.

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**4 ASSESSMENT OF 'ADEQUATE REMUNERATION' FOR
HRC AND/OR NARROW STRIP IN CHINA**

After determining that SIEs that produced and supplied HRC and/or narrow strip in China are in fact 'public bodies' for the purposes of the Act, Customs and Border Protection has turned its attention to determining whether the provision of goods by these SIEs conferred a benefit in respect of the goods (i.e. whether this provision of HRC and/or narrow strip was at less than adequate remuneration).

In doing so, Customs and Border Protection has sought to establish an appropriate benchmark for HRC and/or narrow strip in China, having regard to the guidelines set out in ss.269TACC(4)(d) and (5) of the Act, and Article 14(d) of the SCM Agreement.

Customs and Border Protection has considered the reasonableness of using both an 'internal' benchmark (private prices in China) and an 'external' (out-of-country) benchmark.

4.1 The Act and SCM Agreement

S.269TACC(5) of the Act provides:

For the purposes of paragraphs (4)(d) and (e), 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.

[Emphasis added]

Article 14(d) of the SCM Agreement provides:

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).

[Emphasis added]

4.2 Use of external benchmarks - DS257

In the WTO dispute *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS257 dispute), the issue of the use of benchmarks for determining whether goods were provided at less than adequate remuneration in terms of Article 14(d) of the SCM Agreement was examined in detail.

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In particular, DS257 examined the circumstances under which an 'external benchmark' (i.e. a benchmark established outside of the domestic market of like goods) can be used.

4.2.1 GOC submission

In relation to setting an appropriate benchmark for HRC in China, the GOC, in its submission of 8 March 2012 (*Submission concerning Chinese domestic HRC costs and comparisons with other markets*),³⁶ has highlighted the following statement by the Appellate Body at paragraph 103 of its report in the DS257 dispute:

...an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods. 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).

The GOC then submits that, according to the findings in DS257:

...an external benchmark can only be used in situations where the predominant role of the government in the market [is] as a provider of the same or similar goods³ and where the government distorts the prices of those goods in the market by reason of its predominance. Even then, a benchmark may only be used which relates or refers to, or is connected with the prevailing market conditions in that country and which reflects price, quality, availability, marketability, transportation and other conditions of purchase or sale as required by Article 14(d).

[Emphasis added]

4.2.2 Customs and Border Protection's assessment

Customs and Border Protection has examined the findings of the Appellate Body in DS257, and notes the interpretation of DS257 offered by the GOC that an external benchmark can 'only' be used in the situation where the predominance of government as a provider of goods in the market distorts market prices.

However, Customs and Border Protection disagrees with the GOC's submission that this is the only circumstance in which an external benchmark can be used.

³⁶ Available on Customs and Border Protection's public record, file 2012/001527-03, folio 116.

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Firstly, Customs and Border Protection notes the Appellate Body's position that an internal benchmark (i.e. private prices for sellers of like goods) is the 'starting point' or 'primary benchmark' for establishing an appropriate benchmark to determine the adequacy of remuneration.³⁷

Customs and Border Protection also notes the Appellate Body's position that an external benchmark may be used if:

it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.

However, it is further noted that the Appellate Body in DS257 does not limit the use of external benchmarks to these circumstances, as the GOC's submission indicates. Although DS257 specifically considers a situation where private prices are distorted due to the predominant role of the government as suppliers in the market, it is considered that it does not limit the use of external benchmarks only to circumstances where this is the cause of the distortion.

Rather, Customs and Border Protection considers that the circumstances examined in DS257 are an example of where market distortion can lead to the use of external benchmarks. It is Customs and Border Protection's view that the material point is that private prices are unsuitable due to market distortion, not the reasons for this distortion.

4.3 Benchmark established

4.3.1 Starting point – internal benchmarks

Private prices

In establishing a benchmark price for HRC and/or narrow strip reflecting adequate remuneration, Customs and Border Protection has first considered whether prices from private enterprises in China were an appropriate basis for this benchmark.

However, Customs and Border Protection's preliminary assessment of the Chinese HRC and/or narrow strip market has found the entire market for HRC and/or narrow strip in China to be affected by significant influence by the GOC during (and prior to) the investigation period.

This preliminary assessment is outlined within Customs and Border Protection's report, *Preliminary Assessment of a Particular Market Situation and Reasonableness of Exporters' Costs – China* (Preliminary Market Situation Report), available on Customs and Border Protection's Public Record.

This report concludes:

...the GOC has exerted numerous influences on the Chinese iron and steel industry, which are likely to have materially distorted competitive

³⁷ At paragraph 90.

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conditions within that industry and affected the supply of HSS, HRC, narrow strip, and upstream products and materials.³⁸

It is considered that these GOC influences on the Chinese HRC and narrow strip market have had a distorting effect on the market overall, and hence have distorted prices throughout the entire market (it is considered this distortion is likely to have resulted in prices for HRC and narrow strip that are lower than they would have been without this GOC influence – see the Preliminary Market Situation Report).

It is noted that this distortion is considered to have affected the entire Chinese HRC and narrow strip market, and has therefore distorted all prices within that market, whether they be from SIEs or private enterprises. For this reason, Customs and Border Protection considers that all prices of HRC and/or narrow strip in China (regardless of whether the material was manufactured by an SIE or not) to not be suitable in determining adequate remuneration for HRC or narrow strip in China, as both private and SIE prices are distorted.

It is considered that the distortions observed in the Chinese HRC and/or narrow strip market as a result of GOC influence is another example of where market distortion makes private domestic prices unsuitable for determining adequate remuneration, hence providing for the use of external benchmarks.

Import prices

Customs and Border Protection has considered whether it would be suitable to use imported HRC prices into China as an appropriate in-country benchmark.

However, Customs and Border Protection considers that any import prices for HRC in China in the investigation period are not reasonable for establishing a benchmark as they would logically need to be at levels that are comparable to the GOC-distorted domestic HRC price in order to be a viable alternative.

It is considered that this notion is confirmed by the fact that China does not import significant quantities of HRC in any case (appearing to be somewhat isolated from the global HRC market).

4.3.2 Benchmark used – external price average

Benchmark selected

After concluding that private prices in China are unsuitable for determining a benchmark for adequate remuneration for HRC and/or narrow strip, Customs and Border Protection has preliminarily determined that it is instead reasonable to construct benchmarks for HRC using:

- the average of verified domestic black HRC costs incurred by exporters cooperating with the investigation into HSS from Korea, Malaysia, Taiwan and Thailand to arrive at a black HRC price;

³⁸ At page 55.

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- average of verified data of domestic pre-galvanized HRC costs incurred by cooperating exporters from Korea and Taiwan;

at comparable terms of trade and conditions of purchase to those observed in China.

Note: the use of Taiwanese and Korean-only galvanized HRC prices is due to the fact that the cooperating Malaysian and Thai exporters did not purchase significant volumes of pre-galvanized HRC in the investigation period.

Further, Customs and Border Protection has adjusted this benchmark to take account of:

- differences in delivery terms observed in China (ex-works, delivered); and
- the reduced cost of narrow strip in China (see below for adjustment discussion).

Customs and Border Protection notes that ATM, in its application and subsequent submissions, has proposed that the domestic Japanese free-on-truck (excluding delivery) HRC prices from Steel Business Briefing (SBB) be used as an appropriate benchmark for HRC in China. Various submissions have also been lodged by interested parties that refute the suitability of this Japanese price as a benchmark.

Regardless, Customs and Border Protection considers that the above verified prices of domestic black HRC purchased by cooperating exporters from Korea, Malaysia, Taiwan and Thailand be a reasonable benchmark basis, noting that:

- this data represents domestic prices actually paid for HRC by HSS manufacturers (as opposed to a benchmark like the SBB price, which is arrived at by market research of quoted prices rather than prices actually paid);
- this data represents delivered domestic prices (as do the HRC purchases recorded by Chinese exporters), at similar terms of trade; this data is for purchases of HRC by manufacturers of HSS, so they are likely to be for similar grades and specifications of HRC as that used in China; and
- it is considered the best available, reliable, and reasonable data to reflect the cost of HRC in South-East Asian markets.

Adjustments to the benchmark

1) Differences in quality, availability, or marketability

Customs and Border Protection considers that there is not sufficient evidence on the record to consider that any adjustment needs to be made to its HRC benchmark to account for differences in quality, availability, or marketability as evidence has not been presented to suggest significant differences between

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these matters in China and the domestic HRC market for Korea, Malaysia, Taiwan or Thailand.

2) Comparative advantage

Customs and Border Protection notes the Appellate Body's comments in DS257 at Paragraph 109 that:

It is clear, in the abstract, that different factors can result in one country having a comparative advantage over another with respect to the production of certain goods. In any event, any comparative advantage would be reflected in the market conditions prevailing in the country of provision and, therefore, would have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration, if it is to relate or refer to, or be connected with, prevailing market conditions in the market of provision.

This notion is also reflected in the GOC's *Submission concerning Chinese domestic HRC costs and comparisons with other markets* at p21, which concludes

...a price from some other market cannot simply be used as a benchmark without first attempting to determine its basic suitability for the task, in a comparative sense, and then adjusting it to accord with the prevailing conditions in China.

Customs and Border Protection observes this apparent need to adjust for comparative advantage when using an external benchmark in most circumstances.

It is noted that the GOC submits that such an adjustment would be a 'downwards' adjustment to the established benchmark cost as it considers that Chinese manufacturers hold a comparative advantage over other global producers.

However, Customs and Border Protection preliminarily considers such an adjustment is not reasonable or warranted in this case.

Firstly Customs and Border Protection notes that, by the GOC's own admission, China does not have an unfettered comparative advantage in producing HRC, narrow strip and the upstream raw materials of these products. Multiple identified GOC policies, plans and measures identify that China's iron and steel industry (including HRC and/or narrow strip) lacks advantageous conditions.

For example, the State Council's 2009 *Blueprint for Steel Industry Adjustment and Revitalization* (the Revitalization Plan) highlights many downfalls of the Chinese iron and steel industry:

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... the problems of the steel industry, which have been accumulated during the extensive development in the past, have been more troublesome than ever. (1) Blind investment based on misperception of market demands and overexpansion of aggregate capacity. Until the end of 2008, the production capacity of crude steel exceeds the actual demands for about 100 million metric tons. (2) Weak in innovation. The research and development and application of advanced production technology and high-end products are mainly relied on importation and imitation. Some of the superior quality and key steel products still request numerous import while the structure of consumption maintains at a low level. (3) Poor geographical location of production capacities. Most production facilities and steel enterprises are located in large and medium-sized inland cities, where production are poorly conditioned and seriously restricted in the terms of environmental absorbing capacity, water resource, transportation and energy supplies; (4) Low concentration rate. The average production capacity of crude steel is less than 1 million metric tons. Top 5 producers account only 28% of total production nationwide; (5) Weak in resource reserve. Domestic endowment of iron ore resource is low and the degree of self-sufficiency is less than 50%. (6) Disorder in circulation markets. More than 150,000 vendors are in the steel market. There is serious tendency to speculate on the markets.

It is considered this provides evidence to suggest that, if anything, China may have a comparative disadvantage in certain areas when it comes to producing HRC, narrow strip and upstream inputs.

Secondly, Customs and Border Protection considers that, in certain areas where China has developed (or is developing) a comparative advantage in producing HRC and/or narrow strip, this has been heavily influenced by GOC activities in the Chinese iron and steel markets (by way of policies, plans and implementing measures), which has been aimed at overcoming the comparative disadvantages outlined above.

This GOC influence is examined in detail by Customs and Border Protection in its Preliminary Market Situation Report.

Customs and Border Protection considers that, in this way, at least some of whatever comparative advantage Chinese HRC and/or narrow strip producers may have, is likely to have been created by GOC influence (and hence should not be reasonably adjusted for in any case).

3) Narrow strip adjustment

In its investigations with cooperating Chinese exporters of HSS, Customs and Border Protection has observed that the cost of narrow strip incurred by these exporters was lower than the cost of HRC. This was observed consistently throughout the investigation period, and seen in particular where exporters purchased both narrow strip and HRC.

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This is reflective of Customs and Border Protection's understanding that narrow strip is generally less expensive to purchase than HRC in China.³⁹

Consequently, Customs and Border Protection preliminarily considers it reasonable to adjust the HRC benchmark average downwards to account for this price differential for narrow strip.

In arriving at this adjustment, it is noted that the use of narrow strip is unique to the Chinese market amongst the originating countries/region investigated in this case, and thus no reliable external data was available to Customs and Border Protection to arrive at a 'narrow strip adjustment'. Consequently, Customs and Border Protection has calculated this adjustment as the quarterly verified weighted average difference between HRC and/or narrow strip purchase prices in China by the cooperating Chinese exporters.

It is noted that this differential is considered likely to be distorted by the observed GOC influence on the domestic HRC and/or narrow strip markets in, as this influence may adversely affect one product over the other. However, Customs and Border Protection does not consider this is easily quantifiable and it is instead reasonable to use the actual difference in prices for the purposes of establishing a narrow strip benchmark.

4) Delivery

The verified prices of HRC from Korea, Malaysia, Taiwan and Thailand are all for HRC delivered to the HSS manufacturer's premises. However, Customs and Border Protection notes that purchase of HRC and narrow strip by the cooperating Chinese exporters were made at delivered and undelivered (ex-works) terms.

To arrive at an ex-works benchmark price, Customs and Border Protection has used the verified quarterly weighted average delivery cost of HRC and narrow strip from one cooperating Chinese exporter (being the only exporter whose data allowed for this isolation and comparison) to arrive at a per tonne HRC and narrow strip delivery cost in China.

This delivery cost has been deducted from the adjusted benchmark prices to arrive at an ex-works benchmark price.

It is considered that this delivery cost to be reasonable as it reflects verified, actual delivery costs for HRC and narrow strip incurred in China.

³⁹ Customs and Border Protection notes that ATM has provided some information that suggests that narrow strip and HRC in China during the investigation period were at comparable prices (as observed in CON177 at Page 27). However, data verified with Chinese exporters of HSS contradicts this and is considered to be more reliable.

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4.4 Conclusion

Customs and Border Protection considers that, in assessing whether the provision of HRC and/or narrow strip in China by SIEs was for less than adequate remuneration:

- an external black HRC benchmark of average verified Korean, Malaysian, Taiwanese and Thai black HRC prices; and
- an external pre-galvanized HRC benchmark of average Taiwanese and Korean pre-galvanized HRC prices

should be used to compare with exporters' purchase prices of HRC from SIEs.

This benchmark should be adjusted in line with the following (where appropriate):

- the verified difference between HRC and/or narrow strip in China to arrive at a benchmark for narrow strip; and
- the verified per tonne HRC and narrow strip delivery cost in China to arrive at an ex-works benchmark price.

This results in the following 8 categories of benchmark, to be used as appropriate in determining the adequacy of remuneration for HRC and/or narrow strip paid by HSS exporters:

- black HRC delivered;
- black HRC ex-works;
- black narrow strip delivered;
- black narrow strip ex-works;
- pre-galvanized HRC delivered;
- pre-galvanized HRC ex-works;
- pre-galvanized narrow strip delivered; and
- pre-galvanized narrow strip ex-works.