中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA
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22 February 2013

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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]

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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...*

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[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

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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

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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

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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.*
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> *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.*
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> *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.

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[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...;*

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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.*

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[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*

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[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.

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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

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[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"

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21 TMRO Report, para 108

22 GOC SEF Submission, 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.

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[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

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[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.*

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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;

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[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.

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[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

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[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.