Australian Government
Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved[1] form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time
Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences
You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

[1] By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.
[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. **Applicant's details**

Applicant's name: TIANJIN YOUFA STEEL PIPE GROUP CO., LTD

Address: NO. 33, BAIUIDAO, DAQIUZHUANG TOWN, JINHAI COUNTY, TIANJIN, CHINA PC301606

Type of entity (trade union, corporation, government etc.): Corporation

2. **Contact person for applicant**

Full name: MR. WANG TAO

MS. MU TONG

MR. ZHOU LEI

Position: Legal counsel

Email address: wangtao@rayyinlawyer.com

mutong@rayyinlawyer.com

zhoulei@rayyinlawyer.com

Telephone number: +86 13501092768

+86 15001062012

+86 18910276277

3. **Set out the basis on which the applicant considers it is an interested party**

Producer and selected cooperative exporter of the goods subject to the duty.

4. **Is the applicant represented?**

Yes ~~**No**~~

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.*

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☒Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods subject to the anti-dumping measures and therefore this application (the goods) are:

"certain electric resistance welded pipe and tube made of carbon steel, comprising circular and non-circular hollow sections in galvanised and non-galvanised finishes. The goods are normally referred to as either CHS (circular hollow sections) or RHS (rectangular or square hollow sections). The goods are collectively referred to as HSS (hollow structural sections). Finish types for the goods include in-line galvanised (ILG), pre-galvanised or hot-dipped galvanised (HDG) and non-galvanised HSS.

Sizes of the goods are, for circular products, those –exceeding 21 mm up to and including 165.1 mm in outside diameter and, for oval, square and rectangular products those with a perimeter up to and including 1277.3 mm. Categories of HSS excluded from the goods are conveyor tube; precision RHS with a nominal thickness of less than 1.6 mm; and air heater tubes to Australian Standard (AS) 2556."

7. Provide the tariff classifications/statistical codes of the imported goods

The goods are currently classified to the following tariff subheading of Schedule 3 to the *Customs Tariff Act 1995*:

- 7306.30.00 (statistical codes 31, 32, 33, 34, 35, 36 and 37)
- 7306.61.00 (statistical codes 21, 22 and 25)

- 7306.69.00 (statistical code 10)

8. **Provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

Anti-dumping Notice No. 2017/70.

9. **Provide the date the notice of the reviewable decision was published**

26 June 2017.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

See attached.

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☐

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

See attached.

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

The correct or preferable decision would be to not continue either any anti-dumping or countervailing measure as against Tianjin Youfa Steel Pipe Group Co. Ltd.

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

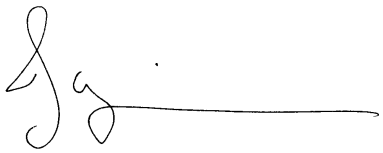
    Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

The proposed decision would lead to the removal of the countervailing measure in its entirety, and not a 12% duty as per the reviewable decision.

PART D: DECLARATION

The applicant/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.



Signature:

Name: Jeffrey Waincymer

Position: Trade Consultant

Organisation: Self Employed

Date: 26/07/2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative:	Jeffrey Waincymer
Organisation:	Self Employed
Address:	45 Victoria Road North, Malvern
	Melbourne VIC 3144
Email address:	jeffreywaincymer@gmail.com
Telephone number:	+61 418 147 629

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....

(Applicant's authorised officer)

Name:**MR. LI MAOJIN**

Position:**CHAIRMAN OF THE BOARD**

Organisation: **TIANJIN YOUFA STEEL PIPE GROUP CO.,LTD**

Date: 26/07/2017

NON-CONFIDENTIAL

SUBMISSION TO ADRP FOR REVIEW OF FINAL REPORT NO. 379 AND THE PARLIAMENTARY SECRETARY'S RESULTANT DECISION PER ADN 2017-70

SECTION A - The grounds on which the decision is argued to be not the correct or preferable one

1. Section 269ZHF(2) of the Customs Act 1901 indicates that there should not be a recommendation for continuation of a measure unless the Anti-Dumping Commissioner ("Commissioner") is satisfied that the expiration of the anti-dumping or countervailing measure would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the measure is intended to prevent. With respect to Tianjin Youfa Steel Pipe Group Co. Ltd ("Tianjin Youfa"), the Commissioner has recommended continuance of countervailing measures, has recommended new variable factors and a resultant 12% countervailing duty. The Parliamentary Secretary with delegated power has accepted that decision as announced in ADN 2017-70.

2. This application to revoke that decision is based on the following grounds:

   (i) The Anti-Dumping Commission ("ADC" or "Commission") failed to engage in a proper investigation in failing to analyse whether State Invested Enterprises were "public bodies"; wrongly concluded that Tianjin Youfa did not respond to information requests; failed to ask proper questions; failed to give timely notice of unanswered questions posed to GOC; placed undue reliance on previous investigations; and relied inappropriately on its own overly general market research report.

   (ii) ADC wrongly concluded that there was a subsidy from a "public body".

   (iii) ADC wrongly concluded that there was a "benefit" by reason of less than adequate remuneration from domestic suppliers of narrow strip and hot rolled coil ("HRC"), in so far as it adopted the wrong geographical benchmark; considered the wrong product; and failed to apply the *de minimis* rule.

   (iv) ADC wrongly concluded that any benefit was "specific".

   (v) The calculations applied by the Commission were erroneous, even if a countervailable subsidy otherwise existed, by reason of applying the wrong benchmark country; the wrong product; utilised the wrong income denominator; and failed to limit its accounting to the alleged

differentlal between actual prices and the benchmark and instead counted the entire benchmark figure as the benefit.

(vi) The Commission improperly double counted for the alleged LTAR input materials, adjusting both as to a constructed normal value and as to countervailable subsidy.

(vii) The Commission treated one exporter unduly favourably in terms of process.

(viii) The Commission failed to adequately consider whether there would likely be material injury caused if the measures were revoked.

(ix) The Commission wrongly recommended that the lesser duty rule not be applicable in these circumstances.

(x) The Commission wrongly based a number of the above assessments, on an erroneous finding of a market situation in the PRC.

3. For the reasons below, ADRP is asked to recommend revocation of the measures, recommend that no countervailing duty measures be applied, or in the alternative, recommend that a proper investigation occur prior to any further determination.

SECTION B - Did ADC engage in a proper investigation?

4. It is apparent from the behaviour of the Anti-Dumping Commission ("ADC") that it has not engaged in an appropriate investigation of the matters that could justify a countervailing duty. Before considering the circumstances and the behaviour of the ADC, it is appropriate to consider the provisions in the legislation and the WTO norms and jurisprudence.

5. Division 6A Part XVB of the Customs Act 1901 sets out the procedures to be followed in inquiries of this nature. The legislation does not elaborate on the evidentiary duties of the relevant authorities. These can be found in the WTO Agreement on Subsidies and Countervailing Measures ("ASCM") as to which ADC and Ministerial practices must be compliant.

6. Article 21.1 ASCM provides that a countervailing duty shall remain in force only as long as, and to the extent necessary to counteract subsidisation that is causing injury. Article 21.3 ASCM deals with the current circumstance, being an application for continuation of a measure. Most importantly, Article 21.4 stipulates that the provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Article 22.3 ASCM also provides that public notices and reports must be provided in sufficient detail as to the findings and conclusions reached on all issues of fact and law considered material. A separate report is to be provided as per Article 22.5. Article 32.1 ASCM provides that no specific action against the

subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

7. Article 12.1 ASCM stipulates that all interested parties in an investigation "shall be given notice of the information which the authorities require …" Annex VI provides for procedures for on-the-spot investigations pursuant to paragraph 6 of Article 12. Paragraph 7 indicates that "it should be standard practice prior to the visit to advise the firms concerned of the general nature of information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained."

8. Article 12.5 ASCM also stipulates that "the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based."

ADC failed to analyse whether State Invested Enterprises ("SIEs") were "public bodies"

9. ADC failed to ask appropriate questions of the exporter in relation to Program 20, the key alleged subsidy purportedly affecting Tianjin Youfa. Hence ADC has breached the requirements of Article 12.1 ASCM.

10. ADC availed itself of the entitlement in Article 12.6 ASCM and undertook a site visit in China. ADC had ample opportunity on that occasion to delve into the details of Program 20.

11. Most telling is the fact that the questionnaire for exporters did not seek to elicit details as to the current applicability and nature of any alleged governmental subsidies. An examination of the exporter questionnaire indicates that the Commission did not ask any questions necessary to determine whether the provider of input materials could be said to be a "public body" under the legislative definition of subsidy per s269T and Article 1.1 of the ASCM.

12. ADC made no attempt to differentiate among SIEs as to the degree of control and the ensuing likely benefit, if any. All that was asked was whether any such providers were State Invested Enterprises. No attempt was made to identify the degree of investment. If the hypothesis is that the Government of China influences the behaviour of certain companies, inducing them to lower prices, it stands to reason that the degree of ownership will impact upon the likely ability to influence pricing. To fail to ask the relevant question is a complete failure to engage in the essential exercise.[1]

[1] As noted below, this led to the Commission's erroneous conclusion that there was no difference between an SIE and a State-Owned Enterprise.

13. Either the differential level of ownership is important and they have failed to appropriately investigate this factor, or they erred in considering that the differential is unimportant. In either event, the ADC recommendation is flawed, as is the decision by the Ministerial Delegate.

ADC wrongly concluded that Tianjin Youfa did not respond to requests for information

14. ADC wrongly relied on Article 12.7 ASCM and implementing Australia provisions, when it wrongly asserted that relevant information had not been provided by the exporter and that as a result, ADC was entitled to make its decision on the basis of the facts available.

15. In the Final Report,[2] ADC asserted that questions were asked of Tianjin Youfa where no adequate responses were provided. That is entirely erroneous. This relates to a further ground of challenge below that the Commission used the wrong benchmark in seeking to identify whether any benefit was provided to Tianjin Youfa by reason of the cost of its input material. Section D below points out that the Commission erred in using the wrong geographical area for the benchmark and also in benchmarking an incorrect input material.

16. As to the latter, the Commission benchmarked for HRC prices, whereas the bulk of the input materials used by Tianjin Youfa is a cheaper product, being narrow strip. A lower cost benchmark would lead to a lower level of calculated subsidies. The legal specifics of that argument are left for that section, but for this section dealing with the Commission's inappropriate investigatory process, the Commission has ignored that true facts as to input materials by reason of erroneously alleging that it had not been provided this information in a timely manner. To that end, it concluded as follows:

> "The Commission has reviewed the evidence provided at the on-site verification and notes that Tianjin Youfa did not raise the issue of lower cost 'narrow strip' as the raw material used in the production of HSS. Nor did it request the downward adjustment during the on-site verification or in its REQ. The raw material purchase list provided to the Commission does not differentiate between purchases of 'narrow strip' and purchases of HRC. Tianjin Youfa has not provided any evidence attached to its submission that substantiates the use of 'narrow strip' as the only raw material or evidence that reflects pricing differences between 'narrow strip' and HRC. Therefore, the Commission is not satisfied that any adjustment is warranted."[3]

17. The Commission goes on to note that a further submission was provided on behalf of Tianjin Youfa on 22 May 2017 including a spread-sheet containing raw material purchases and purchase invoices relating to raw materials. It goes on to conclude as follows:

[2] Report 379, published 26 June 2017 ("Final Report").
[3] Final Report, p 26.

> "As discussed in section 4.4, the Commission is of the opinion that to have regard to this submission would prevent the timely preparation of this report to the Minister due to the submission not being received within 20 days of the publication of the SEF. The Commission wishes to point out that the evidence provided regarding Tianjin Youfa's raw material purchases … has not been sufficiently translated to allow any meaningful understanding of the figures calculated or any ability to verify the raw material purchases … The Commission considers that Tianjin Youfa were provided the opportunity to discuss and present evidence relating to these issues during the on-site verification and provide a further opportunity to satisfy the Commissioner of these claims during the seven days the Commission provided Tianjin Youfa to review the dumping margin calculations for accuracy."[4]

18. These are wholly inaccurate assertions. Representatives of Tianjin Youfa met with Commission staff during the verification visit in conjunction with Tianjin Youfa's external adviser, Mr Jack Howard of Staughtons Pty Ltd and their external lawyer, Ms Mu Tong, of the firm RayYin and Partners, Beijing. Mr Howard explained these issues when presenting the purchase documents during the site visit. He recalls that Commission staff seemed unaware of the difference between narrow strip (sometimes described as skelp) and that the officers subsequently undertook some Internet searches to appraise themselves of the terms. Furthermore, Tianjin Youfa's external lawyer undertook to provide further information to Mr Crowley of the investigatory team and did so via USB stick. Tables provided, differentiated clearly between HRC and strip and showed the percentages of each. Confidential Attachment 1 is that Table. Furthermore, the point was confirmed in Mr Howard's submission of 1 May 2017, that was clearly provided in a timely fashion.

19. In any event, it makes little sense for the Commission to conclude that it had a problem in not being able to verify "the figures …" The Commission never intended to accept the figures, on the basis of its conclusion that there was a market situation in China. The only point that Commission staff needed to take away from the site visit was the fact that the bulk of the purchases were for narrow strip and not HRC. It was the Commission's own determination to seek a benchmark price for relevant inputs from appropriate sources and not rely on Tianjin Youfa's pricing. The Commission was aware that the appropriate input was predominantly narrow strip. They should then have identified which producers of strip were SIEs and which producers of HRC were SIEs. They would have found that narrow strip is essentially made by private companies, hence showing little likelihood of any input subsidy to Tianjin Youfa.

20. Stated differently, there was nothing presented to the Commission that would suggest the contrary. It was only the Commission's erroneous

[4] Final Report, p 26.

assumption that all inputs are HRC that led it astray. Once the Commission was on notice that the relevant input was narrow strip, the Commission should have sought a benchmark for that product. As argued below, under WTO norms, that benchmark should have been from the People's Republic of China, but if the Commission had any valid reason to look outside of China, it needed to find an appropriate producer of such input goods as actually utilised. Tianjin Youfa is not aware whether any of the exporters from Taiwan, Malaysia or Korea in fact manufacture narrow strip. Nevertheless, it is unlikely that they do so. Narrow strip is produced in other countries, for example India.

21. It is not an appropriate investigatory mechanism to obtain a benchmark for a completely different product, being HRC, and then seek to make adjustments. The Commission should instead aim to directly find appropriate figures for narrow strip. This is the obvious approach when one considers the basis on which it could make any adjustment to HRC benchmarks if it thought it had received information in a timely fashion. One could only adjust HRC pricing to equate to narrow strip pricing, by looking at the differences in cost to make for each and also, the market circumstances for producers of such goods that could be expected to impact upon supply and demand. That exercise could only beundertaken by examining narrow strip production, in which case the Commission could simply look at that for the benchmark and not take the circuitous route via HRC figures that then need to be adjusted.

22. The discussion in a timely manner is evidenced indirectly by the verification visit agenda prepared by Commission staff for the visit on 8 to 10 March 2017 and 14 March 2017. This states that Commission representatives were Mr Joe Crowley, Senior Investigator and Mr George Katsoulis, Senior Investigator. The agenda includes "Discussion on the production process including: • raw material types, supply and inventory." It also refers to discussion of model matching. The agenda is attached at Confidential Appendix 2 and the above suffices as a non-confidential summary.

There were no proper questions to exporter as to current circumstances

23. As noted above, ADC spent little effort seeking to identify the current format of Program 20 and the extent and ambit, if any, of its current application.

24. As noted above, no questions were posed to exporters as to the current status of any alleged governmental subsidies. While ADC is entitled to draw conclusions based on best evidence available[5] and may in appropriate circumstances, draw adverse inferences from failures of interested parties to respond to relevant questions, it cannot be the case that ADC itself can refrain from asking the relevant questions and then draw some adverse conclusions against the interests of a particular party.

[5] Customs Act, s269TAACA(1)(c) & (d).

25. Stated differently, an exporter and importer are entitled to rely on the fact that ADC will pose any relevant questions in the questionnaire to exporters. If a question is not raised as to a particular issue, one can naturally presume that ADC does not consider it to be relevant. An exporter or importer can hardly be expected to guess as to all of the matters that ADC might consider relevant that it never posed for response via the questionnaire.

Questionnaire to Government of China (GOC)

26. The Final Report suggests that a questionnaire was sent to the Government of China but that no response was received.[6] Unlike Investigation 177, there does not appear to be a copy of that questionnaire on the public record for this continuation inquiry. If that had been produced, other interested parties could have sought to answer questions that the GOC sought not to respond to.

27. In addition to approaches via questionnaires, there is a WTO obligation to undertake consultations in such circumstances. The Commission ought to have placed on the public record, the nature and results of such consultations.

Undue reliance on previous investigations

28. It is readily apparent from a consideration of the Final Report, that ADC has followed the findings from Report 177 without a proper re-evaluation of the circumstances at the relevant point in time for this enquiry.[7] Procedural and evidentiary requirements are not satisfied simply by presuming, without sufficient investigation, that facts and conclusions that applied in Report 177 still pertain some years and months later. This issue will be discussed in more detail in relation to particular substantive allegations below. This section looks at the behaviour on a broader level.

29. The current inquiry was initiated on 31 October 2016. For the purpose of the inquiry, the Commissioner established an inquiry period of 1 July 2015 to 30 June 2016.[8] While the Commissioner is entitled to consider information prior to that period to identify trends, that can only be relevant to identifying such matters as supply and demand trends for the purpose of injury analysis. It certainly cannot be relevant to identification of a specific subsidy emanating from a public body likely to cause material injury at a later point in time. That has either occurred or has not between 1 July 2015 and 30 June 2016. If so, the calculation of the value of that subsidy has to relate to that time period.

[6] Final Report, p. 45.
[7] Investigations 177 is cited frequently throughout the Final Report, pp. 17, 19, 44, 42, 73, 78, 79, 88. Other investigations and reviews cited, such as at p. 19, p. 63, fn 119, and p. 94, all concern either different products, or the same products exported from a different market, from those relevant to the present case.
[8] Final Report, p. 6.

30. Where Tianjin Youfa is concerned, the only subsidy of any significance in terms of the recommendations, is the alleged application of Program 20.[9] That is based on an assertion of less than adequate remuneration[10] ("LTAR") for corporations in China providing key input commodities. An analysis of LTAR in such circumstances must comprise an analysis of the sales behaviour of relevant corporations between 1 July 2015 and 30 June 2016 and not some years earlier.

31. Furthermore, ADC must conduct an investigation pertinent to each individual selected exporter. It is simply inappropriate to speak on a general basis about worldwide supply and demand, general approaches of government to industry co-ordination and the like, and not even begin to attempt to investigate to the degree required, the elements of the alleged benefit within the time period as designated for the exporters whose interests are sought to be adversely affected.

32. Section 3.3 of the Final Report makes clear that data from 1 July 2009 to 30 June 2015 was also considered, as was the data in the original investigation including injury analysis from 1 July 2008. Once again, such data cannot say anything about the presence or absence of a specific injury-inducing subsidy from a public body in the relevant time period.

33. It is certainly appropriate for the Commission to consider its finding and methodology in Report No. 177 but only so as to establish an appropriate methodology for the relevant inquiry period currently applicable.

34. For example, the market analysis of China in Report 177 is based on the 11th Five Year (2006 – 2010) Plan of the People's Republic of China for the National Economic and Social Development.[11] Report 177 acknowledged that the 12th Five Year Plan (2011 – 2015) was published in March 2011, during its investigation period. But Report 177 declined to take it into account lest that delay the completion of the Report.[12] The present decision relies on the findings on Report 177 which does not cite the most recent, reasonably available information on Chinese policy. In the present matter, neither the 12th nor the 13th Five Year Plan (2016 – 2020) appear to have been considered. They are certainly not cited in the Final Report or the SEF. The ADC has failed to look to the best and most recent information reasonably available to it. The 12th and 13th Five Year Plan are freely available online in English.[13]

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[9] All others have clearly been found to be de minimis as per ADC calculations.
[10] Customs Act, s269TACC(3)(d).
[11] Report 177, p. 120.
[12] Report 177, p 120.
[13] 12th Five Year Plan For Economic and Social Development of the People's Republic of China (2011-2015): <http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html>, accessed 26 July 2017; The 13th Five-Year Plan For Economic and Social Development of the People's Republic of China (2016-2020) <http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf>, accessed 26 July 2017.

35. At the very least, the ADC would be reasonably expected to consider the 12th Five Year Plan (2011 – 2015) into account, when drawing conclusions regarding the Chinese domestic market for steel and iron in 2017, over an inquiry period spanning 1 July 2015 – 30 June 2016.[14]

36. As noted above, it is contrary to proper administrative practice to fail to investigate current facts in a current investigation and instead, rely on findings in a different investigation at an earlier point in time.

Can ADC rely on its own August 2016 general report?

37. The applicant in this matter seeks to rely from time to time on ADC's own general report on the Steel and Aluminium Industry, published in August 2016. A general report seeking to identify broad aspects of particular industries on a worldwide basis, can have no relevance to a particular investigation that calls for an analysis of a range of evidence in relation to the designated investigation period. The 2016 Report does not purport to drill down into dumping and subsidy issues in relation to particular product categories or discrete time periods or particular exporters, as must apply in an individual application for duty or as in this case, continuance of duty.

38. An example of the problem is found at page 18 of the Final Report which concludes that an analysis of various arrangements "indicates that many … market interventions had been economically inefficient and have resulted in distortions to market outcomes." For a measure to apply against an individual exporter, one needs to consider which market interventions apply to their commercial activities. After referring to Investigation 177 and the September 2016 Steel Report, the Commission concludes[15] "(a)ccordingly, and consistent with the original investigation and Reviews 265 and 266, the Commission considers the cost of HRC provided by Chinese exporters relating to the inquiry period do not reasonably reflect competitive market prices."[16] Yet those other investigations do not cover the relevant inquiry period. Hence, the Commission's process is again flawed.

39. Further examples of inappropriately relying upon a generic report not specific to particular exporters, not covering the same time period and not based on verified timely data, is shown in section 9.5 where the Commission cites its own report and its finding of on-going excess capacity. Broad reference to global capacity for crude steel does not speak specifically to the HSS sector.

40. It is perfectly reasonable to rely on such information to raise hypotheses, but the latter must be tested properly in the current investigation.

[14] Final Report, p. 6.
[15] Final Report, p. 19.
[16] Final Report, p. 19; it should be noted that Case 265 concerned a completely different product (aluminium extrusions), and Case 266 concerned exports from an entirely different market (Korea) from the present case.

41. A similar problem is the reference to the steel report finding that governments "commonly" intervene.[17]

42. The observations based on these generic sources then led the Commission to state, without reasoning, that "(o)vercapacity extends to global pipe and tube markets generally."[18]

43. Not only is such evidence inappropriate for a particular investigation, but to the extent that ADC purported to rely on its own previous findings, it has prejudged the outcome of its current investigation.

SECTION C - Was the alleged benefit from a "public body"?

44. The concept of a subsidy is defined in sub-section 269T(1). There are three elements that must be considered, whether the provider is a government or public body, whether there is a benefit provided in the form as designated and whether that benefit is specific.

45. A commercial benefit can only give rise to a valid countervailing duty under Australia's legislation and under Australia's international obligations per medium of WTO obligations, if it emanates from a government, either directly, or via a public body directly, or via a government or public body providing such a benefit through an intermediary entity. Report 177 acknowledged that unless Program 20 is delivered by a public body, it cannot give rise to a countervailable subsidy.[19]

46. In this case, the only allegation is that some suppliers of hot rolled coil were State Invested Enterprises ("SIEs") and in turn, that SIEs constitutes "public bodies" as per the terms of the ASCM and Australia's domestic legislation.

47. Article 14(b) ASCM, when considering calculation of a subsidy by reason of the provision of goods or services at less than adequate remuneration, is limited to the provision of goods or services "by a government …" That is extended by Article 1.1(a)(1) ASCM which allows a subsidy to be deemed to exist if "there is a financial contribution by a government or any public body within the territory of a Member …" Article 1.1(3) then deems a subsidy where "a government (or public body) provides goods or services … and (b) a benefit is thereby conferred."

48. "Public body" is not defined under the Customs Act, or under the ASCM.[20] The leading WTO jurisprudence determines the three considerations relevant to determining the presence of a public body:[21]

[17] Final Report, p.50.
[18] Final Report, p.50.
[19] Report 177, p. 223, fn. 183; definition of 'subsidy', per s. 269T Customs Act 1901; ASCM 1.1(a)(1).
[20] *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 ("*Dalian*"), para [51].
[21] Appellate Body Decision in US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, 11 March 2011 ("*US – Anti-Dumping (China)*").

1) *The existence of a "statute or other legal instrument" which "expressly vests government authority in the entity concerned".*

2) *Evidence that an entity is, in fact, exercising governmental functions.*

3) *Evidence that a government exercises meaningful control over an entity and its conduct.*

49. This was expanded upon in that case:

> "A public body within the meaning of Article 1.1(a)(1) of the ASCM must be an entity that possesses, exercises or is vested with governmental authority."[22]
>
> "In some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. … Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, **the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.** In some instances, however, 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" (emphasis added).[23]
>
> "**In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in**

[22] *US – Anti-Dumping (China)*, para 317.
[23] *US – Anti-Dumping (China)*, para 318.

> **the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government**. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant" (emphasis added). [24]

50. This case is cited by Report 177, and information regarding Program 20 was considered according to the three indicia.[25] While the first was not made out – no express authority for the SIEs to act on the GOC's behalf – this was no impediment to finding the SIEs in question were public bodies, given the other indicia.[26] This analysis has been implicitly relied upon in the present case. But the detailed inquiry undertaken in Report 177 has not been replicated here. The Statement of Essential Facts points broadly to the "Role and Operation of SOEs":[27]

> "Between 2010 and 2015, Chinese SOEs accounted for around 40% of total Chinese steel production and for eight of the 10 largest Chinese steel producers. While the Commission does not consider the presence of these entities alone causes markets to be distorted, it does mean that there is a higher likelihood that the GOC's plans and directives will be adhered to. It is also the Commission's view that steel producing SOEs have and continue to receive significant direct and indirect financial support from central, provincial and local levels of government as means to increase tax revenues, expand employment and maintain social stability. Examples of these support mechanisms include: government subsidies; support from associated enterprises (through direct subsidy, interest-free loans or provision of loan guarantees); and loans from state-owned banks."
>
> "The Commission considers these mechanisms have supported the rapid expansion of steel production capacity in the SOE segment, in spite of repeated orders by the central government to reduce the scale of steel production. It is also the Commission's view that these support mechanisms have created rigidities in the way recipient firms respond to price and profit signals and hence have significantly contributed to the excessive investment in capacity, excess steel production and distorted prices. These distortions are also reflected in that out of the 10 largest losses amongst steel producing firms within China in 2015, nine were SOEs."

[24] *US – Anti-Dumping (China)*, para 319.
[25] Report 177, pp. 234-244.
[26] Report 177, p. 244. This was the same conclusion drawn by Nicholas J in *Dalian* at paras 52 – 65.
[27] Statement of Essential Facts, pp. 76, 77.

> "The significance of SOEs to the broader Chinese economy, including the steel industry, is also reflected in the State Council of China's recent '*Guidance on the promotion of central enterprises restructuring and reorganisation*'. In introducing this guidance, the State Council notes the important role of 'central enterprises' in actively promoting structural adjustment, optimisation of structural layout and quality improvement within the Chinese economy. The guidance also indicates that the State Council will deepen reform of SOE policies and arrangements to optimise state owned capacity allocation, promote transformation and upgrading. Details concerning the promotion of central enterprises restructuring and reorganisation include the 'safeguard measures' theme, the strengthening of the organisation and leadership of SOEs, strengthening of industry guidance, increased policy support and improved support measures more generally."

51. The above comments do not speak to the matters directed by the WTO jurisprudence. In order to apply Australia's legislative provisions and WTO norms and obligations to the facts in issue, the decision-maker must have sought to identify the nature of the relevant SIE. Yet this never occurred. As noted above in Section A, ADC simply did not ask sufficient questions of the exporter in order to elicit the extent if any of government investment in SIEs, the degree of such investment and the extent to which such involvement may have led to pricing directions for LTAR, or which by some other means led to sales at less than adequate remuneration. The above quotes from the SEF even suggest that GOC has sought to demand profitability, which would entail profitable pricing and not the opposite.

52. As a co-operative exporter, Tianjin Youfa simply identified SIEs when asked. Nevertheless, ADC failed to attempt to identify the degree of investment interest, without which it would be impossible to identify the degree of control necessary to constitute a "public body." If ADC knows which questions are relevant and fails to ask them, it cannot draw adverse inferences leading to findings of significant countervailing duties.

53. The Commission thus erred in presuming that any benefit indirectly provided by a State Invested Enterprise satisfies the requirement that it be from a public body.

54. The error is shown in the Final Report section 8.5.2[28] when it concludes as follows:

> "The calculation of a benefit received under Program 20 relies upon Tianjin Youfa identifying which of its suppliers of HRC are state invested enterprises (SIEs)."

[28] Final Report, p. 45.

55. Identification of SIEs alone is inadequate, again as shown by WTO jurisprudence. The question is then as to how the pertinent information should be obtained. Commission staff would be aware that Tianjin Youfa cannot easily identify the degree of governmental investment in a multitude of HRS producers. All that Tianjin Youfa could do (and all it was asked to do), was research publicly available material, being the website, http://www.gsxt.gov.cn/index.html which apparently simply indicates whether there is any governmental ownership from any level of Chinese government.

56. Having that information only gives the Commission an indication of the range of entities that may meet the test as to what constitutes a "public body". Thus, information that indicates some degree of governmental investment, that may be investment from a range of differing levels of government with differing authority levels, should do not more than lead to further lines of inquiry.

57. While it is true that the Commission may itself have at least as much difficulty drilling down into the investment structure and management decisions of such entities, proper practice would be for the Commission to ask appropriate questions and only then make reasonable conclusions on the best evidence available. To fail to even address the factors relevant to a de facto assessment and rely simply on the presence of any degree of governmental investment, is contrary to law and contrary to Australia's international obligations.

58. It is also procedurally unfair to fail to ask the relevant questions and draw adverse conclusions as a result.

59. To the extent that the Commission sought to rely upon earlier findings, that would be unreasonable. Report 177 relied on three questionnaires answered by the GOC, which included around 150 attachments. If Investigation 177 failed to identify the level of control in SIEs, this was also defective. To the extent that it elicited more information in that regard than the current enquiry, such information should have been given direct consideration in this inquiry and addressed in the Final Report and the earlier SEF.

60. For the foregoing reasons, the alleged benefit relied upon by the Commission fails to meet the statutory definition of "subsidy" as per section 269T as nothing emanated from a "public body." Hence ADRP should for that reason recommend that the decision be revoked.

SECTION D - Was there a benefit?

61. Even if contrary to the above submissions, the relevant activities were those of a public body, there is then a need to consider whether any activities by such public bodies could constitute a "benefit" as per that concept in WTO norms and Australia's domestic legislation.

62. Section 269TACC of Customs Act indicates how the Commission is to determine whether a benefit has been received. Section 269TACC(1) requires the Minister to have "regard to all relevant information." That should be both information as provided and also, information that ought to have been sought by the Commission.

63. The only relevant provisions are section 269TACC(2)(b) and section 269TACC(3)(d) as to the provisions of goods by an alleged public body where such goods are provided for less than adequate remuneration.

The need for a proper benchmark

64. It is impossible to conclude whether a benefit arises or not, without comparing the actual behaviour of the allegedly public body concerned with some appropriate benchmark. Stated differently, but for the impugned governmental action, how would the relevant importer and exporter otherwise have been treated?

65. For reasons articulated below, it is asserted that ADC applied the wrong benchmark in this case for a range of reasons as follows.

Benchmark as to place, Taiwan, Malaysia and Korea versus either PRC or India

66. Most telling is section 269TACC(4) of the Customs Act which stipulates that the adequacy of remuneration "is to be determined having regard to prevailing market conditions for like goods … in the country where those goods … are provided …" The proper country where Tianjin Youfa is concerned should therefore be China.

67. Thus the Australian provisions and the ASCM provisions on which they are based call for benchmarking with like goods in the country or provision. This approach is also supported by Australian jurisprudence. In carrying out this analysis, it has been held that pursuant to s269TACC(5) regard must be had to the prevailing market conditions in the country of provision for the same or similar goods.[29]

68. Notwithstanding these requirements, the Commission looked solely at market conditions in Taiwan, Korea and Malaysia, being the data it was looking at for other exporters being challenged on this current inquiry. The Final Report gives no reason why this occurred.

69. To fail to consider the prevailing market conditions in China and shifting to a surrogate based on Taiwanese, Malaysian and Korean pricing is contrary to ASCM and hence contrary to Australia's international obligations.

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[29] *Panasia Aluminium (China) Ltd v A-G (Cth)* 2013 217 FCR 64 ("*Panasia*"), para 82 citing Report of the Appellate Body, US – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber for Canada, 19 January 2004 ("*US - Softwood Lumber*"), para 102.

70. The improper benchmarking would also be in violation of Article 9.4 ASCM which stipulates that no countervailing duty should be levied in excess of the amount of the subsidy found to exist calculated in terms of subsidisation per unit of the subsidised and exported product.

71. While it is accepted that in certain circumstances a third country can be used for benchmark purposes, this only arises where circumstances make this appropriate. Most importantly, such a determination should only be based on clear evidence and a thorough investigation. This did not occur on this occasion, with ADC seeming to simply follow whatever procedure it had thought was appropriate in relation to Report 177.

72. It is well-accepted that the scope for investigating authorities to consider a benchmark other than the private prices in the country of provision is very limited and must be done in accordance with certain requirements.[30] "[T]he fact that "the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted" so this alone cannot form the basis for proving distortion and thus relying on an alternative benchmark. Rather, the "*determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation" (emphasis added).*[31] Here, reference was merely made to the five-year old findings in Investigation 177 with no explanation as to how or why Taiwan, Korea and Malaysia were selected to provide alternative benchmarks against which Chinese market prices could be assessed. Before reference is made to alternative benchmarks, it must first be established that "private prices in that country are distorted because of the government's predominant role in providing those goods".[32]

73. A WTO Appellate Body has also noted that it is important that, when assessing the market conditions in another country, any comparative advantage in the country of provision 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."[33] No account was taken of the economies of scale in GOC and no account was taken of the purchasing power of Tianjin Youfa, one of the biggest producers in China. This contradicts WTO Appellate Body and Panel decisions, which affirm that

[30] *US - Softwood Lumber*, para 102.
[31] *Panasia*, para 82, citing *US - Softwood Lumber*, para 102.
[32] *US - Softwood Lumber*, para 90.
[33] *US - Softwood Lumber,* para 109; cited in Panel Report, US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, 22 October 2010 ("*Panel Report, US – Anti-Dumping (China)*"), para 10.22

distortion cannot be 'presumed' as a 'per se' rule but must be 'established' through a factual inquiry.[34]

74. WTO bodies have distinguished situations where "the government is a "significant" supplier from that where it is "the predominant" supplier, noting that "an allegation that the government is a *significant* supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision". Rather, a "determination of whether the private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, *must be made on a case-by-case basis, according to the particular facts" of each investigation*.[35]

75. A WTO Appellate Body has confirmed the ASCM "does not envisage the application of a "per se" rule whereby in every case and regardless of any other evidence, the fact that a government was the predominant supplier of a particular good would be a sufficient basis for rejecting private in-country prices as the benchmark."[36]

76. The thorough steps taken in that case can be contrasted to the process used here: the USDOC examined records of evidence regarding all potential benchmark prices, looked at the high level of government ownership in the industry, the market power of state-owned enterprises, evidence that the GOC carried out policies to suppress domestic prices and policies to enhance the output of downstream steel-using industries, as well as the fact that SOEs had substantial market power.[37] Additionally, the USDOC did not turn to benchmarks in nearby countries, but relied on world market prices from "Steel Benchmarker", a private publication, to determine whether the HRS was provided for less than adequate remuneration.[38] In this case, the Appellate Body found that the USDOC had made sufficient enquiries to determine whether the GOC had a predominant market share and emphasised that their general approach was clearly not one which merely relied on "a mechanical per se test under which, any time the government is a "significant" supplier, the USDOC mechanically concludes that private in-country prices are unusable as benchmarks" but instead was "clearly based on a case-by-case analysis of the particular facts of the investigation".[39]

77. A WTO Panel has also noted that it must be kept in mind that prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member" and that "it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions

[34] *Panel Report, US – Anti-Dumping (China)*, para 10.25; see also *US - Softwood Lumber*.
[35] *Panel Report, US – Anti-Dumping (China),* para 10.20, citing *US - Softwood Lumber*, para 102.
[36] *Panel Report, US – Anti-Dumping (China),* para 10.40.
[37] *Panel Report, US – Anti-Dumping (China)*, para. 10.51.
[38] *Panel Report, US – Anti-Dumping (China)*, para 10.50.
[39] *Panel Report, US – Anti-Dumping (China)*, para 10.57.

prevailing in one country on the basis of market conditions prevailing in another country."[40]

78. This is because of two key factors:[41]

- Firstly, "there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country"

- Secondly, "it would be difficult to ensure that all necessary adjustments are made to prices in one country in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country, so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country."

79. The jurisprudence also makes it clear that if a third country is to be utilised, it must be a country that most closely resembles the country under investigation. Otherwise differences in factors of production, economies of scale and the like, would distort the analysis. The richer the country selected and/or the less competitive its domestic industry, the higher the surrogate figures and the more one would arrive at a constructed higher subsidy level that does not accord with the true situation in the country under investigation. That would simply be protectionist.

80. An example is the use of Malaysia as part of the surrogacy analysis. It is common knowledge that until relatively recently, Malaysia had only one producer of HRC, Megasteel. That company has also regularly sought safeguard protection from its government. A monopolistic producer in a small economy that cannot make profit without safeguard measures is an inappropriate benchmark for a country like China, with so many producers of this basic input commodity.

81. In addition, the jurisprudence makes clear that for proper comparison purposes allowances must be made for the scale of production and the purchasing power of the exporter under investigation. Confidential data would have shown ADC the scale of activity of Tianjin Youfa. To select surrogates that have much lower levels of production without any appropriate allowance, is a failure to follow proper investigatory process as expected under WTO norms.[42]

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[40] *US - Softwood Lumber*, para 108.

[41] *US - Softwood Lumber*, para 108.

[42] In some circumstances it may be the case that the Commission asserts that after proper investigation, it was not able to assess an appropriate adjustment. That issue was raised in Report 177 and was dealt with by the court in *Dalian*. Whatever the justification or otherwise of the finding in that case, currently on appeal, it is clear that the proper investigatory process is to at least consider the question. The current investigation shows that this did not occur.

82. Even if the Commission was entitled to look at third countries, there is another reason why it should not have looked at Taiwan, Korea and Malaysia. As noted in section 10.5.3 of the Final Report, the Commission found that imports from India and the UAE were the lowest for most of the inquiry period.[43] There is no reason for the Commission to have selected benchmarks from countries it knew to have higher pricing. In terms of economic development and economies of scale, India would be a better benchmark for Chinese prices than smaller and/or more advanced economies.

83. The Final Report suggests that the Commission sought to rely on countries "in the region." One can hardly suggest that India is not in a similar region to China. In any event, geographical proximity would only be one factor to be considered by a thorough investigatory team.

84. There is also a potential distortion in limiting analysis to exporters accused of dumping. If the allegation is true, as ADC alleges in many instances, such enterprises might well inflate home prices and lower export prices. On this basis the benchmark would be excessive for Tianjin Youfa, which has not been subjected to anti-dumping duties.

85. For the foregoing reasons, the Commission has failed to find a "benefit" by reason of a benchmarking methodology open to it as to geographical sources. For this reason alone, ADRP should recommend that the decision be revoked.

Benchmark as to products, HRC versus narrow strip

86. As noted above, the Commission has failed to adopt an appropriate investigation in its treatment of the benchmarking exercise by wrongly concluding that Tianjin Youfa did not respond adequately in showing that it predominantly uses narrow strip in its production processes. Furthermore, ADC wrongly thought that a sensible mechanism would be to start with HRC pricing and perhaps adjust if information had been provided in a timely fashion. That section showed that timely information had indeed been provided and the Commission should have addressed the legal obligations in that regard. This section deals with the distinct argument that hving had that information, the Commission has failed to follow the legal obligations in establishing a benchmark for the input product as opposed to a benchmark for a different product.

87. As noted, Article 12.5 ASCM requires the authorities to satisfy themselves of the accuracy of information supplied. The applicant in this case sought to suggest that the relevant subsidy was provided by hot rolled coil provided on an LTAR basis. Yet when the authorities met with representatives of the exporter, they were told very clearly that the bulk of their goods under consideration, were produced with narrow strip. Verified documents provided at the time made this very clear. Yet ADC still continued to rely on

[43] Final Report, p. 66.

surrogate data about hot rolled coil pricing to underpin its calculations. Such an approach has no relevance to the real facts and hence is contrary to law.

88. The Commission should also have understood that Tianjin Youfa did or could have used narrow strip in its production even for reasons other than this direct advice. To the extent that the Commission could validly rely upon previous determinations, it should be recalled that at section 7.4.3 of Final Report 379, the Commission quotes from EPR 177 page 39 that there had been conclusions about the market for both HRC and narrow strip during Investigation 177. Thus, the Commission was well aware that HSS manufacturers either used HRC or narrow strip. There was then a need to identify which was the case for each exporter and what if any subsidies were provided in relation to each distinct input product.

89. During Investigation 177, the then ACDPS sought to replace the cost of HRC and narrow strip for each Chinese exporter. The Commission was thus in error when it stated in Report No. 379 that it "has again found that HRC represents the majority of the cost to make HSS."[44] The Commission had been advised at all relevant times that very little HRC was used by Tianjin Youfa.

90. The Commission has reiterated the error in discussing Tianjin Youfa in section 7.4.4.2 where it states that it "determined that the costs relating to purchases of HRC during the inquiry period contained in Tianjin Youfa's records do not reflect competitive market costs."[45]

91. The Commission's error in relying on HRC is further evidenced in its reference to that commodity in section 8.5.2.[46]

92. The problem with this approach was exacerbated when the Commission determined not to take into account different types of coil grades utilised by exporters from Korea, Malaysia and Taiwan in establishing a benchmark. Yet the Commission recognised different grades. If the Commission was entitled to find a benchmark surrogate for a particular grade used by a particular exporter in China, it should have looked for evidence of the value of identical or similar grades. To identify a weighted average for the exporters from Korea, Malaysia and Taiwan based on their product mix, with no attention whatever to the particular circumstances of the exporter from China that has been alleged to produce subsidised goods through the pricing of their input material, is unreasonable.

93. It is not clear what the Commission means in its reasons for not adopting this approach. It stated as follows:

[44] Final Report, p. 19.
[45] Final Report, p. 25.
[46] Final Report, p.45.

> "The Commission considers that attempting to group coil grades will inevitably lead to an exercise similar to model matching in an attempt to allocate non-identical grades purchased by the selected exporters and the Chinese exporters. Any calculation of this kind moves away from the emphasis on using actual weighted average costs in the calculation of the benchmark …"[47]

94. Actual weighted costs should be for input goods relevant to the exporter in issue.

95. The importance of properly benchmarking structural and non-structural inputs, is further confirmed by the approach of the Commission to considering the Australian market, where it notes that demand is primarily driven by housing and construction.[48]

96. This approach is also wholly inconsistent with the way the Commissioner dealt with individual companies for anti-dumping analysis. Examples of the Commission looking for comparable models can first be seen in relation to Kukje.[49] The Commission also understood the difference between RHS and CHS where that company was concerned.[50] The Commission also undertook model matching in relation to Alpine,[51] Femco,[52] Shin Yang[53] and Ta Fong.[54] Most telling is the Commission's treatment of Ursine.[55] The Commission acknowledges that it had erred at the SEF stage in using non-structural products as opposed to the structural products sold domestically by Ursine. Yet where Tianjin Youfa is concerned, the Commission has failed to acknowledge the converse scenario and the use of narrow strip and the non-structural production focus.

97. For the foregoing reasons, the Commission erred in benchmarking as against the wrong product and/or failing to make appropriate adjustments.

Is an average differential between SIE and non-SIE domestic product an actual benefit or do de minimis principles apply?

98. Pursuant to s 269TDA(16) of the Customs Act, if the countervailable subsidy is received on goods exported to Australia from a country that is not a developing country and the subsidy as a percentage of the export price of the goods is less than 1%, this indicates that it is a negligible countervailable subsidy and *de minimis* principles apply.

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[47] Final Report, p. 20.
[48] Final Report, p. 47.
[49] Final Report, p.28.
[50] Final Report, p.29.
[51] Final Report, p.31.
[52] Final Report, section 7.7.1.1.
[53] Final Report, p.35.
[54] Final Report, p. 36.
[55] Final Report, p. 38.

99. Article 11.9 ASCM states as follows:

> "There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidised imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1% ad valorem."

100. Evidence was presented to ADC that the average price for hot rolled sheet from SIEs in China was only marginally lower than the average price from non-SIE domestic producers and that on any proper method of calculation, the amount, even coupled with any other subsidies alleged as against Tianjin Youfa, would not begin to come close to the statutory cut-off of 1%.

101. ADC is only able to avoid this de minimis direction by choosing to calculate the subsidy, not by reference to real commercial data in China, but by ignoring the latter and applying a hypothetical surrogate country or group of countries known to have different factors of production, differing exchange rates and differing general market structure.

102. One cannot avoid the obligation to respect a *de minimis* standard by selecting a surrogate that would be known at the outset to have prices more than 1% higher than the country being examined.

103. In addition, no attempt was made by the authorities to determine whether allegedly subsidised material was In fact used in exports to Australia. Given the very small percentage of input purchases from SIEs, it is highly unlikely that any randomly sampled shipment to Australia would indeed include SIE source material.

104. The need to properly identify which inputs were allegedly subsidised and which were not, is supported by the structure of Annex II ASCM dealing with guidelines on consumption of inputs in the production process. While the discrete issue of indirect tax rebates is not relevant to this investigation, nevertheless, the Annex shows a need to consider which inputs were in fact the basis for rebates and which were not. Part II paragraph 1 of that Annex calls for consideration of whether the exporting Member has a procedure to confirm which inputs are consumed in the production of the exported product. Paragraph 2 of that sub-division requires a further examination where the exporting Member does not have such a system.

105. A similar logic should apply to properly matching allegedly subsidised input material, particularly where it only forms a very small part of an exporter's inventory and where this inquiry seeks to impose a 12% countervailing duty over <u>all</u> exported product.

SECTION E - Was any benefit "specific"?

106. Even if contrary to the above, the Commission could demonstrate that there has been a benefit provided by a public body, there is still a need to demonstrate specificity, without which there is no entitlement to impose a countervailing duty.

107. Specificity is defined in Art. 2 ASCM, and s269T of the Customs Act 1901. Both provide for express specificity, where a subsidy is expressly limited to certain enterprises.[56] The ADC acknowledges that there is no express, specific subsidy in relation to Program 20.[57] Nor is the subsidy contingent on export performance, preferential use of domestic goods over imported, or limitation of the subsidy to a specific geographical region.[58]

108. The rules provide an exemption for subsidies granted via objective criteria,[59] that is subsidies granted not to certain industries, but via objective measures such as number of employees or the size of the enterprise.[60] The conditions for exempted subsidies state that they must be neutral, must not favour particular enterprises, and be horizontal in application.[61] The ASCM provides that where a subsidy appears to fall into the exempted category, it can still be found to be specific in practice.[62] A similar carve out exists under the Customs Act.[63]

109. Article 2 sets out the principles to determine when a subsidy is specific "to an enterprise or industry or groups of enterprises or industries …" Article 2.1(c) concludes by saying that:

> "In applying this sub-paragraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation."

110. Article 2.4 ASCM requires a determination of specificity to "be clearly substantiated on the basis of positive evidence."

111. The ADC determined that Program 20 is *de facto* specific.[64] The ADC bases its conclusion on, "the fact that the subsidy program benefits a limited number of particular enterprises."[65]

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[56] Art. 2.1(a) ASCM; S269TAAC(2)(a) Customs Act.
[57] S269TAAC(1) Customs Act; Final Report, p. 44.
[58] S269TAAC(2) Customs Act.
[59] Art. 2.1(b) ASCM; s. 269TAAC(3) Customs Act.
[60] Art. 2.1(b) ASCM, fn. 2.
[61] S269TAAC(3)(c) Customs Act.
[62] Art. 2.1(c) ASCM.
[63] S269TAAC(4) Customs Act.
[64] Final Report, pp. 44, 45.
[65] S269TAAC(4)(a) Customs Act; Final Report, p. 44.

112. As noted by the WTO Appellate body, *de facto* specificity such as this is more difficult to establish than *de jure* specificity.[66] As noted in one WTO Panel Report, "a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis."[67]

113. The central question is this: Is every "downstream" manufacturer of products using any amount of hot rolled steel for any goods in any country, a sub-set of "a limited number of particular enterprises"?

114. Based on the ASCM criteria, it is simply impossible to say that even demonstrable LTAR inputs are a specific subsidy to value added manufacturers. There is no suggestion that the SIEs concerned, are directed to limit their HRC or HRS sales to any particular enterprises or industries. They are able to sell such inputs to any corporation anywhere in the world for any kind of value added activities. Providing an indirect pass through benefit to any end user of such inputs simply does not fit the requirement of an explicit limitation in Article 2.1(a), or fit the relevant factors in Article 2.1(c) being a limited number of certain enterprises or a predominant use by certain enterprises.

115. Once again, erroneous conclusions of fact are exacerbated by an inappropriate investigatory process. The Final Report states that the Commission examined the original findings in Report 177 and all available evidence in relation to Program 20 to determine whether it is specific.[68] It is certainly acceptable for the Commission to be aware of the original findings, but they cannot form probative evidence applicable to the current investigatory period. All those findings can do is to remind the Commission of the data that one might look at to then form an agenda for a current investigation.

116. That is particularly so when de facto specificity is being considered. In those circumstances one is seeking to identify who is currently predominantly using the LTAR products, whether certain enterprises currently gain disproportionate amounts and what if any pricing discretions or directions are currently applied by the granting authority.

117. There seems no evidence of any attempt to try and identify answers to these questions. The Commission's reasoning seems to be found at page 45 where it states:

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[66] *US – Anti-Dumping (China)*, para. 51

[67] Panel Report, US – Subsidies on Upland Cotton, 8 September 2004 ("*US – Upland Cotton*"), para 7.1142.

[68] Final Report, p 44.

> "Given that hot rolled steel is a key input in the manufacture of downstream products, including HSS, it is clear that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration."

118. This led it to conclude that the program is specific because it benefits a limited number of particular enterprises. On that supposed logic, any benefit in any commercial environment will automatically be seen as specific. Benefits to input products can only benefit those who use those input products so that alone cannot be a delineating factor.

119. Where hot rolled steel is concerned, this can be used in hundreds of industries, thousands of applications and hence should not be seen as specific.

120. Most importantly, given that the Commission has found little difference in the pricing between private PRC providers and SIE providers within the PRC, it needed to make some effort to decide why there really is some de facto direction that it purports to rely upon.

121. The Commission also erred in the way it treated the *Dalian* Federal Court decision when it suggests that an obiter dictum comment of the judge "appeared to support this finding …"[69] The relevant comment was as follows:

> "Although the number of enterprises so engaged is no doubt large, and their activities span a range of industries, it does not follow that the subsidy does not benefit 'a limited number of particular enterprises' within the meaning of section 259TAAC(4)(a)."[70]

122. This obiter dictum is stated in the negative and does not indicate how the Commission should determine whether such a broad-ranging benefit can nevertheless be said to be to a limited number of particular enterprises. The court is simply saying that it does not follow as a matter of course that the Commission cannot ever so hold in such circumstances, but does not begin to opine on when and why it should be able to do so. It is for the Commission to make a positive finding and not for interested parties to have to overturn some improper rebuttable presumption.

123. For the foregoing reasons, the Commission should not have determined that any alleged benefit was specific.

124. The previous sections have shown therefore that each of the requirements, being provision by a public body, provision of a benefit determined by way of an appropriate benchmark, a benefit of more than de minimis nature, and a benefit that is specific, cannot be satisfied. Hence there is no reasonable

[69] Final Report, p 45.
[70] Quoting from *Dalian* at [94].

basis for any countervailing duty and the recommendation should be that such measure not be continued to any degree.

SECTION F - Calculation of the amount of any subsidy

125. The previous sections have indicated why there should not be any countervailing duty applicable in these circumstances. Even if the contrary conclusion prevails, the Commission failed further in terms of the method of calculation. This section is based on the premise that, contrary to the balance of this submission, there was indeed a countervailable subsidy and that the raw data used in the calculations was essentially accurate. Nevertheless, even then, the Commission has misapplied that data to arrive at a level of duty more than four times that which could at most pertain.

126. Section 269TACD of the Customs Act merely indicates that if the Minister is satisfied that a countervailable subsidy has been received, the amount is an amount determined by him in writing. Subsection 2 indicates that if such amount is not quantified by reference to a unit of those goods determined by weight, volume or otherwise, it is necessary to work out how much of that amount is properly attributable to each such unit. The Regulations do not add much of significance. Article 14 ASCM outlines further the proper methodology for calculating the amount of a subsidy.

127. A number of flaws alluded to above, also flow into this claim of miscalculation as to the amount. As noted above, Article 14(b) ASCM requires an analysis of the adequacy of remuneration to be determined in relation to prevailing market conditions in the country of provision. ADC did not undertake this exercise. If it had done so, it would have found that there was no benefit or at most a *de minimis* benefit.

128. Further and as previously noted, ADC also wrongly used costs of HRC rather than strip, the latter comprising 90% of the exporter's input material. That would also skew the figures unfairly.

129. A further problem relates to the income figures utilised to calculate the countervailing duty percentage. Having identified the total value of the benefit (a figure that is erroneous as per the above), ADC then sought to apply it against the relevant income to identify a percentage. While that general approach is appropriate, ADC applied the total benefit of all input purchases as calculated, not against the total income of the relevant entity from use of those inputs used to calculate the benefit, but instead, only applied the latter as against the income from sale of the goods under investigation. When this was pointed out to ADC officers, they suggested that they needed to do this as they could only make adjustments in relation to the goods in issue.

130. The position they have taken makes no commercial sense and would be contrary to law. Either they should apply the total benefit to the total income

and find a per tonne percentage average, or if they are concerned to not include income unrelated to the goods in issue, they should equally remove the alleged benefit unrelated to the goods in issue. ADC was provided with confidential details as to the differing figures and simply ignored these.

131. The flaw in mismatching is also shown by the Commission's conclusion in section 11.5 which recommended that "the amount of the subsidy margin be expressed as a percentage of the ascertained export price." If it is looking at export prices of the goods under investigation alone, it should also look at the amount of the subsidy margin for such goods alone and not include the amount of any alleged subsidy on other goods utilising the input materials.[71]

132. It is also impossible to understand what the Commission means in section 8.5.1 when it states that because Tianjin Ruitong was a non-co-operative entity, "(t)he Commission is therefore unable to determine an exporter-specific subsidy margin for any of the exporters who were initially selected."[72] One should analyse each of those exporters individually and not seek to indirectly calculate margins for them via a non-co-operative entity.

133. The most significant computational error is that ADC deducted the total benchmark and not simply the difference. The error in the submission's calculations is shown in Confidential Appendix 3 and Confidential Appendix 4 to this submission. The following is a non-confidential summary.

134. Confidential Appendix 3 comprises the computations in an email from Mr Justin Wickes of ADC, to M J Howard on behalf of Tianjin Youfa attaching a version of Confidential Attachment 2 to Report 379 showing the subsidy margin calculations for Tianjin Youfa only. Confidential Appendix 4 addresses the figures in that attachment. The following suffices as a non-confidential summary. If one looks at the calculations enclosed with the email and for example, looks at the third quarter 2015 one sees the weight in tonnes, a figure we agree with, the weighted average ex-works price, a figure we agree with, and a benchmark determined by ADC, a figure we challenge in terms of entitlement, but have no basis to verify as to the amount. Assuming that amount itself is correct, the proper calculation of the total benefit would be to subtract the weighted average price from the benchmark price and multiply it by the total tonnage. Yet if one engages in that exercise with the figures on Mr Wickes's spread-sheet, one does not even begin to get close to the significantly larger benefit figure there identified.

135. The only way one can get to that benefit figure is to have wrongly presumed that the benchmark is itself the benefit received. That can be shown to be the flaw in calculation by dividing the benefit figure in that spread-sheet by the total tonnage. The result is the exact RMB benchmark figure.

[71] Final Report, p 76.
[72] Final Report, p 35.

136. Adopting that approach would presume that the input goods were provided for free, which is clearly not the case as would be known by ADC in verifying the exporter's accounting records. That error leads to a calculation more than four times that which would otherwise pertain.

137. For that reason alone, the decision is incorrect.

138. The failure to calculate a differential between the actual cost and the benchmark cost is readily highlighted when one looks at the ADC applied uplifts for material costs in the normal value calculations. Here it seems clear that ADC applied each exporter's verified material cost weighted average value, subtracted this from the surrogate material costs they determined, and only used the differential for a material cost uplift.

139. If all other arguments in this submission fail, ADRP should recommend that a recalculation occur and a new countervailing duty be calculated and applied.

SECTION G - ADC has improperly double counted for alleged LTAR input materials

140. Under both the legislation and WTO provisions, the same matter cannot give rise to determinations under anti-dumping and countervailing provisions. This has occurred on this occasion.

141. The Commission has found a market situation in China and has ignored actual normal value and has instead used constructed costs for such purposes. In dealing with HRS inputs, it used the same benchmark as it would have used in relation to the countervailing inquiry. Based on that benchmarking exercise, it found a positive dumping margin. Having formed that conclusion, it should not have relied upon the same benchmarking data to construct a hypothetical subsidy scenario.

142. The approach taken on this occasion is inconsistent with past practices by ADC. For example, the ADC's practice on accelerated review is to only calculate an ascertained export price using any adjustments to input costs for that process. Having engaged in that exercise, ADC then has an entirely sensible practice of stating that the same analysis will not be employed to identify any potential countervailing duty, as this would be double counting the adjustments already utilised.

143. If that practice were to be applied in this instance, there would be no countervailing duty whatever, the adjustment having already been made for normal value purposes leading to the identified anti-dumping margin.

SECTION H - Special anti-dumping treatment of Ta Fong, TNA's exclusive supplier

144. The Commission should have been aware that at least one of the applicants has an exclusive purchasing agreement. The broader the anti-dumping and countervailing measures that this manufacturer can obtain, the more likely that it will have both an oligopoly position within the domestic market and

also within the import market. It would be particularly important in that scenario for the Commission to properly verify purchases from Ta Fong, both to determine their accuracy and to determine the degree to which the manufacturer could possibly be materially injured by imports when it is a significant importer itself. Hence it was inappropriate for the Commission to elect not to conduct an on-site verification visit at Ta Fong's premises.[73]

SECTION I - Failure to consider material injury and causation

145. For the measures to be continued, the Minister must form a positive view as to the matters referred to in section 267ZHF(2) of the Customs Act. There is some debate as to the degree of likelihood, evidence supporting satisfaction and the relevance of factors such as foreseeability and imminence of any material injury should the measures be removed. While the Commission's comments in section 10.8 as to the relevance or otherwise of section 269TAE(2B) are not flawed as a matter of legal logic, it does not answer the question as to whether these elements are inherent in the section 269ZHF(2) analysis. They ought to be.

146. Article 11.7 ASCM requires the authorities to simultaneously consider both subsidy and injury from the time of the initial decision whether or not to initiate an investigation, and thereafter during its course. Article 15.1 requires a determination of injury to be based on positive evidence and involve an objective examination of both the volume of the subsidised imports and the effect of the subsidised imports on prices in the domestic market for like products and the consequent impact of these imports on the domestic producers of such products.

147. Article 15.4 requires consideration of other economic factors and indices so as not to attribute the injury improper to any subsidy. That is supported by Article 15.5.

148. As noted above, the first failure is to consider which imported HSS material is in fact subsidised. One cannot determine that without determining whether the HSS was made with LTAR HRC or not. No attempt was made by the investigators to track through and make a determination. If they had sought to do so, they would have readily identified that very little of the material exported by Tianjin Youfa could be said to have LTAR HRC.

149. More generally, the Final Report makes little attempt to properly identify injury and causation vis-à-vis alleged subsidisation.

150. A particular flaw in the injury analysis is the consideration of supply and demand in China for the relevant goods. At section 9.6.2, the Commission notes broader findings in part from differing time periods, about demand rebalancing away from construction, manufacturing, transport and rural sectors towards consumption and services. It notes a general decline in

[73] Final Report, p. 35.

overall production but contrasts production of pipe and tube as steadily increasing. It concludes that this data "demonstrates that China's crude steel industry not only has a capacity problem, it is faced with an environment of chronic over supply." Yet it is not possible to draw such conclusions without understanding the demand factors applying to the pipe and tube sector. The Commission seems to assume that any growth in production is not matched by any growth in domestic demand. It also presumes that it is not matched by any appropriate economies of scale that can legitimately target export markets as long as these are not improperly dumped or subsidised.

151. The Final Report quotes appropriately from the ADRP Report in Clear Float Glass which noted the hypothetical nature of the assessment under section 169ZHF, that ADC must consider what will happen in the future should the expiry of the measures occur and most importantly, that despite the hypothetical nature of the exercise, the recommendation by the Commission has to be based on facts.[74]

152. ADRP has also suggested that past conduct is probably the most reliable indication of future conduct, although that should not be accepted as a blanket rule. Once past conduct is identified, one must then hypothesise whether it is likely to continue or not. It is logical to hypothesise that a party might have acted in a particular way before any trade remedy measures were imposed, but once they had been imposed for a five year period, the threat of future action would lead to differing behaviour. In any event, the ADRP comments cannot be taken to be a binding test and cannot obviate attention being given to the current circumstances and behaviour during the period under investigation.

153. The entire logic as to the hypothesis of the scenario if the measures are removed seems unduly protectionist. The exercise should be about determining whether there would be a properly competitive market and not simply whether domestic manufacturers can have some guaranteed market share. For example, when speaking of exports, the Commission concludes that "(t)hese export pathways will allow Chinese producers to seamlessly redirect oversupply and increase their exports to Australia if the measures are removed."[75]

154. It is also remarkable that the Commission refers to the excessive duty rates applicable to unco-operative exporters and notes that these operate as a disincentive which would be removed if the measures were removed.[76]

155. More concerning is the fact that no real attempt is made to identify a likely impact if there is a removal of countervailing measures. The Commission simply concludes as follows:

[74] ADRP Report No. 44, Clear Float Glass from the People's Republic of Indonesia and the Kingdom of Thailand, December 2016, p. 9 at [36]-[38].
[75] Final Report, p. 52.
[76] Final Report, p. 53.

> "In relation to subsidisation, the Commission has found that exports of HSS from China continued to benefit from countervailable subsidy programs during the inquiry period."[77]

156. As noted above, the Commission has only found a countervailable subsidy by wrongly considering all SIEs to be public bodies; wrongly concluding as to de facto specificity; wrongly benchmarking; and making erroneous arithmetical calculations. Even leaving these flaws aside, it is not enough to say that a subsidy constructed via benchmarking is on-going, and then conclude *ipso facto* that material injury is likely to be caused. All such a conclusion says is that the Commission still believes that there is a market situation in China, still believes that it is entitled to benchmark in third countries, knows that those third countries have higher pricing levels than China and therefore that the Commission will easily be able to construct a hypothetical countervailing duty. One must then consider the nature of the market in Australia, both dumped, non-dumped, subsidised and non-subsidised imports, together with domestic production, to consider the likely competitive scenario and injury potential if the measures are removed.

157. A further flaw in the approach taken is the failure to consider the potential impact of each individual exporter. While it is entirely reasonable to consider cumulation in appropriate circumstances, if as is known in this inquiry, some concentrate on high quality structural grades, while others concentrate at the other end of the spectrum, the Commission must consider these aspects of the market to determine the likely injurious impact. To similar effect, in undertaking its price comparisons, the Commission has relied on broad country-by-country data without taking into account differences in quality as may apply to individual exporters.

158. Most telling is the fact that when reiterating the key factors supporting its conclusion in section 9.6.5, not one of the seven factors identified relates to subsidisation per se. While the subsidisation as found need not be the sole cause of injury, it is clear under both the legislation and WTO obligations that other causes must not be wrongly attributed to alleged subsidisation. The seven factors mentioned are simply about China's capacity and its interest in export markets. These factors simply do not speak to likely future LTAR by the corporations involved in producing input materials and the likely impact in the Australian market.

159. The same flaws are identifiable in the summary found at section 9.11[78] Here again the Commission seems only concerned about Australia's location relative to export markets; motivations of exporters; over-capacity and over-supply; decreased domestic demand; and trade remedy sanctions in other export markets. None of these factors have anything to do with the central question, as to whether a countervailable de facto subsidy can be

[77] Final Report, p. 53.
[78] Final Report, p. 60.

hypothesised to continue contemporaneously with the measures being removed and if so, whether such subsidy would be likely to cause or threaten material injury to the Australian industry.

160. The same flaws arise at page 63 where again the Commission simply refers to over-supply, demand, exports and the need to dump or circumvent anti-dumping measures to be competitive. None of this speaks to the situation of subsidisation.

161. A crucial finding is that the Commission found that imports from India and the UAE, not subject to the measures, were the lowest in price for most of the inquiry period.[79] Obviously, such imports are the price setters in Australia. Whether or not the measures exist, local manufacturers have to compete with Indian and UAE prices to be competitive. Hence it is not the dumping or subsidisation from those subject to the measures that controls the market.

162. Whatever the conclusion one draws on this issue, one should at least consider it properly, and address it in the SEF and Final Report.

163. To similar effect, in section 10.7, where ADC looks at factors other than dumping (and presumably where it should look at factors other than subsidisation), the Commission again notes the shift to sourcing from India and the UAE. Yet the Commission does not go on to give any reasoned conclusion as to why these supplier countries would not cause the same injury to the domestic industries whether the measures are imposed or not.

164. For the foregoing reasons, the Commission has failed to undertake an adequate analysis of both material injury and causation and its recommendations are flawed for that reason alone.

SECTION J - Failure to properly identify a non-injurious price

165. The flaws in identifying a countervailable subsidy purely by means of an inappropriate benchmark, are further exacerbated when considering the Commission's treatment of the lesser duty rule. The authorities are directed to consider applying less than the full amount of countervailing duty if the lower amount would alleviate the injury.[80] Nevertheless, in section 12.2.2, the Commission notes that pursuant to sections 8(5BAAA) and 10(3DA) of the Dumping Duty Act, the Parliamentary Secretary is not required to have regard to the desirability of fixing a lesser amount of duty if normal value was not ascertained under subsection 269TAC(1) because of the operation of subsection 269TAC(2)(a)(ii). The Commission recommended that the Parliamentary Secretary not have regard to the lesser duty rule.

[79] Final Report, p. 66.
[80] Article 19.2 ASCM.

166. The perversity where Tianjin Youfa is concerned is that the application of section 269TAC(2) arose simply because of a generic finding of a supposed long-standing nature of a market situation in China. Normal values from China were not accepted, nevertheless less than a 2% dumping margin was found pertaining to Tianjin Youfa, and that fact, not capable of allowing for an anti-dumping measure, nevertheless led to the lesser duty rule not applying to the separate issue of subsidisation.

167. The Commission should have considered the factors for and against the exercise of the discretion in such circumstances. To merely note that the legislation states that the Parliamentary Secretary need not do something, does not speak to the reasons why he might or might not exercise the discretion in a particular case. ADC should make recommendations as to reasons for or against the exercise of the discretion.

Section K - Improper determination of market situation in China

168. The previous section noted the market situation finding which undermined the lesser duty obligation. This finding also led to double counting.

169. The finding itself is a separate error. At section 7.4.4.2 of the Final Report, the Commission concludes that there is a situation in the domestic market in China such that domestic selling prices are not suitable for determining normal value.[81] This conclusion is not based on a proper examination during the relevant investigation period. Instead it seems to reiterate findings from Report 177 and the Commission's Steel and Aluminium Report of August 2016. For that reason alone, it is a defective determination.

170. The Commission is also likely to have continued to rely on inappropriate principles by which such a determination is to be made. A proper investigation needs to be consistent with Australia's international obligations, including promises made and sunset provisions in China's Protocol of Accession to the WTO.

171. The Commission's conclusions as to a particular market situation per section 7.4.1 of the Final Report are erroneous generally and are inapplicable as they pertain to Tianjin Youfa. The Commission states that it has "given consideration to conditions within the Chinese HRC market, as HRC is estimated by the Commission to account for above 90% of the cost to make HSS and must be a key determinant of domestic price of HSS in China." Footnote 15 notes that this estimate is based on verified information for Dalian Steelforce and Huludao City. This conclusion did not address the fact that the majority of Tianjin Youfa's products do not utilise HRC.

172. Even leaving aside Tianjin Youfa's circumstances, the Commission's analysis generally is wholly inadequate and does not provide any meaningful basis for its conclusions. All it states is the conclusion "that the Government of China

[81] Final Report, p. 24.

(GOC) materially influenced conditions within the HSS markets during the inquiry period. The GOC was able to exert this influence through its directives and oversight, subsidy programs, taxation arrangements and the significant number of state owned enterprises (SOEs)."[82] The Commission should identify which directives its sees as relevant for each affected exporter, what is the nature and measure of the oversight alleged, which subsidy programs are being considered, which taxation arrangements are of concern and why, and the nature and degree of state owned enterprises. The Commission goes on to conclude that the significance of the influence meant that the domestic price for Chinese HSS is substantially different to what it would have been in the absence of these interventions. It is entirely possible that some of these interventions, if proven, would lower prices, but others might in fact raise prices. To conclude that final prices would be substantially different, requires a balancing exercise after proper analysis of each likely form of impact. This simply did not occur.

SECTION L - Conclusions

173. For all the foregoing reasons, ADRP should recommend that the relevant measures not be continued. At the very least, the level of duty should be properly calculated and a proper investigation conducted.

[82] Final Report, p. 17.