Australian Government
Anti-Dumping Review Panel

APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City
ACT 2601
P: +61 2 6275 5868
F: + 61 2 6275 6784
E: ADRP_support@customs.gov.au

INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Australian Customs and Border Protection Service (ACBPS), or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures;
- to terminate an investigation into an application for dumping or countervailing measures;
- to reject or terminate examination of an application for duty assessment; and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations:

- to publish a dumping duty notice;
- to publish a countervailing duty notice;
- not to publish a dumping duty notice;
- not to publish a countervailing duty notice;

Review inquiries, including decisions

- to alter or revoke a dumping duty notice following a review inquiry;
- to alter or revoke a countervailing duty notice following a review inquiry;
- not to alter a dumping duty notice following a review inquiry;
- not to alter a countervailing duty notice following a review inquiry;
- that the terms of an undertaking are to remain unaltered;
- that the terms of an undertaking are to be varied;
- that an investigation is to be resumed;
- that a person is to be released from the terms of an undertaking;

Continuation inquiries:

- to secure the continuation of dumping measures following a continuation inquiry;
- to secure the continuation of countervailing measures following a continuation inquiry;

- not to secure the continuation of dumping measures following a continuation inquiry;
- not to secure the continuation of countervailing measures following a continuation inquiry;

Anti-circumvention inquiries:

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant;
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision;
- a person directly concerned with the importation or exportation to Australia of the goods;
- a person directly concerned with the production or manufacture of the goods;
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia; or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked "Confidential" and documents containing the summary statement of that confidential information should be clearly marked "Non-confidential public record version", or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- Minister affirm the reviewable decision (s 269ZZK(1)(a)); or
- Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- affirm his/her original decision; or
- revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- lodged with, or mailed by prepaid post to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  Australian Customs and Border Protection Service
  5 Constitution Avenue
  Canberra City ACT 2601
  AUSTRALIA

- OR emailed to:

  ADRP_support@customs.gov.au

- OR sent by facsimile to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  +61 2 6275 6784

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City ACT 2601
AUSTRALIA

Telephone:	+61 2 6275 5868
Facsimile:	+61 2 6275 5784

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2601

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular (Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

APPLICATION FOR REVIEW OF

DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☑ a dumping duty notice(s), and~~/or~~
☑ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or
☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in ~~an~~ attachments to this application:

☑ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☑ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☑ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☑ Full description of the imported goods to which the application relates.

☑ The tariff classification/statistical code of the imported goods.

☑ A copy of the reviewable decision.

☑ Date of notification of the reviewable decision and the method of the notification.

☑ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☐ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature: 

Name: Daniel Moulis

Position: Principal, Moulis Legal

Applicant Company/Entity: Government of the People's Republic of China

Date: 4 September 2013

ATTACHMENT A

4 September 2013

In the Anti-Dumping Review Panel

Application/s for review
Zinc coated (galvanised) steel and aluminium zinc coated steel exported from China and certain other countries

Government of the People's Republic of China

NON-CONFIDENTIAL

1 Applicant

Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

The applicant is the Government of the People's Republic of China ("the GOC") represented by its Ministry of Commerce ("MOFCOM").

The address of the applicant is No. 2, East Chang'an Street, Dongcheng District, Beijing, China 100731.

The Government of the People's Republic of China is the government of the country of export of goods the subject of the respective application/s for the publication of dumping duty notices and countervailing duty notices to which this Application to the Anti-Dumping Review Panel refers.

2 Applicant's contact details

Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation

The contact person at MOFCOM is Mr Tian Shuguang, Deputy Division Director, Bureau of Fair Trade for Import and Export, MOFCOM.

His contact details are:

- telephone +86 10 8509 3420;
- fax +86 10 6519 8443
- email – tianshuguang@mofcom.gov.au

3 Applicant's representative

Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

The GOC is represented in this matter by Daniel Moulis, Principal of Moulis Legal.

The contact details of Moulis Legal are:

- address - 6/2 Brindabella Circuit, Brindabella Business Park, Canberra International Airport ACT 2609
- telephone +61 2 6163 1000
- fax +61 2 6162 0606
- email - daniel.moulis@moulislegal.com

A copy of the authorisation of Moulis Legal is at Attachment B.

Please address all communications relating to this application to Moulis Legal.

4 Description of imported goods

Full description of the imported goods to which the application relates.

This Application applies to zinc coated (galvanised) steel and aluminium zinc coated steel ("coated steel") imported from the People's Republic of China. These goods are defined by Australian Customs and Border Protection Service ("Customs") in its Reports No. 190 ("REP 190") and No 193 ("REP 193") as:

(i) Galvanised steel

flat rolled products of iron and non-alloy steel of a width less than 600mm and,

equal to or greater than 600mm, plated or coated with zinc.

Galvanised steel of any width is included.

(ii) Aluminium zinc coated steel

"flat rolled products of iron and non-alloy steel of a width equal to or greater than 600mm, plated or coated with aluminium-zinc alloys, not painted whether or not including resin coating"

5 Tariff classification of imported goods

The tariff classification/statistical code of the imported goods.

The imported goods are classified to the following tariff subheadings in Schedule 3 to the *Customs Tariff Act* 1995 ("the Tariff Act"):

- 7210.49.00 (statistical codes 55, 56, 57 and 58);
- 7212.30.00 (statistical code 61); and
- 7210.61.00 (statistical codes 60, 61, and 62)

6 Reviewable decisions

Copy of the reviewable decision, date of notification of the reviewable decision and the method of the notification

Copies of the decisions are at Attachments C1, C2, C3 and C4.

The reviewable decisions were notified on 5 August 2013. They were published in *The Australian* on that day.

On that day the Anti-Dumping Commission ("ADC", formerly Customs) also caused to be published:

- Australian Dumping Notice ADN 2013/66 – *Zinc coated (Galvanised) steel and Aluminium zinc coated steel Exported from the People's Republic of China, the Republic of Korea and Taiwan*;

- *Report to the Minister No. 190 – Dumping of Zinc coated (Galvanised) steel and Aluminium zinc coated steel Exported from the People's Republic of China, the Republic of Korea and Taiwan* ("REP 190") - a copy of REP190 is at **Attachment D1**; and

- *Report to the Minister No.* 193 – *Alleged subsidisation of zinc coated steel and aluminium zinc coated steel exported from the People's Republic of China* ("REP 193") - a copy of REP 193 is at **Attachment D2**.

It should be noted that there are four reviewable decisions to which this Application refers. They are the dumping notices in relation to each of zinc coated (galvanised) steel and aluminium zinc coated steel (two notices) and countervailing notices in relation to each of zinc coated (galvanised) steel and aluminium zinc coated steel (two notices). The application form issued by the Anti-Dumping Review Panel ("ADRP") indicates that it is flexible for the inclusion of reviewable decisions in the one form.

References to "coated steel" in this Application are references to both zinc coated (galvanised) steel and aluminium zinc coated steel collectively.

References to "Customs" in this Application should be taken to be references to the Anti-Dumping Commission ("ADC") in relation to matters referred to in this application which occurred after the date on which the ADC assumed the responsibilities of Customs in relation to anti-dumping and countervailing matters (on and from 1 July 2013).

7 Applicant's reasons

A statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision

A Introduction

On 5 August 2013 the Attorney-General ("the Minister") decided to impose dumping and countervailing duties on coated steel exported to Australia from China. Specifically, the Minister decided to publish notices in relation to dumping under Sections 269TG(1) and (2) of the *Customs Act* 1901 ("the Act"), and notices in relation to subsidisation under Section 269TJ(2) of the Act.

The GOC seeks review of these decisions by the ADRP under Section 269ZZC of the Act.

In particular, the GOC notes the following key findings which led to Customs' recommendations in relation to the determination of dumping margins and subsidy margins in respect of the goods concerned, and ultimately to the reviewable decisions to impose dumping and countervailing duties against the goods when imported into Australia from Chinese exporters by the Minister, who accepted those recommendations:

- in relation to the dumping determinations[1] concerning coated steel exported from China:
  - the finding that the situation in the Chinese *"domestic market of galvanised and aluminium zinc coated steel exported to Australia from China"* was such that *"sales in that market were not suitable for use in determining a price"* under Section 269TAC(1) of the Act ("Finding 1");
  - the finding that the records of Chinese exporters of coated steel did not

[1] Sections 269TG(1) and (2) of the Act.

"reasonably reflect competitive market costs associated with the production or manufacture of the like goods" for the purposes of clause 180(2)(b)(ii) of the *Customs Regulations* 1926 ("Finding 2"); and

- the finding that the cost of hot rolled steel/coil ("HRC") of Chinese integrated producers of coated steel was to be substituted in the calculation of their normal values by a "benchmark" price of HRC ("Finding 3");

- in relation to the countervailing determinations[2] regarding the alleged Programs 1, 2 and 3 concerning Chinese exporters:

  - the finding that for the purpose of the alleged subsidy Program 1, enterprises with State investment that produced and supplied HRC to coated steel manufacturers were "public bodies" ("Finding 4");

  - the finding that for the purpose of the alleged subsidy Programs 2 and 3, enterprises with State investment that produced and supplied coking coal or coke were "public bodies" ("Finding 5");

  - the finding that a countervailable benefit was conferred by public bodies because the subject raw materials were provided at "less than adequate remuneration" ("Finding 6"); and

  - the finding that the alleged subsidies were "specific" ("Finding 7").

The GOC notes that the reviewable decisions involved a decision to reject the domestic sales prices of the Chinese coated steel exporters for the purpose of determining normal value under Section 269TAC(1) of the Act, on the basis of Finding 1. Further, based on Findings 2 and 3, Customs substituted (or "surrogated") the cost of HRC of the Chinese coated steel exporters

---

2 Section 269TJ(2) of the Act.

for the purpose of determining constructed normal values. The increased costs arising thereby increased the level of the normal values of the Chinese coated steel exporters, and generated and inflated the dumping margins determined for them. These decisions resulted in an incorrect decision to issue a dumping notice against the Chinese exporters concerned.

Further, Findings 4 to 7 resulted in the Minister deciding that Programs 1, 2 and 3 existed during the investigation period, thereby leading to the decisions to determine subsidy margins for the Chinese exporters of coated steel under those programs and to issue a countervailing notice against the Chinese exporters concerned.

The GOC submits that all of the above findings are manifestly flawed. The decisions made were not the correct and preferable decisions.

The GOC requests the ADRP to review these findings and to recommend to the Minister that the reviewable decisions be revoked and be substituted with new decisions on the basis:

- that the situation in the domestic markets for coated steel in China was not unsuitable for determining a price for normal value purposes (ie, in WTO parlance, that there was no *"particular market situation"* in the Chinese domestic markets) for the coated steel products concerned;
- that the Minister determines that the costs of the Chinese exporters are the costs set out in their financial records, without exception; and
- that the alleged subsidy Programs 1, 2 and 3 do not exist.

The grounds supporting the GOC's submission in relation to each of the Findings 1 to 7 are discussed separately as follows.

B Finding 1 – Particular market situation determination

1 The GOC is disappointed with the Minister's conclusions, on the recommendations of Customs, regarding the existence of a so-called particular market situation, and wishes to state categorically and without reservation that such a conclusion is both factually and legally incorrect.

2 Section 269TAC(1) of the Act provides that:

> *the normal value of goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

3 This general rule is subject to various exceptions, some of which are referred to in Section 269TAC(2). Section 269TAC(2)(a)(ii) is one of these exceptions. It refers to a situation that has become generally known as a "particular market situation". It permits resort to be had to either of Sections 269TAC(2)(c) or (d) for determination of normal value:

> *...where the Minister:*
>
> *(a) is satisfied that:*
>
> *...*
>
> *(ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);*
>
> *the normal value of goods exported to Australia cannot be ascertained under subsection (1);*

4 Section 269TAC(2)(a)(ii) is said to be the Australian legislative implementation of Article 2.1 of the World Trade Organisation ("WTO") *Anti-Dumping Agreement*. That Article provides, in this context:

> *When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country,[1] such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.*

> *1 Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.*

5 In Appendix 1 to REP 190, Customs determined that a "particular market situation" existed in the coated steel market in China within the meaning of Section 269TAC(2)(a)(ii). As a result of this, and of the related Regulation 180 finding, normal values for Chinese exporters were calculated under Section 269TAC(2)(c), which provides for the calculation of normal values on the basis of the exporter's costs to make and sell with an amount of profit. Critically, Chinese exporters' costs to make were surrogated by Customs with higher "benchmark" costs for hot-rolled coil ("HRC"), being a main raw material for the production of coated steel. The way this came about is due to the interaction assumed by Customs to exist between a finding of unsuitability of sales under Section 269TAC(2)(c), and a finding under Regulation 180 that, for similar reasons as those which led to Customs' opinion of "unsuitability", the HRC cost did not reasonably reflect a competitive market cost.

6 The GOC considers that there is no valid rationale for the particular market situation finding, namely that the *"prices of coated steel in the Chinese market are not substantially the same as they would have been without the influences by the GOC"*, and that this formulation of a test for "unsuitability" or for a "particular situation" in a market for specific like goods lacks any relevance to the questions posed under Australian law or under the WTO.

7 The suggestion that a particular market situation finding can be made so long as the Chinese domestic market is somehow influenced by the GOC, and that prices of coated steel are *"not substantially the same"* as they would have been without the GOC's influence, does not differentiate the Chinese market for coated steel from any other market in the world. The facts for a particular market situation determination did not exist and do not exist.

REP 177 related analysis

8 The GOC notes that most parts of the particular market situation analysis as reflected in REP 190 are the same as those adopted by Customs in its particular market situation analysis in the report of its investigation ("REP 177") concerning the alleged dumping of hollow structural sections ("HSS"). The finding in REP 177 was rejected by the Trade Measures Review Officer ("TMRO") following his thorough review of Customs' definition and determination of particular market situation in REP 177. The TMRO held that there was insufficient evidence and no justification for the particular market situation finding in REP 177. The TMRO's HSS review report ("the TMRO report") is attached, at **Attachment E.**

9 Also attached is a submission provided by the GOC to Customs for the purposes of its reinvestigation of its HSS findings at **Attachment F**. This submission provides support and further commentary on the TMRO's particular market situation analysis. We ask that the ADRP take those submissions of the GOC into account for the purpose of its review. The arguments of the GOC therein are part of this Application and are repeated for the purposes of supporting this Application.

10 In the report of its HSS reinvestigation ("REP 203"), Customs did not disagree with the TMRO's analysis and conclusion. Rather, it was argued by Customs that in rejecting Customs' finding the TMRO had a higher evidentiary standard than Customs required. From Customs' perspective, this evidentiary standard was too high, and accordingly Customs reaffirmed its original finding that there was a particular market situation in REP 203.

11 In the TMRO Report, the TMRO considered each of the factors that Customs regarded as providing evidence of there being an intervention by the GOC which Customs maintained created a distortion of such magnitude so as to render sales of HSS taking place in the market "unsuitable" for price determination under Section 269TAC(1). For example, in relation to Chinese export tariffs on coke, which was considered to be one of the key indicators of so-called government "interference" in

REP 190, the TMRO found that:

> *there is no data available about the impact of the export duty on the domestic price of coke, and therefore the impact on the domestic HSS market cannot at this time be ascertained.*[3]
>
> *this export tariff policy is motivated by environmental concerns... [t]he development of policies and legislation for the purpose of environmental protection is the proper function of government and is engaged in by all modern governments.*[4]
>
> *...the lack of evidence about the impact of the tariffs on HSS prices itself tells against a finding that the domestic sales would thereby be rendered "unsuitable".*[5]

12 The GOC finds no evidence about the impact of tariffs on coated steel prices in REP 190. Therefore the GOC cannot see how REP 190 can be said to have overcome the concerns expressed by the TMRO as to the illegitimacy of Customs finding,

"Economics of supply" analysis

13 There is an added analysis in REP 190 concerning the market situation to that contained in REP 203, entitled "economics of supply". This was first iterated in the Statement of Essential Facts in the coated steel anti-dumping investigation ("SEF 190"), and then was repeated in REP 190. The GOC submitted to Customs that the analysis was a single-sided misapplication of basic economic theory, and that a hypothetical economic model of that type could not hope to prove what Customs intended to use it to prove. The GOC submitted that complicated real world markets are influenced by many economic factors, and that the very purpose of the interaction of all of those factors through a market clearing mechanism was to

---

3 TMRO Report, para 97

4 TMRO Report, para 100

5 TMRO Report, para 100

determine a market price.

14 We refer the ADRP to the GOC's detailed comments on the "economics of supply" analysis in its submission in response to SEF 190 at **Attachment G**. We ask that the ADRP take those submissions of the GOC into account for the purpose of its review. The arguments of the GOC therein are part of this Application and are repeated for the purposes of supporting this Application.

15 In summary, the GOC submits that the "economics of supply" analysis cannot show that the price of raw materials, or the coated steel in the domestic market of China, were "artificially low". With respect, the GOC submits that the "economic analysis" highlights a misunderstanding and confusion of economic theory and of the application of such theory in economic analysis. The analysis was only made from a supply side perspective, ignoring all other market factors, including the equally basic, demand prospects. It was overly simplistic, based purely on assumption and not supported by any actual Chinese market data, which deprives it of any meaning or utility as an instrument to establish that any allegedly "unsuitable" situation exists in the Chinese market for coated steel.

Comparative analysis of HRC costs

16 REP 190 also includes an analysis entitled "comparative analysis of HRC costs". This compared the HRC cost of Chinese exporters, including integrated producers who produced HRC themselves, with a selected "benchmark" price involving certain prices paid by five exporters - two from Korea and three from Taiwan - in their own country markets. REP 190 claims that this comparison:

> *...supports the conclusions above that the cost of the raw materials used in the production of HRC in China is lower than what it would be without government influence, which in turn has resulted in the price of HRC in China being lower than what it would be without government influence.*
>
> *It was also observed that the domestic Chinese prices of galvanised steel and aluminium zinc coated steel were lower than Korean and Taiwanese galvanised steel and aluminium zinc coated steel products.*

> *Customs and Border Protection considers this further supports the conclusion that the prices of galvanised steel and aluminium zinc coated in China are lower than what they would be without the Government's intervention in the upstream raw material product markets.*

17 The GOC cannot understand the logic in such reasoning. The comparison was made between three different markets, none of which could be said to be "free from government influence". It is even more confusing when it is suggested that the price of HRC in the *Korean* market can somehow demonstrate what the *Chinese* coated steel market would be like without any government influence. No reason is offered as to the basis of such a comparison and why the HRC price in Korea and Taiwan can serve the purpose of establishing that Chinese exporters' prices in the coated steel market in China are unsuitable for comparison with their export prices.

Response to interested parties submissions

18 The GOC is also concerned about certain comments made by Customs in REP 190 in response to interested party submissions regarding the particular market situation issue.

19 In particular, the GOC is concerned about Customs' response to the disagreement to the particular market situation finding voiced by five interested parties, which was as follows:

> *In response to item (i), none of the five respondents provided any evidence as to how the prices of galvanised steel and aluminium zinc coated steel and the major upstream raw material prices are determined. The interested parties did not demonstrate that the GOC's export and import tax policies, the macroeconomic policies and plans did not impact the costs of major upstream raw materials that distorted the price of HRC.*
>
> *The GOC's continued influence in the iron and steel industry and the assessment of additional information collated during the course of the current investigations discussed in the report suggests that the cost of the major raw materials used in the production of HRC were distorted. As such the price of HRC used in the production of galvanised steel and aluminium zinc coated steel was also distorted in the current investigation period.*

20 In this response Customs seems to be suggesting that the particular market situation finding was made because the interested parties were not able to demonstrate that their costs of raw material were not affected by any GOC policy and that they did not provide evidence as to how prices are determined. The GOC would be concerned if this is the case, as it would represent a clear reversal of the burden of proof, and would fail to observe the objective standards required for an investigating authority to be properly satisfied of the matters required to be determined in the investigation. The response also neglects the extensive amount of information provided by the Chinese exporters as well as by the GOC in their relevant questionnaires showing that the prices of the goods and of the raw materials in the Chinese markets concerned were fully formed under market principles and conditions in China.

21 In another response, this time to the comments of the GOC and Union Steel China about the "economics of supply" analysis, Customs said:

> *This theory of economics of supply has been used to illustrate the effect of the GOCs import and restrictive export policies, broad overarching macroeconomic policies and plans on the domestic supply of major upstream raw materials used in the production of HRC. The increased supply of raw materials significantly distorted cost of production of HRC which in turn distorted the price of HRC that was used in the production of galvanised steel and aluminium zinc coated in China.*

22 The GOC disagrees that this is the case. The graphical depiction of economic principle was entirely theoretical and single-sided. It gave consideration only to the presumed effect of an assumed increase in supply, and ignored all other factors and impacts on a market. Moreover, the GOC does not know why its regulatory measures should be considered to be different to the regulatory measures which impact upon the markets of other countries.

Suitability of sales for comparison

23 The GOC notes that the test of unsuitability under Section 269TAC(2)(a)(ii) is an unsuitability which affects the comparison of an exporter's domestic selling price with its export price. This aspect is discussed in the TMRO Report, as well as in

various GOC submissions.[6] The need for considering whether there is an unsuitability which affects this comparison is not dealt with by REP 190.

24 In the GOC's opinion, the market situation claimed to have been identified by Customs in REP 190 does not disrupt the comparison required. As this matter is fundamental to the application of Section 269TAC(2)(a)(ii), and as it has not been considered, the reviewable decisions cannot be supported. As to the question of whether the situation in the Chinese domestic markets created an unsuitability that prevented such a comparison being made, the GOC submits that there was no such prevention. Chinese exporters were free to price their coated steel products as they wished on both the domestic and export markets. The alleged impacts creating "artificially low" input prices did not differentiate between the costs or the pricing decisions of Chinese exporters on the domestic and the export markets.

C Finding 2 – "Reasonably reflect competitive market costs"

25 Regulation 180(2) of the Act provides

> *If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.*

26 In REP 190, a blanket finding is made that the costs of HRC recorded in the

---

6 Including in those attached to this Application.

financial records of all Chinese producers of coated steel did not reasonably reflect competitive market costs for the purposes of Regulation 180(2)(b)(ii). On the basis of this conclusion, Customs substituted HRC costs as recorded by Chinese exporters and producers with a "benchmark" cost. REP 190 did not particularise why this finding was reached, apart from stating:

> *Customs and Border Protection's view is that HRC prices are affected by GOC influences and do not reasonable reflect competitive market costs.*

27 The GOC submits that REP 190 did not make any assessment or any proper assessment as to the competitiveness of the market relating to the "costs associated with production or manufacture of like goods" for the Chinese exporters of coated steel, or whether the cost records of Chinese exporter of coated steel "reasonably reflect[ed]" that cost in a competitive market.

28 It appears that the only determination Customs considered to be relevant for the purpose of making the finding under Regulation 180 was to "benchmark" the HRC cost of Chinese exporters of coated steel with a set of selected HRC prices paid by five coated steel exporters from Korea and Taiwan. However, no explanation was offered as to what was the purpose of such a benchmark or why the Regulation 180 finding could be made following such benchmarking. The only explanation provided in relation to the benchmark was this:

> *The issue of an appropriate benchmark for HRC costs was discussed in Appendix C of REP 177. That report discussed three options for determining a benchmark, in order of preference based on World Trade Organisation (WTO) Appellate Body findings...*

29 Customs then went on to simply surrogate the Chinese exporters' cost of HRC by "uplifting" their costs in accordance with Customs' own benchmark costs of HRC. The GOC notes that the Regulation 180 finding was simply made on the bases that:

- the GOC had some unspecified "influence" on prices of HRC; and
- Chinese exporters' HRC costs were different from Customs' benchmark cost.

30 The GOC submits that any finding of the influence that the GOC may have on the HRC prices cannot itself support a finding that the Chinese exporters' HRC cost does not reasonably reflect competitive market costs. Further, the fact that any particular Chinese exporter's HRC costs may be different from a foreign benchmark based on a certain price paid by other exporters does not support a finding that the Chinese exporter's costs do not "reasonably reflect competitive market costs". The GOC submits that Chinese markets for coated steel products – being competitive markets – provide such competitive market costs. Not only is it likely that those costs *reasonably reflect* those competitive market costs in the financial records of the exporters, they are obviously likely to *actually reflect* those costs.

31 In relation to the reference made to "the issue of an appropriate benchmark" in the extract from REP 190 set out above, the GOC submits that Customs could not simply make a finding in one investigation on the basis that the same finding was made by itself in a different investigation concerning a different product, different exporters, and a different period of investigation. Further, the GOC submits that the "WTO Appellate Body findings" which were cited to support Customs' approach to benchmarking were made in the context of countervailing findings. They do not deal with the questions raised by Regulation 180 at all.

32 The GOC submits that Customs had no proper grounds to make findings that the costs of Chinese exporters of coated steel did not reasonably reflect competitive market cost, and that the costs can be surrogated with a so called "benchmark" cost. The GOC considers that finding to be one that ignores the existence of the competitive markets for coated steel and HRC that are in play in China, and that it does not follow the correct legislative test for determining whether the records of Chinese exporters can be used for determining their costs.

D Finding 3 – Surrogation of the HRC cost for integrated producers

33 As part of the Regulation 180 finding, Customs also surrogated the HRC cost in the calculation of the normal value for the "integrated" Chinese coated steel producer

who cooperated in the investigation. As discussed above, the GOC submits that Customs had no basis to make the Regulation 180 finding and to surrogate the costs of Chinese producers, whether integrated or non-integrated. However, the GOC considers that the approach to the surrogation of the costs of the integrated producer was additionally flawed.

34 Customs defined an "integrated" producer as being one that produces coated steel from primary raw materials, and not directly from HRC. In this case, an integrated primary producer was said to be one that purchases iron ore, coking coal and/or coke to make its coated steel. As such, HRC is produced in the process by that producer, rather than being purchased from the market. This is the key difference between an integrated producer and a non-integrated producer of coated steel. The GOC submits that the question of whether the costs of HRC in the records of an integrated producer reasonably reflected the competitive market cost cannot be answered by looking at the price of HRC sold on the market because the producer does not buy that raw material on the market.

35 REP 190 itself concedes the logical difficulty in its finding:

> *As stated above, integrated manufacturers of galvanised steel and aluminium zinc coated steel do not purchase HRC but manufacture it themselves from other raw materials such as iron ore, coke or coking coal and scrap steel. However, as noted in Appendix 1, the GOC influences in the iron and steel industry are wide ranging and affect competitive market supply of raw material inputs including HRC.... In the absence of*
>
> - *sufficient information to establish a benchmark for each of the raw material inputs to HRC; and*
> - *sufficiently detailed cost records from the cooperating exporters in their questionnaire responses to make the adjustment at this level,*
>
> *it is considered reasonable to make the substitution at the HRC level for integrated producers.*

36 However Customs seems to consider that the integrated producers' own costs of production can be rejected on the basis that:

> *Customs and Border Protection has observed that some of the cooperating integrated exporters of galvanised steel and aluminium zinc coated steel also sell HRC to some of the non-integrated producers. Because this selling price is said not to reflect a competitive market cost to the purchaser, and has been substituted by a benchmark, this leads to an inference that the HRC manufacture costs of the integrated producers also do not reflect competitive market costs.*

37 With respect, the GOC considers that this is not logical and that it does not accord with the consideration required under Regulation 180. The GOC submits that the sales of HRC said to have been made by other integrated producers have nothing to do with the question that must be asked under Regulation 180 in relation to the integrated producer itself. The inference that an integrated producer that sells HRC in a market that Customs has found does not generate competitive market costs can therefore be expected to have a cost for HRC in its financial records that does not reasonably reflect competitive seems to be circular and self-justifying. The GOC submits that this thinking is flawed and cannot lead to any inference regarding the HRC manufacturing cost of the integrated producer.

38 The GOC submits that the comments in REP 190 as quoted above imply that Customs did not consider that there was sufficient information or justification to make a finding under Regulation 180 – but that such a finding was made anyway. As such it represents a finding against the Chinese exporters made in the absence of relevant information, and contrary to what the GOC would expect to be the well-documented cost records of the Chinese enterprise concerned. The GOC submits that it purchased – and that all Chinese producers of coated steel purchased – materials for the manufacture and sale of coated steel under market conditions and on competitive terms.

E Finding 4 – Characterisation of SIEs as "public bodies"

Public body finding in relation to SIEs producing and selling HRC

39 It was alleged in the application that led to the initiation of the subject investigations that Chinese exporters of coated steel had benefitted from the provision of raw

material in the form of HRC by the GOC for less than adequate remuneration. In REP 193, Customs found that a *"Program 1 - HRC provided by Government for Less Than Adequate Remuneration"* ("Program 1") existed and that a countervailable subsidy was thereby conferred on the exporters that purchased HRC.

40 First and foremost, the GOC submits that State invested enterprises ("SIEs") that produce and supply HRC to manufacturers of coated steel are not public bodies at all. The GOC has consistently and clearly stated this position, and the reasons supporting this position, in all recent investigations undertaken by Customs concerning Chinese exporters of steel products. It has also actively participated in those investigations, as well as in the reviews by the TMRO of the outcomes of those investigations, and has rebutted the grounds relied on by Customs in making such findings.

41 In REP 193, Customs maintained the public body finding that it had preliminarily made in the Statement of Essential Facts that preceded REP 193. REP 193 recorded the making of the public body finding for its purposes as follows:

> *REP 203 sets out ACBPS's findings in relation to the reinvestigation, which include the following in relation to the public body issue:*
>
> > *'The reinvestigation finds that sufficient evidence exists to reasonably consider that, for the purposes of the investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies'. The reinvestigation considers that these SIEs are exercising government functions and that there is evidence that the government exercises meaningful control over SIEs and their conduct. In performing government functions, SIEs are controlling third parties.'*
>
> *Based on the findings in REP 203, ACBPS considers it is reasonable to conclude for the purpose of the current investigations that SIEs that produce and supply HRC to manufacturers of galvanised steel and aluminium zinc coated steel should be considered public bodies.*

42 As referred to in REP 193:

> *The GOC and Union Steel China stated that public body findings by the*

> *ACBPS based on REP 203 (the reinvestigation of HSS) are incorrect. The GOC stated that REP 203 contains major flaws of evidence and of logic in relation to the ultimate finding that SIEs are public bodies. The GOC also stated that ACBPS did not correctly interpret the ruling by the WTO Appellate Body in relation to DS379.*
>
> *Union Steel China claims that its suppliers of HRC are not public bodies. It also claimed that from its observations and practical experience in China, the SIEs that it deals with are commercially operated enterprises that are subject to market forces that are at play in the Chinese market.*

43 The GOC's submission referred to in the above paragraph is the submission of the GOC in response to SEF 193 dated 7 June 2013 ("the SEF 193 submission"). In that submission the GOC provided extensive analysis and comment regarding Customs' public body analysis in SEF 193 (and in REP 203, where it was referred to in SEF 193).

44 It does not appear that Customs addressed the GOC's SEF 193 submission apart from stating that:

> *ACBPS did not solely base its public body findings on REP 203. ACBPS considered that the evidence and reasons set out in REP 203, while made in relation to consideration of HRC producers and suppliers, are equally applicable to SIE producers and suppliers of coke and coking coal.*

45 Given that REP 193 did not offer any further reasoning or explanation in relation to its public body finding, the GOC considers that its SEF 193 submission remains relevant to the reviewable decision and to this ADRP review. In support of this review application, and to avoid repeating the analysis and comments which are already on the public record of the coated steel investigation, we now attach the GOC's SEF193 submission, in order that it can be considered as part of this application. A copy of the SEF 193 submission is at **Attachment H**. We ask that the ADRP take those submissions of the GOC into account for the purpose of its review. The arguments of the GOC therein are part of this Application and are repeated for the purposes of supporting this Application.

46 The GOC's SEF 193 submission identifies flaws in the public body analysis

undertaken by Customs as perceived by the GOC, particularly:

- that Customs has not identified the vesting of government authority in SIEs, or the possession of government authority by SIEs, which could characterise them as "public bodies";
- when given its proper interpretation, the evidence adduced to support the contention that SIEs are vested with government authority shows no such thing;
- the finding that SIEs producers that produce coking coal and coke are public bodies because they are part of the "iron and steel industry" is not supported by evidence or logic.

47 Further, the GOC also refers to the TMRO Report of his review of the investigation undertaken by Customs concerning HSS, where the TMRO provided lengthy analysis of the legislative framework and the meaning of the term "public body" in the context of Australian law as informed by WTO authority. The TMRO report is at **Attachment G**.

48 The GOC notes that the TMRO rejected Customs' findings that Chinese SIEs can somehow be labelled as "public bodies" for countervailing purposes in three separate reviews. In particular, the GOC notes the TMRO's finding that a public body determination requires an identification that the SIEs subject to that determination are invested, or possess, or exercise government authority, which is *"the power to control, compel, direct or command"*, and that there was no evidence of that adduced in the investigations that were reviewed by the TMRO.[7]

Public body finding in relation to SIEs producing and selling coking coal and coke

---

7 TMRO HSS Report, page 54

49 In relation to Programs 2 and 3, REP 193 made the finding that the SIE producers and suppliers of coking coal and coke in China should also be considered as "public bodies". The reasoning for this finding was stated as follows:

> *Because coking coal and coke producers are part of the iron and steel industry in China, ACBPS considers that SIE producers and suppliers of coking coal and coke in China should be considered public bodies.*[8]

50 In relation to this finding, the GOC again refers to its SEF 193 submission, which states:

> *Ignoring the lack of an evidentiary method or a legal basis for REP 203's public body determination, the GOC would firstly point out that REP 203 made no finding in relation to SIEs in the iron and steel industry. Rather, REP 203 made a finding that SIEs that produce HRC and/or narrow strip were public bodies. While SEF 193 may be of the opinion that this is equally applicable to coke and coking SIEs, there is no evidence referenced to show why this may be the case. Therefore, the SEF establishes no basis for the finding - preliminary or otherwise - that SIEs that produce coke and coking coal are public bodies.*
>
> *Secondly, the GOC would question the finding that coke and coking coal producers form part of the iron and steel industry. Certainly, coke and coking coal is sold to the iron and steel industry, but they are themselves not iron or steel, and have uses beyond those of the iron and steel industry. The GOC discussed this in response to Question 1 of Section A of its response to the Government Questionnaire. The coking coal industry is an extractive industry. Coking coal can be produced by iron and steel enterprises as part of an integrated steel-making process, or not.*
>
> *It appears that the only basis for this conclusion is that coke and coking coal is an input to the production of iron and steel. The GOC requests that Customs explain what the bounds of the "iron and steel industry" are. Does it extend to every input used in the production of iron and steel? Without such a definition, the GOC considers that the concept of an iron and steel industry will be used to mean whatever it has to mean to support the findings of these non-existent subsidies.*

---

8 REP 193, page 151

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

51 With respect, the GOC submits that the glib assumptions in REP 193 about the status of Chinese coal miners and coke producers as "public bodies", arrived at without any apparent investigation of them, or of their activities and business conduct, cannot satisfy the requirements imposed on an investigating authority such as Customs to be properly satisfied of the matters that are required to be established in order to reach that conclusion. The GOC also continues to submit that the categorisation of *"coking coal and coke producers"*, the activities of which are coal mining and coking, as part of the Chinese iron and steel industry is factually incorrect and groundless. In any event this simplistic conclusion cannot be a relevant consideration in an ultimate decision that they are also "public bodies".

F Finding 6 – Provision of raw material at less than adequate remuneration

52 In the alternative to a reversal of the decision concerning the status of SIEs as public bodies, and without detracting from the GOC's submissions in that regard, the GOC wishes to submit that the Minister's "benefit" determination, on the recommendation of Customs, was incorrect.

53 For a subsidy such as the alleged Programs 1, 2 and 3 to be established, it must be shown that it has conferred a benefit. In turn, this is established if the remuneration for the raw material in question provided by a public body is *"less than adequate"*. In this regard, Sections 269TACC(3)(d) and (4)) explain (previously Sections 269TACC(4)(d) and (5)) that:

> *(3) In determining whether a financial contribution confers a benefit, the Minister must have regard to the following guidelines:*
>
> *...*
>
> *(d) the provision of goods or services by the government or body referred to in subsection (3) does not confer a benefit unless the goods or services are provided for less than adequate*

remuneration

(4) For the purposes of paragraphs (3)(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

54 This is the Australian legislative embodiment of Article 14(d) of the WTO *Subsidies and Countervailing Measures Agreement* which, in part, provides:

> *the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration.*

Test for determining adequacy of remuneration

55 The GOC submits that Customs' analysis of the less than adequate remuneration requirement was incorrect as it failed to consider, among other relevant factors, the rate of return for the provision of the raw materials. Instead, Customs' focus was on finding a price benchmark which it said was free from government influence.

56 In determining the adequacy of remuneration, Customs took the position that the *"adequacy of remuneration"* of HRC in China could be adjudged by establishing *"a competitive market cost"* which needs to be benchmarked *"in order of preference based on WTO Appellate Body findings"*. As stated above, the GOC submits that there is no evidence to support the finding that the costs of HRC reported by Chinese exporters of coated steel are not competitive market costs. The GOC also notes that the WTO Appellate Body findings that must be those to which Customs refers are not findings made in relation to *"competitive market costs"*.

57 Further, the GOC considers that Customs' approach to this issue is at odds with both Australian law and the available WTO authority.

58 The text of Section 269TAAC requires that:

> *the adequacy of remuneration in relation to goods or services is to be*

determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

59 Similarly, Article 14 of the Subsidies and Countervailing Measures Agreement requires that:

the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

60 In the review by the TMRO of the HSS investigation, having considered the legislation and the WTO materials, the TMRO found as follows:

In my view, when given its ordinary English meaning s 269TACC(4)(d) requires a determination of the question whether Chinese producers provided HRC to exporters of HSS for less than adequate recompense or reward for the costs, work or trouble incurred by them in their production of HRC. The section is not concerned with whether or not the prices at which those producers supply HRC are the prices that would prevail in a competitive market unaffected by government intervention...

I consider that the term 'adequate remuneration' in s 269TACC(4)(d) requires an assessment of the adequacy of the return on investment. This requires a comparison between the cost to make and sell and the price of sale of the goods. The comparison may take account of price, quality, availability, marketability, transportation and other conditions of purchase or sale in assessing the adequacy of the difference between cost and price.

61 The relevance of rate of return in determining adequacy of remuneration is also discussed in the WTO Panel report issued in *in Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-In-Tariff Program*.[9] In that case, the Panel was of the view that

---

[9] WT/DS412/R and WT/DS426/R (19 December 2012). The Appellate Body supported the Panel's view that rate of return was an appropriate way to assess adequate remuneration, in saying: *"We have noted above that government-administered prices may or may not reflect what a*

the rate of return can be used when determining a benefit related to issue adequacy of remuneration.[10]

62 This was not considered by Customs in REP 193. The GOC requests that this should now be the subject of consideration and review by the ADRP in the event that the ADRP is of the view that SIEs have been justifiably treated as being "public bodies".

Application of external benchmark for the adequacy of remuneration for HRC

63 Section 269TAAC(4) requires that regard must be had to the prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased for the purposes of determining the adequacy of remuneration. For the purposes of the coated steel investigation undertaken by Customs, this can only be interpreted as being the Chinese market. The GOC is aware of no legislative basis under which Customs would be able to have reference to an external benchmark – meaning a benchmark that Customs intends to be a measure of adequate remuneration for the purposes of determining benefit – from a different market in a different country.

64 The GOC respectfully submits that neither the Act nor the Regulations contemplate, mention or explain the use of an external benchmark in this sense. In the GOC's opinion, reliance on such a benchmark is lacking in transparency, is beyond

---

hypothetical market would yield. In the case of FIT, however, while FIT prices were intended to cover costs plus a reasonable rate of return731, there are no undisputed facts on the record or factual findings by the Panel that would allow us to assess whether the methodology the OPA used to establish the FIT prices resulted in prices that provide more than adequate remuneration." Reports of the Appellate Body in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector and Canada – Measures Relating to the Feed-In-Tariff Program, AB-2013-1,* WT/DS412/AB/R and WT/DS426/AB/R (6 May 2013)

10 *Ibid*, para. 7.323

Customs' powers under Australian law, and is at odds with Australia's WTO obligations.[11]

65 Further, as submitted in the GOC's SEF 193 submission:

> *While the GOC notes that the WTO's Appellate Body has indicated reference may – in certain limited circumstances – be had to an external benchmark, Australia must still act in accordance with the obligations of the chapeau to Article 14 of the SCM Agreement. Moreover, the circumstances under which Customs has determined that the use of an external benchmark is appropriate, and indeed the calculation of the benchmark itself, are not consistent with what has been envisaged by the Appellate Body as being acceptable in any given circumstance. As the Appellate Body has noted:*
>
> > *...the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited. We agree with the United States that "[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted". Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.[12] [underlining supplied]*

66 Indeed the GOC notes that the reason provided in REP 193 for rejecting Chinese domestic prices for HRC was that such prices are not "free from government influence". This approach was specifically rejected by the Appellate Body in *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*[13] which Customs cites as the authority in support of the "issue

---

11 SEF 193 submission, page 22

12 Softwood Lumber IV, para 102.

13 WT/DS257/AB/R (29 August 2003)

of an appropriate of benchmark":

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

Prevailing market conditions

67 The GOC does not agree that an out-of-country benchmark may be used under Section 269TACC(4) of the Act. The GOC also submits that an out-of-country benchmark cannot have regard to prevailing market conditions in the country of provision of the alleged subsidy, precisely because it has regard to, and is formed by, the prevailing market conditions of another country.

68 Without detracting from these positions, the GOC maintains that if an external benchmark is intended to be used in determining adequacy of remuneration (which the Appellate Body considered in DS257 might be the case only in "very limited" circumstances), such a benchmark must still have regard to the prevailing market conditions in the domestic market of the goods. According to the Appellate Body, an investigating authority must:

> *...ensure that the resulting benchmark relates or refers to, or is connected with,*

---

14 *Ibid*, para 87.

prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).

69 The GOC sees no indication or suggestion in REP 193 that the external benchmark used was considered to reflect the prevailing market conditions in China or that any adjustments were done to ensure such a reflection.

G Finding 7 – Non-specificity of "Programs 1, 2 and 3"

Specificity of Program 1

70 A *"subsidy"* under Australian and WTO law is made up of three parts – a financial contribution, that confers a benefit, and which is "specific". Specificity is dealt with under Section 269TAAC of the Act. Subsection (2) provides:

> *Without limiting the generality of the circumstances in which a subsidy is specific, a subsidy is specific:*
>
> *(a) if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or*
>
> *(b) if, subject to subsection (3), access is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority; or*
>
> *(c) if the subsidy is contingent, in fact or in law, and whether solely or as one of several conditions, on export performance; or*
>
> *(d) if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.*

71 In REP 193, Customs' reasoning concerning "specificity" is as follows:

> *As provided for in s.269TAAC(4)(a), the Minister may determine that a subsidy is specific, having regard to the fact that the subsidy program benefits a limited number of particular enterprises.*
>
> *Given that HRC is a key input in the manufacture of downstream products (including galvanised steel and aluminium zinc coated steel) 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.

72 The alleged Program 1 subsidy benefits any enterprise that buys HRC and does not discriminate against any enterprise that buys HRC. Anyone can buy HRC. The first paragraph of Customs' reasoning could only be correct if Customs asserts that Program 1 does not benefit any enterprise that does not want or need HRC – such as Chinese bakers - and that this underpins its specificity. Such a position cannot be maintained, because Section 269TAAC(2) does not admit of it. The alleged subsidy in this case – the provision of HRC at less than adequate remuneration – is not explicitly limited to particular enterprises, nor to enterprises in a designated geographical region. Although it is unrealistic to speak in terms of a "program", if there is such a "program" for the provision of such a subsidy, it certainly does not exclude any enterprises from receiving it. Any enterprise that purchases HRC receives the so-called subsidy.

73 Regarding the second paragraph, HRC is an input for the manufacture of many products, not just coated steel. It is not *"only enterprises engaged in the manufacture of [coated steel]"* that would benefit from the provision of the alleged subsidy if they purchased HRC.

74 It is worth noting that the same statement was also made in REP 177, concerning the same alleged program, but in relation to an HSS producer, as follows:

> *As provided for in s.269TAAC(4)(a), the Minister may determine that a subsidy is specific, having regard to the fact that the subsidy program benefits a limited number of particular enterprises.*
>
> *Given that HRC and/or narrow strip is a key input in the manufacture of downstream 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.*

For this reason the subsidy is determined to be specific.[15]

75 The same statement is also repeated in the SEF of an ongoing investigation concerning Chinese exporters:

> *As provided for in s.269TAAC(4)(a), the Minister may determine that a subsidy is specific, having regard to the fact that the subsidy program benefits a limited number of particular enterprises.*
> *Given that HRC is one of the key inputs in the manufacture of downstream products (including plate steel) 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. As such the subsidy is determined to be specific and countervailable.*

76 Such repetition of the specificity determination concerning exporters of different products highlights the flaw in Customs' reasoning – the so-called specific benefit to *"the manufacture of downstream products"* includes such a broad and undefined downstream industry that it could not be said to be a specific "benefit". If Customs means to say that all downstream products for which HRC is an input "benefit" from the alleged subsidy, then this is an admission that all downstream producers – of anything for which HRC is used – benefit from the subsidy. This establishes the universality of the subsidy, and contradicts the alleged specificity of the subsidy.

77 In *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*[16] ("DS379"), the question of "specificity" of a subsidy constituted by low interest loans provided by State-owned commercial banks ("SOCBs") was answered in the affirmative because the investigating authority in that case had identified policy documents stating that such loans should be made by the SOCBs to the Chinese tyre industry. Thus, the "program" could fairly be said to single out that industry, in that it would receive a different (lower) interest rate to

---

15 REP 177, page 225

16 WT/DS379/AB/R (11 March 2011)

other industries. By contrast, in this case the HRC is sold at the market price to all comers, and there is no evidence to suggest that any enterprise would be required to pay a higher price because of some categorisation or exclusion of it from the "program" rules.

78 We also note Customs' emphasis on the fact that HRC is a *"key input in the manufacture of downstream products"* which apparently is offered as support for its specificity finding. In *China Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*[17] the Panel held that the fact that the input that is allegedly provided at a subsidised price is an "important input" in the production process of the allegedly subsidised industry *"is not evidence indicating or tending to prove specificity"*.[18]

79 Therefore, it is submitted that Customs' has not established that Program 1 is a "specific" subsidy.

Specificity of Program 2

80 REP 193's reasoning in relation to the claimed specificity of Program 2 is as follows:

> *Customs and Border Protection understands that coal can be classified into two categories – thermal coal used for heat generation and metallurgical coal. The form of coking coal examined in this investigation is metallurgical coking coal. ACBPS understands that this type of coking coal is mainly used in the manufacture of iron and steel. Given that the coking coal being examined used mainly in the production of iron and steel 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.*
>
> *As such the subsidy is determined to be specific and countervailable.*

---

17 WT/DS414/R (15 June 2012)

18 *Ibid.*, para 7.114.

81 The GOC submits that this reasoning again fails to establish specificity, and we repeat the previous reasoning set out immediately above in that regard. The statement that *"this type of coking coal is mainly used in manufacture of iron and steel"* is incorrect because coking coal is mainly used to produce coke, and not iron and steel. The statement is an admission that the alleged subsidy is not specific to the iron and steel industry, because it cannot be specific if it is only *"mainly"* for that industry. Anyone buying coking coal would "benefit" from the alleged "subsidy", and no conditions of the alleged "program" preclude that from happening.

82 Therefore, the GOC submits that Customs' has not established that Program 2 is a "specific" subsidy.

Specificity of Program 3

83 REP 193's reasoning in relation to the claimed specificity of Program 2 is as follows:

> *ACBPS understands that while coke has a number of uses, it is predominantly used in the production of iron and steel, so it is clear that the provision of the input by the GOC at less than adequate remuneration would mainly benefit enterprises engaged in the manufacture of iron and steel.*

84 The GOC repeats the reasoning set out above in relation to the lack of specificity of Programs 1 and 2 and repeats them in relation to Program 3.

85 Also, the GOC notes that such reasoning cannot lead to a conclusion that the benefit alleged to have been provided under Program 3 is limited to or only benefits the manufacturers of iron and steel. In fact, the GOC advised Customs as early as during the pre-initiation consultation stage of its investigation that:

> *Primarily, coke is used in the production of iron and steel. Coke is also used:*
>
> *(a) for the smelting of phosphate rock in the production of elemental phosphorous;*
>
> *(b) in the production of calcium carbide;*
>
> *(d) in ferrochrome production;*

(e) in the production of manganese alloys;

(f) in producing soda ash;

(g) for making carbon electrodes.

Coke is also used as a domestic fuel. Coke may itself be used – instead of being consumed – for conductive flooring, friction materials, foundry carbon raiser, corrosion materials, reducing agents, and ceramic packing media

86 The GOC submits that Customs' has not established that Program 3 is a "specific" subsidy.

8 Conclusion and request

The decisions to which this application refers are reviewable decisions under Section 269ZZA of the Act. Where references are made to Customs and its recommendations, it is those recommendations which were accepted by the Minister and form part of those reviewable decisions that the GOC seeks to have reviewed.

The GOC is an interested party in relation to the reviewable decisions.

The GOC's application is in the approved form and has otherwise been lodged as required by the Act.

We submit that the GOC's application is a sufficient statement setting out the GOC's reasons for believing that the reviewable decisions are not the correct or preferable decisions, and that there are reasonable grounds for that belief for the purposes of acceptance of its application for review.

No information included in this application is considered to be confidential.

On behalf of the GOC, we respectfully request that the ADRP:

- undertake the review of the reviewable decisions as requested by this application under Section 269ZZK of the Act; and
- recommend that the Minister revoke the reviewable decisions and substitute new

decisions to be specified by the ADRP on the bases:

- that there is not a situation in the coated steel market of China such that sales in that market are not suitable for use in determining a price under Section 269TAC(1) of the Act;
- that there are no grounds to consider that the financial records of Chinese coated steel exporters did not reasonably reflect competitive market costs associated with the production or manufacture of like goods; and
- that there are no grounds to consider that countervailable subsidies were conferred on Chinese coated steel exporters under any of the alleged Programs 1, 2 and 3,.

Lodged for and on behalf of the Ministry of Commerce for the Government of People's Republic of China

Daniel Moulis
Principal

Moulis Legal

4 September 2013

中华人民共和国商务部
MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA
2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

22 February 2013

Mr John Bracic
Director, Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra ACT 2601
Australia

Dear Sir

Reinvestigation of certain findings- ACDN 2013/07
Certain Hollow Structural Sections exported from the People's Republic of China, Korea, Malaysia, Taiwan[1] and Thailand

A Introduction

The Government of the People's Republic of China ("GOC"), through this Ministry of Commerce ("MOFCOM") has been a committed and cooperative party in this matter, at all times. It participated fully and carefully during the original investigation into the alleged dumping and subsidisation of hollow structural sections from China ("the original investigation") conducted by the Australian Customs and Border Protection Services ("Australian Customs") in this matter. The GOC also actively participated in the review by the Trade Measures Review Officer ("TMRO") of the Minister's decision, which was based on the recommendations outlined in its report of the original investigation ("the Customs Report").[2]

[1] Under the framework of the WTO, the Region of Taiwan should be addressed as *"Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)"*, or simply as *"Chinese Taipei"*.
[2] *Report to the Minister No. 177 – Certain Hollow Structural Sections Exported from the People's Republic of China, the Republic of Korea, Malaysia, Taiwan and the Kingdom of Thailand* (7 June 2012)

The TMRO's report of his review was published on 17 January 2013 ("the TMRO Report").[3] On the same day the Minister advised that he had accepted the recommendations of the TMRO. The Minister directed Australian Customs to reinvestigate certain matters, as set out in Australian Customs Dumping Notice 2013/07 ("the ACDN").

The GOC welcomes the opportunity to provide further comment on certain of those directions and on the relevant reasoning contained in the TMRO Report. They are the directions to reinvestigate:

- the finding that there was a particular situation in the Chinese iron and steel market such that sales in that market were not suitable for use in determining a normal value under s 269TAC(1) of the *Customs Act 1901* ("the Act");
- the finding that State-invested enterprises providing hot rolled coil steel to HSS producers under Program 20 are "public bodies"; and
- the finding that hot rolled coil supplied under "Program 20" was provided for less than adequate remuneration.

The GOC's comments are based on the information and conclusions to which the TMRO had regard, being the information relied upon, and the conclusions drawn, by the Chief Executive Officer of Australian Customs ("the CEO") when reporting to the Minister at the conclusion of the original investigation. This is because, according to Section 269ZZL(2)(a)(i) of the Act, in conducting the reinvestigation the CEO must only have regard to the information and conclusions to which the TMRO was permitted to have regard and must not consider any new information or conclusions.

B Finding in relation to "particular market situation"

At page 42 of the Customs Report, the following is said:

> *After having regard to all relevant information, Customs and Border Protection finds that there was a situation in the Chinese HSS market during the investigation period such that sales in that market are not suitable for use in determining normal value under s.269TAC(1).*

The TMRO disagreed, saying in his Report:

> *Having regard to the totality of the evidence and submissions made, I consider that the evidence currently available to me fails to sufficiently establish that the policies and plans of the Government of China are being implemented and enforced in such a manner as would support the market situation finding...*

---

[3] *Decision of the Trade Measures Review Officer – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice Concerning Certain Hollow Structural Sections Exported to Australia from the People's Republic of China, the Republic of Korea, Malaysia and Taiwan* (14 December 2012)

I therefore recommend that the Minister direct the CEO of Customs to reinvestigate the market assessment that formed the basis of the market situation finding.

The GOC is mindful of the other comments and analysis made by the TMRO in relation to the particular market situation issue. Before addressing those other comments, we note that, in coming to this conclusion, the TMRO firstly examined the question of "what is a particular market situation" for the purpose of this investigation – ie, under the relevant provision of the Act.

A "particular market situation" finding can only be made correctly and validly if the decision maker understands what finding he is making and is required to make under the law. Neither the Minister nor the CEO has the discretion make a "particular market situation" finding outside the scope of that concept. A misinterpretation of the concept – including by way of reliance on flawed policy - will lead to a flawed finding

During both the original investigation and the TMRO review process, we expressed our concerns that there seemed to be a misunderstanding on Australian Customs' part as to the meaning of "particular market situation" under the Act, and of the legal tests involved in making such a finding.

In the GOC's submission in response to the Statement of Essential Facts issued in the original investigation ("the SEF"),[4] we said:

> *Australian Customs' assessment of a particular market situation must conform to Australia's international obligations, specifically those that it has assumed within the WTO framework. The SEF does not apply a proper or recognised test to establish the existence of a situation in which sales of HSS did not permit a determination of normal value in the meaning of Article 2.2 and a proper comparison within the meaning of Article 2.4 of the WTO Anti-Dumping Agreement ("the AD Agreement"). Nor does it conform with the requirements of Section 269TAC(2)(a)(ii) of the Act, which is asserted to be the Australian legal provision which implements the rights of WTO Members in relation to a "particular market situation" under the AD Agreement.*
>
> *It is unclear exactly what test has been applied to establish that a particular market situation exists. As noted above Australian Customs seems to believe it is sufficient to establish that prices of HSS in the Chinese market are not substantially the same as they would have been without GOC influence.*

Further, in the GOC's submission to the TMRO, we noted that:

> *A "particular market situation" under Article 2.1 of the WTO Anti-Dumping Agreement[5] ("the AD Agreement") can only be invoked in extreme cases. This test goes to the identification of whether there are transactions which are properly*

---

4 Letter from Moulis Legal to Customs dated 16 May 2012, entitled *"GOC submission in response to SEF 177"* ("GOC SEF Submission"), at page 2.

5 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*

recognisable as "sales" in the domestic market such that they can be "compared" to "sales" in the export market. Serious interventions in markets, such that the conditions of competition do not operate to permit "sales" to take place – which in turn means that "prices" are not generated by those conditions – can constitute a "particular market situation". This is roundly acknowledged amongst WTO Members, and by the available Australian legal and administrative precedent (prior to that expounded by the Report).

The TMRO Report went to great length to examine the appropriate meaning of "particular market situation" under the Act. The TMRO notes that the particular market situation finding relies on Section 269TAC(2)(a)(ii) of the Act, which provides as follows:

Subject to this section, where the Minister:

(a) is satisfied that:

(i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or

(ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);

the normal value of goods exported to Australia cannot be ascertained under subsection (1); or

(b) [...]

the normal value of the goods for the purposes of this Part is:

[...]

The TMRO further notes that there is no definition of *"situation in the market"* or *"criteria by reference to which sales may be rendered 'not suitable' for use in determining a normal value because of a situation in the market"*. However, the TMRO was able to find appropriate interpretations of the "situation in the market" and "not suitable" – which are the key elements of a "particular market situation" finding in the context of Section 269TAC(2)(a)(ii) - by reference to statutory interpretation rules, the relevant WTO Agreement, and judgements in relevant Federal Court cases where the court was required to interpret and to consider what constitutes a "particular market situation".

In particular, the TMRO Report notes that Section 269TAC(2)(a)(ii) was considered by the Federal Court of Australia in *Enichem Anic Srl v Anti -Dumping Authority*[6] ("Enichem Anic") and *Hyster Australia Pty Ltd v Anti-Dumping Authority (No 2)*[7] ("Hyster"). In both cases, the

---

6 *Enichem Anic Srl v Anti-Dumping Authority* (1992) 39 FCR 458.

7 *Hyster Australia Pty Ltd v Anti-Dumping Authority (No 2)* (1993) 40 FCR 364

Federal Court found that a "particular market situation' may arise for the purposes of Section 279TAC(2)(a)(ii) where there is some factor which "*so distort[s] the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give true normal value in the country of export*".

Having considered Federal Court cases in relation to this issue, the TMRO concluded that:

> *The above analysis indicates that there must be a degree of distortion in the market that renders arms length transactions in the ordinary course of trade unsuitable to give a true normal value, but that this unsuitability will not necessarily be brought about by any factor that simply depresses or inflates domestic prices.*

We note that in the report of a separate TMRO review (of the decision by the CEO to terminate that part of the original investigation involving the allegation of a "particular market situation" in relation to HSS exported from Thailand),[8] the TMRO noted that the legal test of an unsuitability of sales in a market under Section 269TAC(2)(a)(ii) of the Act:

> *... requires a determination of the question whether 'there is some factor which so distorts the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give the true normal value in the country of export'*[9][emphasis added] [footnote omitted]

The TMRO referred to Enichem Anic in support of this proposition. At paragraph 21 of the same report, the TMRO states:

> *However, as noted above, the fundamental issue for determination is whether the mechanism (whatever it may be) so distorts the situation in the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give the true normal value. In my view, the mere existence of government involvement in the market does not automatically engage paragraph 269TAC(2)(a)(ii), because such involvement or control does not necessarily distort the market to the extent that the domestic prices are made unsuitable for use under s 269TAC(1).*

In the result, the TMRO determined such a distortion was not present and that the CEO was correct in finding that the situation in the Thai market (whether it derived from price monitoring, an actual price ceiling or a *de facto* price ceiling) did not make it unsuitable to determine the normal value of HSS by reference to the price paid for HSS in the ordinary course of trade in Thailand in arms length transactions.

The GOC submits again, as we did in our submission to the TMRO, that there is no factor (to paraphrase Hill J in Enichem Anic) which so distorted the market that arms-length

---

[8] *Decision of the Trade Measures Review Officer – Review of a Termination Decision 177 Concerning Certain Hollow Structural Section Exported to Australia from Thailand* (31 August 2012).

[9] Ibid, para 17

transactions of HSS made in the ordinary course of trade could be said to have been rendered unsuitable for the purposes of normal value determination of the HSS in China.[10]

The TMRO went on to provide some hypothetical examples to demonstrate what can and cannot establish a "particular market situation":

> *59. I do not believe that it is possible to suggest any definitive test of what more would be required. Nevertheless, some hypothetical examples may be useful.*
>
> *60. So, for example, where an extreme weather event greatly reduced the supply of a primary product with a consequential significant increase in both domestic and export prices, this would not, in my view, give rise to a market situation that rendered the abnormally high domestic prices unsuitable for comparison with the equally affected export price. However, if the export sales were covered by forward contracts at a set price reflective of normal production levels, the increase in domestic prices resulting from that weather event during the investigation period may well be sufficient to bring about a market situation that rendered the domestic prices unsuitable for use in assessing whether or not sales at usual export prices involved dumping.*
>
> *61. Government regulation of business provides another example of a factor which may affect pricing. The imposition, for example, of strict environmental controls on products for sale on the domestic market over and above those imposed in the importing country may clearly inflate domestic prices to a point where it would be inappropriate to conclude that export sales at a lesser price that reasonably reflected the less onerous controls involved dumping.*
>
> *62. Conversely, a government subsidy in the country of export for goods sold on the domestic market but not applicable to goods for export, may render a domestic price unsuitable for comparison with the export price for the purpose of ascertaining whether there is dumping. There may be factors other than the payment of the subsidy that mean that the export price is less than what the domestic price would be, but for the payment of the subsidy.*

These examples clearly demonstrate that the ultimate question in determining whether a "particular market situation" exists in the context of an anti-dumping investigation:

- is not whether there is any government influence in the market – or indeed whether there is a government at all;
- is also not whether there is any "distortion" in that market which would result in a market different from a market without such "distortion";
- is also not whether the prices of product concerned on that domestic market of the country of export are higher or lower than the domestic price of a third country.

---

[10] See letter from Government of China to the TMRO, dated 11 October 2012 ("GOC TMRO submission"), page 12

Rather, the correct question to ask is whether the situation of the domestic market for the goods concerned is so distorted such that the prices in that market cannot be used as a point of comparison to the prices of export sales in order to determine if dumping has occurred.

As the examples provided by the TMRO indicate, a particular market situation can only be found – regardless of the cause of such situation or distortion – when the "situation" in the domestic market of the goods under consideration has a very different effect on the domestic sales as opposed to the export sales of the goods under consideration. The law, and the examples provided by the TMRO, indicate that the effect or impact must be so significant such as to render the comparison between the domestic sales and export sales unsuitable. As the first example provided by the TMRO indicates, where the "situation" equally affects both the domestic sales and the export sales, the "situation" cannot be said to be a "particular market situation" in the context of Section 269TAC(2)(a)(ii). This is because the factor said to be the relevant "distortion" does not differently affect the domestic sales when compared to the export sales of the goods concerned.

The TMRO's finding in this regard conforms to the GOC's long standing position on this issue – which is that a particular market situation requires a comparative difference between markets.[11] At that time, Australian Customs responded to MOFCOM's position by saying the following:

> *Customs and Border Protection agrees that an examination of a particular market situation is focused on whether a factor exists in the country of export that has materially distorted domestic selling prices such that those prices cannot be considered to have been set under competitive conditions. However, it does not agree with the view that before determining that a particular market situation exists, it is required to further establish the extent to which that factor has also impacted on domestic and export sales differently to permit a proper comparison.*[12]

The GOC considers that the TMRO's considered legal explanation of the definition of a "particular market situation" – which we have fully and faithfully explained above - is correct. The GOC submits that it must now be adopted by Australian Customs in this reinvestigation, and when making future determinations concerning that concept.

Furthermore, even the test that Australian Customs advised the GOC it would apply – "*whether a factor exists in the country of export that has materially distorted domestic selling prices such that those prices cannot be considered to have been set under competitive conditions*"- appears to be significantly different to the test applied in the original investigation, which was either:

> *that prices of HSS in the Chinese market are not substantially the same (likely to be artificially low), as they would have been without the examined GOC influence...;*

---

11 See letter from MOFCOM to Customs dated 23 January 2009, entitled "*Draft revised Dumping Manual and discussion paper regarding anti-dumping applications claiming existence of a particular market situation*".

12 *Customs Assessment of Submissions regarding Exposure Draft Dumping Manual*, page 7.

or,

> *[that] Government of China (GOC) has significantly influenced the Chinese iron and steel industry, and this influence is likely to have materially distorted competitive conditions and affected supply in that industry.*

As the TMRO Report states, those considerations, if applied alone, are insufficient justifications for the making of a "particular market situation" finding. Section 269TAC(2)(a)(ii) and Regulation 180(2) do not require Australian Customs to make a finding as to whether the domestic market of the goods under consideration in the country of export is free from any government influence, nor do they require Australian Customs to make a finding as to whether the competitive conditions in that market are "distorted" by government or non-government influences. A finding that government influence "is likely to have materially distorted competitive conditions" in a market merely acknowledges that a government does exist in the country in which the market operates, and that the competitive condition of that market is different from the competitive condition of a market in another country which has different government influence, or of a perfect market (in pure economic terms). A particular market situation finding cannot be supported in that way. Instead, it requires a finding that the situation in the domestic market of the goods concerned in the country of export is so distorted that the domestic sales of the goods concerned in that market are rendered unsuitable for the purpose of determining a normal value for the goods which can then be compared to the export prices of the goods.

The GOC submits that if the correct test is applied in the reinvestigation, it must be found that there is no particular market situation in the Chinese HSS market. The TMRO correctly pointed out in his Report that a particular market situation does not exist simply because of:

- the exercise of regulatory controls that are within the scope of ordinary government functions; or
- the making of government policies encouraging or exhorting market participants to act in a certain way or to achieve a certain result, such as to improve business efficiency, rationalisation or environmentally-friendly operations.[13]

The effects such government actions have on costs or prices do not necessarily render domestic sales unsuitable for determining normal value.

Further, the TMRO Report states:

> *86. Equally, however, it is clear that government intervention in a market beyond this usual level can conceivably distort the workings of an ordinary market economy to such a degree as to create a market situation that renders domestic sales unsuitable for determining normal values. Perhaps the classic example would be Government provision of free or subsidised raw materials, meaning that the industry was able to operate at less than what would otherwise be fully commercially determined prices.*

[13] TMRO Report, paras 83 to 85

87. The question here is whether or not there is sufficient evidence of sufficiently distorting intervention by the Government of China.

These two paragraphs must be read in the context of the preceding discussions and the definition of "particular market situation" as was outlined carefully and in detail by the TMRO in the previous text of his Report. The TMRO's view that significant government intervention can in some circumstances result in a particular market situation is predicated by that intervention being distortive to the degree that sales on the domestic market are unsuitable to be used as the basis of a normal value for comparison with the export price. The question is not whether there is any government intervention in the market, or whether there is any government influence on the market. Finding a "particular market situation" is about spotting a significant factor which distorts the sales on the domestic market to such an extent that they are not suitable for comparison with the export sales.

In particular, the GOC does not accept that any input used in the production of HSS in China is "artificially low". Notwithstanding that, an input price that is the same for goods sold domestically as it is for exported goods is not a factor which would affect the comparison of domestic sales and export sales at all.

Findings made for each element of a "particular market situation" determination must be borne out by sufficient evidence. Suspicion alone is not an adequate basis for a market situation finding. This of course is not a special requirement applicable only to a "particular market situation". It is a general requirement, applicable to the making of any administrative decision.

We now turn to consider the TMRO's analysis of specific aspects of Australian Customs' "particular market situation" finding. The TMRO's analysis provides a good reference for the reinvestigation of this issue by Australian Customs.

In his Report, the TMRO considered each of the factors Australian Customs regarded as providing evidence of distorting intervention by the GOC:

1 **Chinese export tariffs on coke**[14]

The TMRO found that:

> *there is no data available about the impact of the export duty on the domestic price of coke, and therefore the impact on the domestic HSS market cannot at this time be ascertained.*[15]
>
> *this export tariff policy is motivated by environmental concerns... [t]he development of policies and legislation for the purpose of environmental*

[14] The TMRO Report refers to "*coke and coking coal*" [underlining supplied]. However in its conclusions, Australian Customs did not suggest that measures in relation to coking coal were relevant to its particular market situation analysis. See Customs Report, page 152.

[15] TMRO Report, para 97

protection is the proper function of government and is engaged in by all modern governments.[16]

...the lack of evidence about the impact of the tariffs on HSS prices itself tells against a finding that the domestic sales would thereby be rendered "unsuitable".[17]

Further, the TMRO noted that the WTO Panel and Appellate Body decisions in DS394, DS395 and DS398 concern whether the subject export duty and export quota measures were in compliance with China's obligations under our WTO Accession Protocol, and that these decisions do not assist in the consideration of a market situation finding.[18]

The GOC takes note of the TMRO's findings and observations and requests that Australian Customs take them into account in its reinvestigation.

Moreover, there is no fact on record supporting that the GOC has any industrial or trade measure specifically designed for the coking coal, therefore, the Customs' findings regarding to coking coal is baseless, and should be corrected properly.

2 The occurrence of mergers and acquisitions within the Chinese iron and steel industry

In relation to this factor, the TMRO Report states:

It is clear that mergers and acquisitions have occurred in the Chinese iron and steel industry, and these would appear to be consistent with the policies for that industry enunciated by the Government of China. However, Customs was [not] able to provide to me any evidence that these had occurred either because of those policies or by reason of their enforcement by the government. They may equally have occurred simply because the relevant market participants judged them to be in their best commercial interests.[19]

The GOC agrees with this finding. Further, we reiterate that our industrial and macro-economic policies are aspirational in nature. Chinese enterprises choose to act in their own commercial interests – whether this is in line with or is contrary to GOC policies. The occurrence or non-occurrence of a merger or of an acquisition in the Chinese HSS or the Chinese iron and steel industries is not caused by "government distortion" for the purposes of a market situation finding.

Further, we do not know how it could be said that any such merger and acquisition activity – whether or not "enforced" by the GOC – would render domestic sales of HSS unsuitable for comparing with export sales.

---

16 TMRO Report, para 100
17 TMRO Report, para 100
18 TMRO Report, para 99
19 TMRO Report, para 101

3 **Alleged supply of hot rolled coil steel to HSS producers at subsidised prices, and lower HRC prices in China than in other countries under investigation**

In this regard, the TMRO Report states:

> *While Customs found Program 20 to be a countervailable subsidy that involved the supply of HRC at less than adequate remuneration, as discussed below I consider this finding to be incorrect. Effectively, Customs' finding amounts to no more than observation of the fact that HRC prices in China are lower than in other countries. But without any evidence that this result has been caused by government action, that observation by itself cannot in my view justify a 'market situation' finding. There may be multiple explanations for such an outcome that may be equally consistent with the operation of an undistorted market economy. The fact that the Government of China has invested in and may even wholly own HRC suppliers does not demonstrate government market distortion in the absence of evidence that, for example, those HRC suppliers are selling at a less than commercial rate of return by government direction or are being subsidised by the Government to do so.*[20]

The GOC agrees with the TMRO's statement that *"Customs' finding amounts to no more than observation of the fact that HRC prices in China are lower than in other countries"*. In this investigation by Australian Customs, and in investigations since then, Australian Customs has used the observation that the prices of goods in China are lower than in other countries as the basis for:

- the Chinese market being afflicted by a "particular market situation";
- prices being artificially low;
- financial records not being reasonably reflective of competitive market costs;
- enterprises being provided with raw materials at "less than adequate remuneration".

The GOC takes note of the TMRO's comment that the simple observation of lower prices does not allow these prejudicial conclusions to be arrived at against the GOC and against Chinese exporters. The GOC urges Australian Customs not to misapply the statutory tests, and to conduct a proper and objective consideration of the evidence when making its findings in the reinvestigation.

4 **Comments made by market participants about GOC policies and the actions of other market participants**

In the Customs Report, Australian Customs considered that public comments made by certain enterprises (in particular, by "General Steel Holding") constituted evidence

---

[20] TMRO Report, para 102

supporting a finding of a "particular market situation" in the Chinese HSS market. In this regard, the TMRO said:

> *...while market participants have indeed made comments about those Government of China policies, they have in my view done so in equivocal terms. They may equally be consistent with a mere expression of fact that a market participant has acted in a manner consistent with government policy in exercise of its own commercial judgement, or in recognition that the Government of China (like any other government) could potentially legislate to enforce a policy that is not yet enforceable.*[21]

The GOC agrees with the TMRO's observation above. Further, we refer to our comments regarding the use of General Steel Holdings information by Australian Customs,[22] and respectfully request that Australian Customs bases its recommendations to the Minister in the reinvestigation on a fair and objective consideration of the information available to it.

Lastly on the topic of the "particular market situation" finding, the GOC notes that the direction in relation to the reinvestigation of the finding makes reference to the "iron and steel market" instead of the "HSS market". The GOC considers that the reinvestigation must be confined to considering whether there is a particular market situation in the Chinese HSS market, being the market for the goods which are actually under consideration in this investigation.

A "particular market situation" finding relates only to the domestic market of the goods subject to the investigation. Further, it has never been claimed that a particular market situation exists in the "iron and steel market". Australian Customs did not initiate an investigation in relation to a "particular market situation" in the "iron and steel market". There is no definable "iron and steel market" in China.

The GOC believes that the confusion on this point – and an explanation for the TMRO's phrasing of his recommendation – arises from the approach adopted towards this issue in the Customs Report. In the Customs Report, the "iron and steel industry" appears to have been used as a proxy for the HSS market, or at least it was assumed that the HSS market would be affected in the same way by broad government policies that relate to the "iron and steel industry". The TMRO's formulation of his recommendation simply identifies that Australian Customs finding related to the "iron and steel industry", when it should have related to a market. The GOC requests that Australian Customs re-orient its analysis so that its consideration of a "particular market situation" relates to the market for HSS – the goods under consideration.

C Finding in relation to State-invested enterprises as "public bodies"

---

21 TMRO Report, para 108

22 GOC SEF Submisslon, at page 7

The TMRO considered this finding in his assessment of the subsidy referred to as "Program 20" in the Customs Report. In that Report, Australian Customs found that State-invested enterprises that supplied hot-rolled steel ("HRS") were "public bodies" for the purposes of Section 269T of the Act.

Similar to the approach adopted in reviewing the "particular market situation" finding, the TMRO started his analysis by examining the definition of "public body" in the context of Section 269T. The GOC welcomes this approach – ie an investigating authority should always work out, as a first step, the legal meaning of the key element of the finding it is required to make, and the tests that it needs to apply in arriving at a finding on that key element.

The TMRO notes that there is no legislative definition of "public body" in the Act. Section 269T's definition is the Australian implementation of Article 1.1 of the SCM Agreement. Thus the TMRO noted that WTO Appellate Body jurisprudence bearing on the meaning of "public body" can be used to determine what a "public body" is, and what is required when determining whether a private entity is such a body. In the original investigation Australian Customs also referred to Appellate Body discussion of this issue as a form of guidance in making its determination.

The TMRO notes that the Appellate Body said this - in DS379[23] - about the meaning of "public body":

> *We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body [...] must be an entity that possesses, exercises or is vested with governmental authority.*

In relation to government authority, the TMRO considered that the Appellate Body in DS379 was right in summarising the nature of government function and authority as being concerned with the power to control, compel, direct or command private bodies and persons.

Having ascertained the meaning of the term "public body", the TMRO then considered each of the three tests applied in the Customs Report for the purpose of determining whether an entity – in our case, a State-invested enterprise - is a public body. Those tests were:

- whether a statute or legal instrument expressly vests government authority in the entity concerned;
- whether the entity concerned is in fact exercising governmental functions, serving as evidence that the entity possesses or has been vested with governmental authority;
- whether the government exercises meaningful control over the entity, and the entity's conduct serves as evidence that it possesses governmental authority and exercises that authority in the performance of governmental functions.

---

[23] Appellate Body report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (WT/DS379/AB/R)

In relation to the first of these tests, the TMRO considered that Australian Customs was correct in acknowledging that there was no evidence of any legal instrument expressly vesting government functions and authority in any Chinese HRS producer.

The TMRO went on to find that Australian Customs had no basis to conclude that the second or third tests were met. In this regard, the TMRO said that:

- actively taking steps to comply with government policy and/or regulation does not equate to the exercise of government functions or authority;
- the essential element of government function or authority is the exercise of a power of government over a third person;
- Section 36 of the *Law on State-owned Assets of Enterprises* falls short of establishing that State-invested HRS producers are invested with the power to control, compel, direct or command private bodies and persons – the essential element of government function;
- it was not necessary to determine whether or not the GOC exercises meaningful control over State-invested HRC producers, as the evidence failed to establish that the enterprises are exercising government authority

These findings are consistent with the GOC's consistent and persistent position that:

> *State-invested enterprises in China are not public bodies. They are not expressly vested with government authority, and they do not exercise government authority. They are neither "controlled" nor "meaningfully controlled" by the GOC. State-invested enterprises do not have a punitive, commanding, or directive power over any citizens, or over any other entities. They are commercial entities operating under the very many commercial laws that we have enacted for the free-running of our economy.*[24]

The GOC notes that this is now the second time that the TMRO has overruled Australian Customs' finding that Chinese SIEs are public bodies for the purpose of Section 269T. The GOC considers that to the extent that any confusion regarding this issue had not been resolved before now, that it now has been.

Australian Customs is requested by the GOC to cease labelling Chinese SIEs as "public bodies". The GOC trusts that a proper, objective and unbiased assessment by Australian Customs will now conclude that Chinese SIEs are not bodies of that nature.

D Finding in relation to HRS supplied at "less than adequate remuneration"

In the Customs Report, Australian Customs concluded that the HRS supplied by Chinese SIEs to HSS producers was provided for "less than adequate remuneration". This was done

[24] GOC TMRO submission, pages 17 and 18.

by reference to a "benchmark" price for HRS based on data obtained from Korean, Malaysian and Taiwanese producers of HSS.

The GOC said the following in its submission in response to the SEF:

> *The GOC considers that Australian Customs' view of the WTO Appellate Body's report in DS257[4] as indicating that the material factor for using a benchmark is that "private prices are unsuitable due to market distortion, not the reasons for this distortion" is incorrect. The GOC submits that there is no legal right to use an external benchmark under WTO or Australian law, either at all or in the circumstances of this case.*

---

4 *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*

Section 269 TACC(5) of the Act clearly provides:

> *For the purposes of paragraphs (4)(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.*

Having considered the meaning of "remuneration" in the Macquarie Dictionary, the TMRO considered that:

> *In my view, when given its ordinary English meaning s 269TACC(4)(d) requires a determination of the question whether Chinese producers provided HRC to exporters of HSS for less than adequate recompense or reward for the costs, work or trouble incurred by them in their production of HRC....*
>
> *I consider that the term 'adequate remuneration' in s 269TACC(4)(d) requires an assessment of the adequacy of the return on investment. This requires a comparison between the cost to make and sell and the price of sale of the goods. The comparison may take account of price, quality, availability, marketability, transportation and other conditions of purchase or sale in assessing the adequacy of the difference between cost and price.*
>
> *Because regard must be had to the prevailing conditions in the domestic market, it would also be appropriate to consider 'the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision' in order to obtain 'an appropriate measure of the adequacy of remuneration' (see paragraph 269 above). This simply means that adequacy of remuneration must be determined in the particular market context. But this is very different from an assessment of the difference between actual prices and prices that might apply in a notional competitive market unrelated to the prevailing conditions in the domestic market.*

Accordingly, the TMRO found that there was no evidence that the sale prices of HRC by the SIEs led to "less than adequate remuneration".

In so far as the TMRO's views reinforce the proposition that the question of "adequate remuneration" relates to adequate remuneration in the country of provision of the alleged subsidy, the GOC endorses the views of the TMRO.

E The GOC's participation in the original investigation

After assessing each of the factors and key "evidence" relied on by Australian Customs in making its "particular market situation" finding, the TMRO concluded that the evidence available failed to support that finding. As explained at length in B above, the GOC supports this conclusion. However, the GOC is concerned to note certain comments in the TMRO Report relating to the GOC's participation in the original investigation on the topic of "particular market situation. The GOC is concerned that some of these comments may reflect some misunderstanding on the part of the TMRO as to the GOC's participation in the original investigation, and the interchanges that took place between the GOC and Australian Customs during that long and exhaustive process. The GOC would now like to take this opportunity to identify those comments in the TMRO Report and to respond to them.

The TMRO states in his Report that Australian Customs may have had a reasonable cause to suspect that the GOC was intervening in the iron and steel market. The TMRO opined that:

> *[t]hat suspicion may have been further encouraged by the actions of the Government of China in the manner of its participation in Customs' investigation. Customs reports that, in many instances, the Government of China declined to provide Customs with information of relevance sought or provided information that was not adequate. Indeed, in its submission to me, the Government of China did not overtly and unequivocally address the key issue, but focussed instead on forensic aspects.*[25]

The GOC rejects this accusation. We do not understand how it can be levelled against us. The statement lacks objectivity. Therefore, the GOC chooses to treat this statement as being the result of either a misunderstanding on the part of the TMRO, or the receipt by the TMRO of criticisms from third parties which are not on the public record and which the GOC has never had an opportunity to address.

The GOC is not aware of the alleged "many instances". On the contrary, the GOC provided full cooperation to Australian Customs for the purposes of the original investigation. The GOC provided:

- 253 pages of responses to the questions in the Government Questionnaire, accompanied by 224 attachments;

---

[25] TMRO Report, para 93

- 64 pages of responses to the questions in the Supplementary Government Questionnaire Response, accompanied by 47 attachments;
- 95 pages of responses to the questions in the Second Supplementary Government Questionnaire Response, accompanied by 12 attachments;
- 17 pages of additional submissions in relation to the preliminary affirmative determination and provisional measures;
- eight pages of submissions in response to the SEF; and
- numerous other letters, emails and other communications in relation to the investigation in general.

During the original investigation, Australian Customs did not suggest to the GOC that it was being non-cooperative. Supplementary questions were routinely asked of the GOC, and the GOC responded to those as well. At the end of that information gathering process Australian Customs advised the GOC that no verification of the information provided was necessary or warranted. We indicated to Australian Customs that we accepted this comment in a positive way, as indicating that our responses were adequate and did not require verification, and not in a pejorative way. The GOC offered Australian Customs whatever further advice and clarification that might be required.

In all respects the GOC acted to the best of its ability during the investigation. Necessary information was provided within the times allowed by Australian Customs. The GOC facilitated Australian Customs inquiries. None of our information was "not accepted", and we were not advised of any rejection of our information. None of our explanations were said to be unsatisfactory, except where supplemental questions were raised. These supplemental questions, and any other deficiencies in information, were carefully addressed by the GOC when they were raised by Australian Customs. The published determination did not suggest that any of the GOC's information had been rejected.

We acted to the best of our ability at all times in order to provide the information that was requested by Australian Customs. Any attempt by Australian Customs to now exclude information provided, or to suggest that the GOC impeded the investigation, would be a serious breach of good faith, of due process, and of the WTO Agreements pursuant to which the original investigation was meant to have been conducted. To act on such aspersions now to the detriment of the GOC – after the final decision in the investigation and at a time when no new information can be taken into account by your investigating authorities – would be entirely untenable.

The GOC takes issue with the TMRO's suggestion that the GOC's submission "did not overtly and unequivocally address the key issue, but focussed instead on forensic aspects". With respect, we have to say that this is an absurd criticism of the GOC as an interested party to the investigation. It is unclear what is meant by the use of the word "overtly", and what the TMRO thinks was actually required from the GOC.

We wish to remind Australian Customs that we have at all times –at the consultation stage, during the original investigation, and in our submission to the TMRO - unequivocally and overtly addressed the "key issues":

- that there is no particular market situation in the HSS (or even the wrongly alleged "iron and steel industry/market") in China;
- that participants in those markets operate under competitive market conditions;
- that Chinese industrial and macro-economic policies relating to the iron and steel industry are not "legally binding" – unless embodied in law, their contents are aspirational in nature, signalling the government's vision of the future shape of the industry;
- that State-invested enterprises in general, and those supplying HRS to HSS producers, are not public bodies; and
- that State-invested enterprises do not provide HRS to HSS producers at less than adequate remuneration

The "suspicions" that Australian Customs might have had during the original investigation were its own. Plainly, it is the investigating authority's obligation to make findings based on positive and sufficient evidence, rather than based on "suspicions". It is not the obligation of the GOC or of the Chinese exporters concerned to "disprove" the allegations of a "particular market situation" or of a "Program 20" subsidy. Even if the GOC did focus on the "forensic aspects" of the investigation, it is because it is exactly those aspects that it was asked to concentrate on. After all, it is the evidence that must be obtained and analysed by Australian Customs. By satisfying those forensic requirements, the GOC was doing exactly what it was supposed to be doing.

Also in this regard, the GOC notes the following comments in the TMRO Report:

> *95. The Government of China submitted to me that there is no evidence that the mandatory requirements of the policies are implemented or policed. At the same time, I note that its submission does not go so far as to expressly deny any measures to implement the policies by regional governments or other public authorities. In this regard, the submission appears to be very carefully worded.*

The GOC has consistently and repetitively advised that industrial policies are not mandatory requirements imposed on enterprises. The GOC has not qualified such statement by reference to central or regional governments.[26] It is remarkable – and, again, out of character – for the TMRO to criticise the GOC for not denying something in our own unilaterally-provided submission. Our submission was not in response to any request by the TMRO to confirm or deny anything.

---

[26] For further details of the Government of China's submission to the TMRO regarding particular market situation and the nature of the industrial policies, please refer to page 4 to 8 of the Government of China submission to the TMRO.

The GOC is nonplussed by the comments made by the TMRO which are underlined in the following passage from his Report:

> *111 Having regard to the totality of the evidence and submissions made, I consider that the evidence currently available to me fails to sufficiently establish that the policies and plans of the Government of China are being implemented and enforced in such a manner as would support the market situation finding. In saying this I do not wish to be read as positively finding that there is definitely no market situation in the Chinese domestic HSS market. I do not know whether or not that is the case, in part because the Government of China did not provide all the factual material sought from it by Customs. I simply say that the currently available evidence is not adequate to definitively establish a market situation finding.* [underlining added]

It is not clear to the GOC what was the intended purpose of the underlined statement, and again it is a statement which seems to be out of character for the TMRO to have made. It certainly is a comment which is irrelevant as to the final outcome of his Report.[27] There is evidence that proves that the GOC fixes prices of HSS or of HRS, or that it forces SIEs to do its bidding, or that it does anything else to manipulate its markets in a non-commercial way – because the GOC does not do those things.

F Conclusion

In light of the TMRO Report, and of the explanation and commentary contained in this submission, and in the many other submissions and information responses that the GOC has provided to Australian Customs, the GOC respectfully submits that Australian Customs must base its recommendations to the Minister in this reinvestigation on the following findings:

1 That there is no situation in the Chinese domestic market for HSS that renders domestic sales unsuitable for the purpose of determining normal value.

2 That the costs for HRS incurred by Chinese HSS producers are competitive market costs.

3 That:

(a) Chinese State-invested HRS-producing enterprises are not public bodies; and

---

[27] The Government of China notes that in its submission on the public record of this reinvestigation dated 8 February 2013, the applicant suggests that the use of the word "definitively" means that the TMRO applied an overly onerous test. This is incorrect, firstly because the investigation needed to establish that a state of affairs did exist (and it did not), and secondly because the TMRO did not say that a definitive finding was required. In the context of the extracted paragraph, and in the context of the TMRO's discussion about the particular market situation issue as a whole, it is clear that the TMRO found that there was insufficient evidence to establish that there was a particular market situation in the Chinese HSS market. The evidence that was on hand did not establish the kind of severe distortions which could be said to have affected the comparison of the normal value derived from domestic sales with the price of export sales. The use of word "definitively" on this one occasion serves only as a contrast to the word "definitely" in the preceding sentence. The first sentence of the passage correctly summarises the TMRO's views as expressed in the many pages of the Report which precede it.

(b) even if they were, there is no evidence that goods were provided by them to HSS producers at less than adequate remuneration.

These outcomes naturally flow from the findings of a review undertaken by a senior legal officer of the Commonwealth with the responsibility of reviewing decisions of the Minister and the recommendations of Australian Customs on which they are based.

The GOC requests that Australian Customs make an objective assessment of these matters, and as a result recommend to the Minister that Section 269TAC(1) can and should be used for normal value determination; that the costs recorded in the financial records of our HSS exporters must be used for normal value determination; and that there is no "Program 20" subsidy.

Yours sincerely

Wu Dan

Wu Dan

First Secretary

Bureau of Fair Trade for Imports & Exports

Ministry of Commerce, P.R.C.

Canberra
5/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia

Telephone +61 2 6163 1000
Facsimile +61 2 6162 3000
Email: info@moulislegal.com
www.moulislegal.com

17 April 2013

Mr S Sharma
Manager, International Trade
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

moulislegal

commercial+international

By email

Dear Sir

Certain coated steel - Statement of Essential Facts 190 Submission of the Government of the People's Republic of China

We write on behalf of the Ministry of Commerce of the People's Republic of China ("the GOC") in relation to Statement of Essential Facts 190, which was published on 18 March 2013 in this matter ("the SEF").

Particularly, the GOC wishes to voice its concerns regarding *Appendix 1 – Assessment of a Particular Market Situation*, which outlined the findings that have led the Australian Customs and Border Protection Service ("Customs") to conclude – for the purposes of the SEF - that a particular market situation ("PMS") existed in the Chinese markets for zinc galvanised and aluminium zinc coated steel (collectively "coated steel"), such that the sales in those markets were unsuitable for deriving a price for the purpose of comparison with export prices of Chinese exporters of coated steel.

The GOC is gravely disappointed with the SEF's conclusion regarding the existence of a PMS, and wishes to state categorically and without reservation that such a conclusion is both factually and legally incorrect. This submission explains the various legal, factual and economic shortcomings of that conclusion.

If the contents of this submission are fully understood, the GOC would anticipate Customs' acceptance of the fact that no PMS exists, and that Customs will reverse the SEF's contrary conclusion when issuing its final report to the Minister for Home Affairs ("the Minister") in these investigations.

1 Misapplication of "particular market situation" law

At the opening of its response to the Government Questionnaire ("GQ"), the GOC expressed the view that Customs' request for the GOC to respond to the GQ must have been based on a material misunderstanding of Australia's rights and obligations under Article 2.2 of the WTO *Anti-Dumping Agreement* ("ADA"). The GOC went on to explain the appropriate interpretation and application of Article 2.2 of the ADA. Despite the GOC's response to the GQ and to the Supplementary Government Questionnaire ("SGQ"), and despite its other submissions, the SEF construes and applies the PMS concept in a manner that is inconsistent with the ADA and Australian law.

To reiterate, Article 2.1 of the ADA provides that the existence of dumping must be determined on the basis of a comparison between home market and export prices. This is the primary rule, the only exceptions to which are contained under Article 2.2 of the ADA. Relevantly, Article 2.2 provides an exception to Article 2.1 where, because of the particular market situation in the domestic market of the exporting country, such sales do not permit a proper comparison with sales on the export market.

The important factor in this regard is not the existence of what could colloquially and broadly be referred to as any "particular situation in the market". Rather it is the existence of a particular situation in the domestic market, of the kind of severity that the relevant precedent concerning the concept requires, having an impact which does not permit a proper comparison of the sales on the domestic market with those on the export market. This interpretation is patently clear on the text of the ADA and is also supported by the extracts of the Panel's judgement from *EC — Imposition of anti-dumping duties on imports of cotton yarn from Brazil* (as set out in the GOC's response to the GQ).

This interpretation is reflected in the Australian implementation of Articles 2.1 and 2.2 of the ADA under Section 269TAC of the *Customs Act 1901* ("the Act"). Specifically Section 269TAC(2)(a)(ii) allows for the use of a constructed normal value where:

> *...the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1).*

Section 269TAC(1) provides:

> *...the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.*

To activate Section 269TAC(2)(a)(ii), the situation in the market of the country of export must affect the sales in that market in such a way that the prices of the exporter in those sales can no longer be used as an appropriate comparator to the prices of the exporter in export sales. As an extension to this, it is clear that factors that affect both the domestic price and the export price cannot be considered to be such a situation, because they will cause no impediment to the price comparison. This is a distinct, and much narrower, consideration than would be required if the Sections called for a comparison of markets generally.

It is also clear from the text of Sections 269TAC(1) and 269TAC(2)(a)(ii) that the relevant market is the market from which the normal value would otherwise be derived under Section 269TAC(1): ie, the domestic market for like goods. This was made explicit at paragraph 28 of Hill J's judgement in *Re Hyster Australia Pty Limited and Hyster Europe Limited v the Anti-Dumping Authority; the Minister of Small Business, Construction and Customs and Clark Equipment Australia Pty Limited* ("Re Hyster").[1] At that paragraph the learned Judge said:

> *The question which is relevant, for the purposes of s.269TAC(2)(a)(ii), is whether, having regard to the situation in the relevant market, there is something about the sale prices obtained in that market which renders them "unsuitable" for use for the purpose of determining "normal value".* [underlining supplied]

Finally, it will not be any "situation" in the domestic market for like goods that triggers recourse to Section 269TAC(2)(a)(ii). The situation must render the sales of the exporter in that market unsuitable to derive a price for comparison with the exporter's export prices. According to Section 269TAC(2)(a)(ii) the situation in the domestic market for like goods must be such that it renders sales in that market unsuitable for use in determining the normal value under Section 269TAC(1). Unsuitability in this context is not intended to be easily or randomly achieved. For example, sales are routinely non-comparable by reason of factors which are accommodated – in the dumping determination - by adjustment under Section 269TAC(8) of the Act.[2] Market differences giving rise to such adjustments do not render the sales "unsuitable" for use in determining a normal value.

There has been judicial discussion of when a sale might be unsuitable, in terms of Section 269TAC(2)(a)(ii). That discussion has indicated that the hurdle required to establish "unsuitability" is very high indeed, and must be supported by strong evidence. For example, Hill J in Re Hyster explained that:

---

1 [1993] FCA 36 (17 February 1993)

2 *Re Enichem Anic SRL and Enimont Australia Pty Ltd v the Anti-Dumping Authority and the Minister of Small Business and Customs* [1992] FCA 579, per Hill J at 37.

> *Suffice it to be said here that the mere fact that an oligopoly exists in the country of export, which has led to higher prices and higher profit margins, does not of itself make the prices prevailing in that country unsuitable for use in determining the normal value.*[3]

And:

> *The conclusion of the Authority that imperfect market conditions are of themselves insufficient grounds to ignore domestic prices is, in my view correct.*[4]

Similarly, in *La Doria Di Diodata Ferraioli SPA v David Peter Beddall, Minister of Small Business, Construction and Customs; Anti-Dumping Authority and Comptroller-General of Customs* ("La Doria"),[5] Lee J explained that:

> *Whether the domestic market in Italy is a market in the sense of a free trading market is not the question required to be addressed under sub-para.269TAC(2)(a)(ii). Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of sub-s.269TAC(1).*[6]

The Australian jurisprudence correctly interprets the ADA requirements. There is a very high bar that needs to be satisfied to establish the existence of a market situation for the purpose of Section 269TAC(2)(a)(ii). This is understandable, in that the Section refers to "unsuitability", which carries with it an extreme and absolute literal sense. In context, it also suggests an "extremity" in the situation claimed to exist, because sales in one market are expected to be comparable to sales in other markets, regardless of the conditions in the markets themselves. Differences in prices caused by different market conditions are of course what dumping is all about, and an investigating authority cannot simply "dismiss" a domestic market because of its own particular attributes.

Where the issue has been raised before Australian Courts, the only occasion on which a Court has been satisfied that the situation claimed has caused the unsuitability required for recourse to be had to Section 269TAC(2)(a)(ii) was when the payment of production aid to Italian producers of canned tomatoes *"distorted domestic selling prices to the extent that canned tomatoes were being consistently sold at prices below the production and selling costs of the canners."*[7]

It is also clear that Section 269TAC(2)(a)(ii) must be read in line with, and applied in accordance with, Article 2.2 of the ADA. Article 2.2 only applies where the situation only affects the sales of the like goods in the domestic market. If the situation affects sales in both markets then there is no need to rely on a constructed normal value, because the situation will not have a deleterious effect on the comparison that is required to be made in working out whether there has been any dumping. Based on the text of Section 269TAC(2)(a)(ii), it is clear that it is to have the same role, because Section 269TAC(2)(a)(ii) is only concerned with situations that affect the suitability of the sales in the domestic market for determining the price of the like goods. A relevant situation must make such sales unsuitable for use as the normal value, or to put it another way, unsuitable for being used as a comparator against the export price in order to determine whether dumping has occurred. Again, a situation that affects both export prices and domestic prices will not allow reliance on Section 269TAC(2)(a)(ii).

Initially, without commenting on the shortcomings of the PMS analysis, the GOC wishes to emphasise the following points:

- The alleged GOC influences on the Chinese iron and steel industry that the SEF claims have created a PMS – "artificially low prices" - would have an equal effect on the exporter's export prices, in that goods sold domestically and those exported incur the same costs. Therefore, *prima facie,* they are not capable of rendering prices derived from the Chinese market for coated

---

3 *Ibid,* at paragraph 29.
4 *Ibid,* at paragraph 33.
5 [1993] FCA 288 (11 June 1993)
6 *Ibid,* at paragraph 33.
7 *Minister of Small Business, Construction and Customs, Anti-Dumping Authority, Comptroller-General of Customs v La Doria Di Diodata Ferraiolli SPA* [1994] FCA 904 (10 February 1994) at paragraph 38.

steel unsuitable for determining normal values. Therefore, there is no relevant situation that would legally allow recourse to Section 269TAC(2)(a)(ii).

- The existence of the PMS is premised on the alleged distortion of competitive conditions in the Chinese iron and steel industry. The GOC rejects the opinion that the Chinese iron and steel "industry" is a "market". If this "industry" could be said to be a "market" - and the SEF implies that it is a "market" by determining that it has "competitive conditions" – it is not the relevant market for a PMS finding. As noted, the only market in which a relevant situation can exist is the domestic market for the goods under consideration.[8]
- In any case, a general finding that prices in the coated steel market are *"not substantially the same as they would have been without the influences by the GOC"* does not at all meet the standard of requisite "unsuitableness" as required by Australian Courts or by any of the opinions of WTO members that the GOC have previously brought to the attention of Customs.[9] As the above extract from La Doria indicates, depressing or inflating factors affecting the price of goods sold in a market will not in themselves establish that there is a situation in the market that makes sales obtained in the market unsuitable for use for the purpose of Section 269TAC(1). Moreover, as noted in Re Hyster, imperfect market conditions are insufficient reason to ignore prices derived from sales in a domestic market.

The GOC submits that the grounds under which the SEF asserts that prices derived in the Chinese market for coated steel are unsuitable for determining normal values falls far short of the recognized grounds under which such a finding could be made under the ADA or the Act. It is not legally correct to assert the existence of a PMS on the basis that prices may be different because of the existence of the GOC as a government which duly undertakes its economic, social and environmental responsibilities in a sovereign way.

But in any case – the GOC submits that there is no evidence to support the SEF's conclusion, as will now be discussed in the following sections.

2 SEF 190 does not establish the existence of a relevant market situation

The major finding of fact that led to the SEF's conclusion that a PMS existed in the market for coated steel was that:

> *Customs and Border Protection has determined that the GOC has exerted numerous influences on the Chinese iron and steel industry, which have substantially distorted competitive market conditions in the iron and steel industry in China. The impact of the GOC's numerous broad and extensive overarching macroeconomic policies and plans outlining the aims and objectives for the Chinese iron and steel industry have been significant. Furthermore, the various taxes, tariffs, export and import quotas have influenced the raw materials used in production of the goods, which based on fundamental economic theory would lead to a distortion in the selling prices of the goods themselves.*[10] [underlining supplied]

The *"numerous broad and extensive overarching macroeconomic policies and plans"* are discussed in 3 below.[11] At this juncture the GOC wishes to address what the SEF refers to as *"fundamental economic theory"* as also mentioned in the following quote:

> *...the various taxes, tariffs, export and import quotas* [that] *have influenced the raw materials used in production of the goods, the various taxes, tariffs, export and import quotas* [that] *have*

---

8 In any case, the GOC notes the conclusion of Public File document 206, that the *"Chinese steel industry, by all standard measures, is less concentrated and more competitive than most other major steel markets"*.The GOC understands that this document, prepared by academics with strong background in economics and Asian studies, arose from communications initiated by Customs itself.

9 See letter from MOFCOM to Customs dated 23 January 2009, entitled "*Draft revised Dumping manual and discussion paper regarding anti-dumping applications claiming existence of a particular market situation*".

10 SEF, page 128.

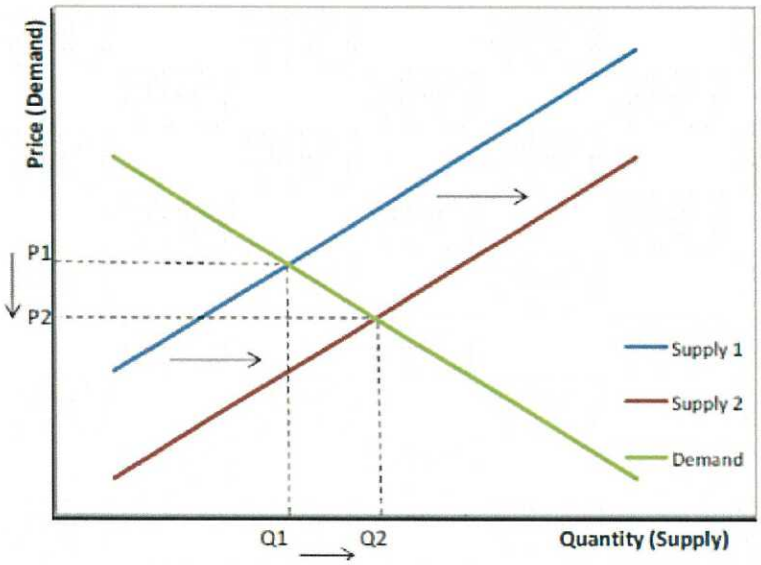
11 The GOC notes that all countries have overriding macroeconomic policies and plans for their economic development, and that the numerousness and extent of these *"policies and plans"* is highly exaggerated by the SEF.

> *influenced the raw materials used in production of the goods, which based on fundamental economic theory would lead to a distortion in the selling prices of the goods themselves.*[12] [underlining supplied]

The relevance of these various measures to the market for coated steel is explained in the following extract from the SEF:

> *The most influencing factors identified were the 40% export tax on coke and scrap metal, 0% VAT rebates on HRC, coke, coking coal and iron ore. These factors have led to an increased supply of those goods moving the supply down (right) and artificially lowering the cost and selling price of these raw materials – a cost to downstream users that purchase them – used in the production of galvanised steel and aluminium zinc coated steel.*[13]

SEF 190 bases this conclusion on what it calls the *"economics of supply theory"*, which dictates that *"increasing the supply of a commodity, given all other factors being equal will lead to lower demand (price) due to excess supply"*. This is said by the SEF to be an *"artificially low price"*. The SEF attempts to graphically represent the implications of this *"economics of supply theory"* as shown below:



The GOC does not agree with the economic analysis which is offered by the SEF at all.

Firstly, the GOC would point out that, based on *"fundamental economic theory"*, there is nothing artificial about the price derived at the intersection of the Demand and Supply 2 curve, nor could it be concluded that the competitive market conditions (whatever the SEF means by that term) are distorted. To the contrary, where those two curves meet is an equilibrium which, according to (correct) fundamental economic theory, provides the market-clearing price/quantity combination from both the suppliers' and consumers' (demanders') perspective, and is the outcome of a competitive market. Economics is the study of the allocation of scarce resources in the face of unlimited potential uses. Efficiency, whereby those scarce resources can be used to satisfy more demand, is considered to be a very good thing indeed. Finding some issue with the price derived from a market which has achieved greater efficiency is an artificial and illogical concept that entirely misses the point of the market mechanism.

This confusion of *"fundamental economic theory"* may be a result of a misunderstanding or misapplication of other fundamental economic theory in the SEF.

---

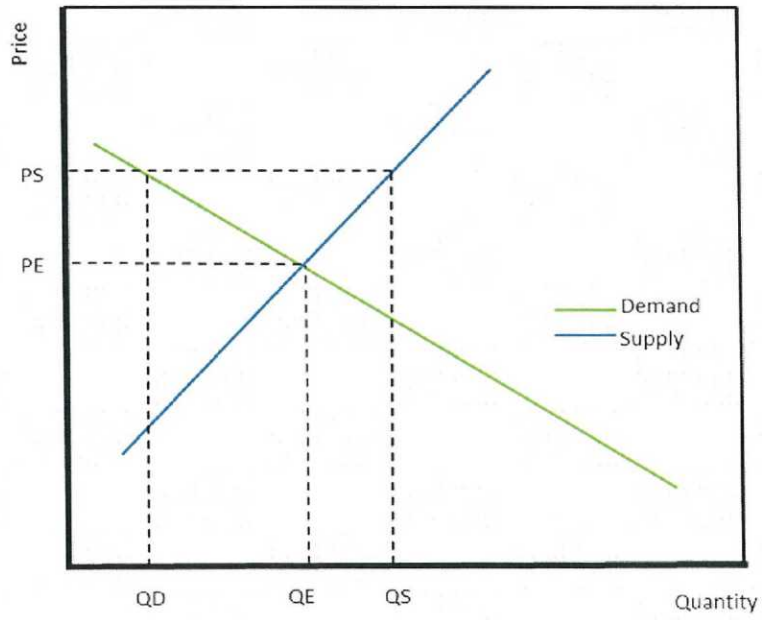
12 SEF, page 128.
13 *Ibid*, page 127.

For example, there is no such theory as the *"economics of supply theory"*. We consider it more likely that the SEF's intention, when referring to an economics of supply theory, was to introduce the *"law of supply"*. The law of supply provides that, all other things being equal, the quantity of the product offered by a supplier increases as the price of the product increases, and *vice versa*. This is to be contrasted with the *"law of demand"*, which provides that, as the price of a product increases, all else being equal, a lower quantity will be demanded, and *vice versa*. These are the two laws that dictate the shapes of the supply and demand curves in graphs such as that extracted above.

This fundamental confusion about what are considered to be basic economic principles is a major concern to the GOC, particularly as the confusion is being applied by an agency that implements a policy that is essentially economic in nature and application. This confusion continues throughout the analysis. For example, the axes on the graph are labelled to be *"Price (Demand)"* and *"Quantity (Supply)"*. This is incorrect. The axes represent only various volumes and prices. They do not represent supply and demand. It is the supply and demand curves that represent supply and demand. To put it another way:

- the supply curve represents the quantities that suppliers would be willing to offer their product at a given price;
- similarly, the demand curve represents quantities that consumers would be willing to purchase the product at a given price.

On this basis, it is important to note that an increase in the quantity of a product supplied to the market will not lead to a shift in the supply curve. Additionally, contrary to the stated economics of supply theory, all other factors being equal, increasing the quantity of a commodity will not lead to a lower demand or price, due to excess supply, nor will it lead to a shift in the supply curve. Rather the law of supply dictates that all things being equal, an increase in the quantity supplied will lead the supplier to seek a higher price for its product as, among other things, the greater cost of production needs to be satisfied by the market. In other words, if there is a higher quantity supplied to a market overall then suppliers have to extract a higher overall price to recover the costs of that supply to that market. This can be explained graphically, as we have done below:



Where QS is supplied, the supplier will seek to receive a price equal to PS, in accordance with the law of supply. As you will note, the PS/QS combination occurs outside of the market equilibrium (PE/QE), which means that the willingness of suppliers to supply a particular quantity of the product at a given price does

not match the ability of consumers to purchase that product at a given price. Instead, at a price PS, the consumer will only purchase a volume of the product equal to QD, as this is the particular price/quantity combination dictated by the demand curve. This means that the amount of product equal to QS minus QD will not be purchased.

This excess of supply is obviously in the short-term. In the long-term, suppliers will change their behaviour to get the market back into equilibrium (ie, they will provide a quantity of the product equal to QE), because they receive no benefit by continuing to produce the product at the higher volume, which led to the surplus in the quantity supplied. Because, if a supplier continues to make a product which it cannot sell at the price it desires, then why would it continue to make the product?

The underlying logical problem with the conclusion in the SEF is that it assumes that producers of the upstream products (the raw material inputs to coated steel) exist only to produce those products, and will continue to produce them to their own detriment. This is clearly a ridiculous position to adopt. If they produce the product to the point where they no longer receive a good price for that product, or start to make a loss, they will stop producing those volumes of the product. Supply will not continue to expand if it is not matched by demand, regardless of the particular taxes or other measures imposed on the particular products under consideration. Even if – hypothetically - the various measures had a significant effect along the lines of that attributed by the SEF, such an effect would only be a short-term issue, as the market participants would adjust their actions so that the market would return to equilibrium.

The second underlying illogicality with the analysis in the SEF is that it does not consider the effect of demand on the market. Each of the raw products that the SEF assumes has a distorted price is sold to a large number of consumers. In the GQ the GOC was able to identify **[CONFIDENTIAL TEXT DELETED – number]** iron ore producers, **[CONFIDENTIAL TEXT DELETED – number]** coking coal producers, **[CONFIDENTIAL TEXT DELETED – number]** coke producers and **[CONFIDENTIAL TEXT DELETED – number]** HRC producers, as well as what could be considered to be globally significant volumes of imports for each of these goods. In addition to this, the GOC was able to identify that each of these raw materials were also sold to other entities for the production of other goods. Steel consumption in China has accelerated in line with the country's rapid development and rising living standards. The demand for these goods has been absolutely massive, and it continues to grow on a yearly basis Yet the SEF treats demand as if it is just a static (*"all things being equal"*) and inconsequential consideration.

Although an alleged increase in the quantity of raw materials supplied is at the heart of the reasoning in the SEF, the SEF also notes that *"lower costs of production, changes in production technology, government taxes and subsidies* and *the number of producers in the market"* will cause an *"increase of supply in an economy"*.[14] Again, there is absolutely no evidence that this has occurred for any of the raw materials that are used in the production of the subject goods, and it is safe to say that these assumptions are not evidence that it has occurred. For example, changes in production technology are obviously quite costly for a producer to implement, and therefore may increase the price charged for the final product. In addition to which, there is no guarantee those changes will drive efficiency and lead to a lower production cost. Where technology is changed to prevent the environmentally damaging effects of a production process, there may be no net efficiency gain. In fact, it may be more costly to produce the final product. Again, the findings that these particular factors (a) have occurred and (b) have had the net effect of decreasing the price for coated steel are simplistic and unsupported by any evidence.

Ultimately, the GOC would note that the SEF's reliance on basic models of economics – whether those models are applied in a correct way or not - as a fundamental part of its reasoning is in itself troubling. Economic models are simply an abstraction that are used to simplify the relationship between two variables in what could rightly be considered a chaos system. The simple fact is that the law of supply and the law of demand, as well as the SEF's own *"economics of supply"* theory, all explain the likely outcome of the change in one variable in a market, when all other factors are static (the term used in economic literature is *ceteris paribus*, meaning "all other things being held constant"). However, in reality a market is a very complex system with manifold variables. There is absolutely no guarantee that a

[14] Again, the GOC notes the misguided focus on its *economy*, when the PMS concept relates to a situation in the *market* for the goods under consideration.

predicted outcome from a model will be replicated in a market. As with all markets in all countries, the Chinese markets for coke, coking coal, iron ore, hot rolled coil ("HRC") and scrap metal are far more complex than the situation that the standard model of supply and demand represents. Applying basic economic principles in a way that is entirely unrelated to the actual situation in the markets they attempt to describe does not prove what has happened in the market. It shows what theory predicts might happen, but it is not evidence of the situation in the market, nor should it be taken to be.[15] Even if the economic theorising attempted by the SEF was correct, which the foregoing should establish it is not, any conclusion based on that theory is not evidence of what has actually occurred in the market.

Essentially, the finding that a PMS exists in the Chinese market for coated steel is based on a chain of assumptions. Firstly, the SEF assumes that the various GOC measures have had a net effect of reducing the price of the input materials of coated steel. Secondly, it is assumed that these reduced costs are passed on, up the chain of production, to ultimately infect the markets for coated steel and create some vaguely defined distortion in those markets. Finally, it is assumed that this distortion is significant enough to render sales in the markets for coated steel unsuitable for use in determining the normal value of Chinese producers. These linked-assumptions are simply that - assumptions which do not prove what has actually taken place in the markets themselves.

In conclusion, the GOC sees no evidence for the proposition that *"the various taxes, tariffs, export and import quotas have influenced the raw materials used in production of the goods"* and have led to *"substantially distorted competitive market conditions"* in the Chinese iron and steel industry and *"a distortion in the selling prices of the goods themselves"*. There is nothing that supports the conclusion that prices in either the raw material markets or the coated steel markets are artificial or distorted. Furthermore, even if the SEF had applied *"fundamental economic theory"* correctly, any conclusions based on that theory could not be considered evidence that proves the existence of a situation in the market, and therefore cannot form a factual basis for reliance on Section 269TAC(2)(a)(ii) to exclude the calculation of the normal values of Chinese exporters of coated steel on the basis of their prices in domestic sales.

3 Evidence before Customs when making the PMS finding

The GOC notes the comments made in the SEF regarding the level and quality of information provided by the GOC in response to the GQ. As noted in the SEF, the PMS analysis was made without the benefit of the GOC's response to the SGQ. The SGQ was provided to the GOC as a means to remedy what Customs considered to be the deficiencies in the GOC's GQ response. After the provision of the SGQ, the GOC and Customs discussed the information that the GOC was reasonably able to provide in response to the SGQ. The GOC's final submission in response to the SGQ reflected the outcome of those discussions. Having noted this, the GOC would now like to address the information used in the SEF in support of its PMS finding.

Firstly, the GOC is concerned that the PMS finding was largely based upon the findings from Investigation 177. The PMS finding in that investigation is currently under reinvestigation. Despite this, the SEF supported its reliance on that investigation as follows:

> *The Review Officer concluded that the evidence available to him in his view failed to sufficiently establish that policies and plans of the GOC were being implemented and enforced in a manner as would support a particular market situation finding. The Review Officer further stated that he did not wish for his conclusion to be read as positively finding that there is definitely no market situation in the Chinese domestic iron and steel industry... His view was that the available evidence in HSS Report number 177 (Rep 177) was not adequate to definitively establish a 'particular market situation finding'.*[16]

This is an incorrect interpretation of the views expressed by the Trade Measures Review Officer ("TMRO") in his review of the report emanating from Investigation 177 ("REP 177"). The TMRO premised his

---

[15] The GOC wishes to emphasise that it is the very purposes of a market to deal with "situations", and to create a new equilibrium in response to the situation concerned.

[16] SEF, page 110.

recommendation that the PMS finding be reinvestigated on the basis that there was not sufficient evidence in REP 177 to support such a conclusion. That is clear on the basis of his following statements:

> *Having regard to the totality of the evidence and submissions made, I consider that the evidence currently available to me fails to sufficiently establish that the policies and plans of the Government of China are being implemented and enforced in such a manner as would support the market situation finding. In saying this I do not wish to be read as positively finding that there is definitely no market situation in the Chinese domestic HSS market. I do not know whether or not that is the case, in part because the Government of China did not provide all the factual material sought from it by Customs. I simply say that the currently available evidence is not adequate to definitively establish a market situation finding.*
>
> *At the same time, I am mindful that my recommendation to re-investigate this finding is unlikely to deliver the necessary evidence. This is because s 269ZZL(2) of the Customs Act requires the CEO of Customs to have regard only to the information and conclusions to which I was permitted to have regard under s 269ZZK, and that in turn is confined to the material that was before the CEO when he made his Report. That is, Customs is not authorised to collect new information in the course of a re-investigation. As I had specifically invited Customs to provide me with all evidence that it had in relation to Government of China action to enforce its policies, it is unlikely that the CEO will now have other evidence sufficient in my view to sustain a market situation finding.*[17] [underlining supplied]

This is a strong condemnation of the evidence relied upon in REP177 to establish the existence of a PMS in the market which was there under consideration. The TMRO considered that there was not sufficient evidence to support the allegations that a market situation existed in the Chinese market for HRC (as was alleged in that matter). We therefore question the rationality the continued reliance on the analysis in REP 177 to arrive at unfavourable conclusions against Chinese producers in these continuing investigations.

In any regard, there would appear to be no additional evidence in the SEF that would alter the view of the TMRO. Rather the SEF simply attacks the GOC's explanations surrounding the various "plans" and "policies" to which it refers. For example, the SEF notes the GOC's explanation that the National Steel Plan ("NSP") is an aspirational document, however it goes on to note that the GOC *"did not explain and or/provide any evidence to differentiate the difference between an 'aspirational' document and a 'legal' document"*.[18] The GOC considers this to be a strange sentiment. How is the GOC meant to prove that something is aspirational, other than to reiterate that it is not a law and has no legal force? There is no dedicated process for producing non-legally binding documents. There are no requirements to be met, other than the fact that it is not a law. Having noted that, the GOC would point out that under the Chinese Constitution, only the National People's Congress and the Standing Committee of the National People's Congress have the power to enact national-level legislation. Similarly, the State Council is able to make legally binding administrative regulations pursuant to the Law of Legislation, which is clearly not the case with the NSP.

The SEF does not take into account the responses of Chinese coated steel producers to the *Supplementary Exporter Questionnaires – Particular Market Situation* in this regard. Question 7(c) requested that each responding exporter detail how the NSP has impacted its business, and how that exporter ensures compliance with the NSP. In every case, the exporter explained that the NSP does not impact the operation of its business, is not binding on companies, and does not affect their business decisions. This is positive evidence from participants in the domestic market for the goods under consideration as to the lack of impact of the NSP. Even if Customs continues its perplexing reticence to accept the GOC's explanation of the nature of the NSP, the evidence before it from other sources must lead to the conclusion that the NSP has no effect on the Chinese market for coated steel, nor indeed on

---

[17] *Decision of the Trade Measures Review Officer – Review of Decisions to Publish a Dumping Notice and Countervailing Duty Notice Concerning Certain Hollow Structural Sections Exported from Australia to the People's Republic of China, the Republic of Korea, Malaysia and Taiwan* (14 December 2012), paragraphs 111-112 (hereinafter "TMRO Report")

[18] SEF, page 111.

the "steel and iron market" as a whole.[19]

Otherwise, no additional comment is provided in the SEF on the "plans" and "policies" that allegedly lead to the PMS finding. The SEF seems to consider that the analysis of these documents in REP 177 is sufficient grounds on which to found the PMS finding, despite the TMRO's strong opinion as to the lack of probative evidence of these documents, the different time periods of the respective investigations, and the different products concerned. On this basis, the GOC does not understand how the SEF could conclude that a PMS exists in the Chinese market for coated steel, nor that such a situation would allow recourse to Section 269TAC(2)(a)(ii).

Beyond the REP177 factors, the SEF identifies recent European Commission ("EC") investigations that are considered to have "some relevance" to the coated steel investigations. The GOC has addressed the lack of relevance of the EC investigations in its submission dated 11 March 2013. The GOC will not reiterate its opinion in this current submission. It suffices for it to say that the EC analysis was not a PMS analysis, and that to persist with a contrary view simple defies Australian legislation, the ADA and China's WTO Accession Protocol. In any regard, even if the EC investigations were based on sound logic and similar law to that which has led to the SEF, the conclusion that a PMS exists in the SEF is factually, legally and economically without virtue. No credibility can be provided to that conclusion by reference to the EC investigations.

Finally, the SEF refers to the 29 alleged subsidies under investigation in the currently running countervailing investigation as being relevant to the PMS finding. The SEF explains that 27 of the 29 alleged subsides were found to exist in the HSS Investigation, as discussed in Rep177, and that these 27 programs *"will have also impacted on the costs of factors of production of galvanised steel and aluminium zinc steel in China"*.[20] Once again, the logic here is muddled. Firstly, the major subsidy "found" to exist in that investigation was Program 20, relating to an alleged program for the provision of HRC by State-invested enterprises ("SIEs") at less than adequate remuneration. Again, as noted in the GOC's submission of 11 March 2013, the existence of this subsidy was flatly rejected by the TMRO. He found, firstly that SIEs were not public bodies, and secondly that there was no evidence that SIEs had provided HRC for less than adequate remuneration.[21] On that basis, no such program could be found to exist. In the absence of Program 20, the other 26 programs were of very little effect. Any impact of these programs on the factors of production of galvanised steel will be objectively, and without question, miniscule.

Even where an enterprise has received what might appear to be a "large" subsidy - for example, for environmental improvements - Customs ought to compare the amount with the total production of the enterprise concerned. Many Chinese enterprises operate at an absolutely massive scale. In any case, the prospect that an anti-dumping investigation is in some way able to address subsidisation concerns is not accepted by the GOC. Insofar as the 27 subsidies may have affected the price of coated steel, that will be remedied by the application of countervailing duties. Any subsidies that might be validly identified are wholly irrelevant to an anti-dumping investigation such as this.

There is no evidence to support the finding that sales derived from the Chinese market for coated steel are not suitable for determining the normal value under Section 269TAC(1). As the TMRO noted in relation to the PMS finding in REP177:

> *Effectively, Customs' finding amounts to no more than observation of the fact that HRC prices in China are lower than in other countries. But without any evidence that this result has been caused by government action, that observation by itself cannot in my view justify a 'market situation' finding. There may be multiple explanations for such an outcome that may be equally consistent with the operation of an undistorted market economy. The fact that the Government of China has invested in and may even wholly own HRC suppliers does not demonstrate government market distortion in the absence of evidence that, for example, those HRC suppliers are selling at a less than commercial rate of return by government direction or are being*

---

[19] We note similar comments attributed to Angang Steel Company Limited in its verification visit report, regarding the GOC's 12th Five-Year Plan.

[20] SEF, page 128.

[21] TMRO Report, paragraph 276.

subsidised by the Government to do so. [22]

The GOC considers that this comment is particularly apt in light of the *Comparative analysis of HRC costs* mentioned on page 128 of the SEF. Prices of HRC are lower in the domestic market because China is a low cost producer, which gives it a comparative advantage in the production of steel products. There is no evidence that the price of HRC or other raw materials used in the production of coated steel has been distorted or lowered through the actions of the GOC.

In conclusion, the GOC emphasises that none of the factors discussed in the PMS analysis evidence the existence of a situation in the Chinese market for coated steel that would render prices derived from that market unsuitable for determining the normal value. This is the only factor that allows recourse to Section 269TAC(2)(b)(ii). In its absence normal values must be calculated under Section 269TAC(1).

4 Requests

As discussed throughout this submission, the conclusion that a PMS exists in the Chinese markets for coated steel is:

- not based on positive evidence; and
- not based on a correct application of the ADA and Australian law.

Consequently, the GOC requests that Customs accept that prices in domestic market sales made by Chinese exporters of coated steel are not unsuitable for normal value determination. Additionally, any other decisions made throughout the investigation that are contingent on the existence of a "particular market situation" should be abandoned.

Yours sincerely

Daniel Moulis
Principal

[22] TMRO Report, para 102.

Canberra
5/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT 2609 Australia

Telephone +61 2 6163 1000
Facsimile +61 2 6162 0000
Email: info@moulislegal.com
www.moulislegal.com

7 June 2013

moulislegal

commercial+international

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

By email

Dear Ms Reid

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

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

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

A "Public body" finding generally

1 Introductory comments

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

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

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

in China should be considered public bodies.[2]

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

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

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

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

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

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

DS 379 provides that:

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

---

2 SEF 193, page 149.

3 *Customs Act* 1901, Section 269TACC(4)(d).

4 WT/DS379/AB/R (11 March 2011).

5 *Ibid*, para 317.

In this regard, REP 203 notes:

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

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

> *The evidence analysed by Customs indicates that certain producers of HRC are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.*[6]

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

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

---

6 TMRO Report, para 245.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved. There are many different ways in which government in the narrow sense could provide entities with authority... Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.* [underlining supplied]

Noticeably, the DS 379 report specifically pointed out that the key question to ask is *"whether an entity is vested with authority to exercise governmental functions"*. The evidence used by Customs as "Indicia 2" in relation to the question of whether an entity is, in fact, exercising governmental functions cannot in and of itself lead to a conclusion that that entity is a public body. To the contrary, it *"may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice"*.

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

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

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

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

> *245. The Appellate Body in decision DS 379 described government functions and authority as being concerned with the power to control, compel, direct or command private bodies and persons. In my view, this aptly summarises the nature of government authority. The evidence analysed by Customs indicates that certain producers of HRC are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.*
>
> *246. Customs substantially relied on s 36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies. But in my view this section requires no more than compliance with the policies of the Government of China. It falls short of establishing that State-Invested HRC producers are invested with the power to control, compel, direct or command private bodies and persons.*
>
> *247. Accordingly I consider that Customs had no basis to conclude that the second limb of the Appellate Body test was met.*
>
> *248. Moreover, even if it were accepted that the Government of China exercises meaningful control over State-Invested HRC-producers, the third test drawn from DS 379 would again not be met in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority.* [underlining supplied]

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

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

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

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

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

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

However, REP 203 goes on to pontificate that:

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

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

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

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

---

[7] REP 203, page 51.

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

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

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

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

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

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

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

---

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

9 REP 203, page 53.

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

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

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

to be simply absurd.

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

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

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

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

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

and:

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

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

---

10 REP 203, page 54.

11 REP 203, page 52.

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

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

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

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

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

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

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

---

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

that purpose is to fulfil government functions.[13]

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

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

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

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

> *The evidence analysed by Customs indicates that certain producers of HRC are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.*[14]

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

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

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

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

---

13 REP 203, page 53.

14 TMRO Report, para 245.

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

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

The Annual Report goes on to note that:

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

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

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

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

---

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

16 *Ibid.*

17 *Ibid.*

government authority in either the Baosteel Group or the Company.

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

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

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

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

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

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

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

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

---

18 TMRO Report, para 247.

19 REP 203, page 53.

20 REP 203, page 51.

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

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

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

> *...evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.*[21]

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

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

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

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

The "policies" in question are said to be:

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

[21] DS 379, para 318.

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

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

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

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

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

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

REP 203 considers that these regulations:

---

22 REP 203, pages 55-56.

23 TMRO Report, para 85.

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

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

What the text says is that the GOC:

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

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

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

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

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

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

[24] REP 203, page 56.

(ii) in the 2009-2010 financial year.

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

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

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

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

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

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

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

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

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

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

> *The evidence analysed by Customs indicates that certain producers of HRC are actively taking steps to comply with the policies promulgated by the Government of China, and display an awareness that there may be negative consequences to their business if they fail to do so. However, in my view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons.*[25]

and that:

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

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

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

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

Lastly, REP 203 states that:

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

---

25 TMRO Report, para 245.

26 *Ibid*, para 248.

parties to also adhere to these policies.[27]

The GOC requests to be informed what that evidence is.

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

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

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

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

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

This is facile.

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

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

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

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

C Adequacy of remuneration for HRC

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

---

27 REP 203, page 57.

28 SEF 193, page 149.

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

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

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

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

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

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

---

29 SEF 193, page 150.

30 SEF 190, page 51.

31 *Ibid*, page 52.

32 *Anti-Dumping Agreement*, Article 2.2.1.1.

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

"Adequate remuneration" has been defined to mean:

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

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

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

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

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

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

---

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

[34] *Ibid*, para 87.

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

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

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

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

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

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

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

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

---

35 Softwood Lumber IV, para 102.

36 SEF 193, page 151

37 *Ibid*

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

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

> *...it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).*[38]

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

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

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

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

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

D Conclusion and request

The GOC submits that:

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

---

[38] Softwood Lumber IV, para 106

[39] *Ibid*, para 120.

are vested with government authority shows no such thing;

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

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

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

Yours sincerely

Daniel Moulis
Principal