中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA
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20 March 2013

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Dear Sir

Reinvestigation of certain findings- ACDN 2013/14
Certain Aluminium Road Wheels exported from the People's Republic of China

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 aluminium road wheels ("ARW") from China ("the original investigation") conducted by the Australian Customs and Border Protection Services ("Australian Customs") in this matter.

The GOC notes 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").[1]

[1] *Report to the Minister No. 181 – Certain Aluminium Road Wheels Exported from the People's Republic of China* (12 June 2012)

The TMRO's report of his review was published on 23 January 2013 ("the TMRO Report").[2] Prior to the publication of the Report, on 16 January 2013, 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 2013/14 ("the ACDN").

The GOC welcomes the opportunity to provide further comment on the directions and on the relevant reasoning contained in the TMRO Report, in particular, the direction to reinvestigate the finding that there is a countervailable subsidy of the type described as "Program 1".

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.

At the outset the GOC wishes to make known that it completely rejects and completely disagrees with the apparent "endorsement" by the TMRO of findings made by Australian Customs in relation to "particular market situation" and the use of countervailable subsidies by "non-selected" Chinese exporters. These are also very serious and disconcerting matters.[3]

B Finding of countervailable subsidy of the type described as "Program 1"

The TMRO considered this finding in his assessment of the subsidy referred to as "Program 1" in the Customs Report. In that Report, Australian Customs found that State-invested enterprises that supplied aluminium or alloy were "public bodies" for the purposes of Section 269T of the Act that had provided aluminium or alloy to ARW producers at "less than adequate remuneration".

1 "Public body" 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,

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2 *Decision of the Trade Measures Review Officer – Review of Decisions to Publish a Dumping Duty Notice and a Countervailing Duty Notice Concerning Certain Aluminium Road Wheels Exported to Australia from the People's Republic of China* (December 2012)

3 The GOC's comments regarding these issues are at Section D of this letter.

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 its report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*[4] ("DS379) - 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.

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 aluminium or aluminium alloy 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;

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

- 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.

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.

2 Finding of aluminium or alloy supplied at "less than adequate remuneration"

In the Customs Report, Australian Customs concluded that the aluminium or alloy supplied by Chinese SIEs to ARW producers was provided for "less than adequate remuneration". This was done by reference to a "benchmark" price for aluminium based on data obtained from London Metal Exchange.

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 269TACC(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 aluminium and/or alloy to exporters of ARW for less than adequate recompense or reward for the costs, work or trouble incurred by them in their production of aluminium and or aluminium alloy....*
>
> *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 aluminium or alloy 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.

C Comments in relation to the "particular market situation" finding

The GOC now turns to the TMRO's review of Australian Customs' "particular market situation" finding, and of the assumption that "non-cooperative" exporters of ARW situated in one city or province in China were in some way entitled to subsidies granted by every other city or province in China (which formed part of that finding).

The GOC is mindful that the Minister has not directed Australian Customs to reinvestigate issues in relation to "particular market situation" or subsidies other than Program 1. However, the GOC must take this opportunity to identify the serious errors which have been made, and to urge the Minister and Australian Customs to reassess the policies and the conduct of investigations in relation to these issues.

1 Definition of "particular market situation"

At page 36 of the Customs Report, the following is said:

> *After having regard to all relevant information, Customs and Border Protection has formed the view that it is satisfied there was a situation in the Chinese ARW market during the investigation period such that sales in that market are not suitable for use in determining normal value under section 269TAC(1).*

In review this finding, the TMRO firstly examined the question of "what is a particular market situation" in the context Section 269TAC(1) and the WTO Anti-Dumping Agreement. This is the same approach as was adopted by the TMRO in his review of the Minister's decision in relation to hollow structural sections ("HSS"), where Customs' finding of particular market situation was also under review.

The GOC agrees with this methodology, as 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.

In his examination of the appropriate meaning to be given to the expression "particular market situation" under the Act, the TMRO notes that the key elements involve a consideration of the "situation in the market" and "not suitable". The TMRO 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"* under the Act. But the TMRO was able to find appropriate interpretation of these concepts by reference to statutory interpretation rules, the relevant WTO Agreement, and judgements in relevant Federal Court cases where the court has been required to consider what constitutes a "particular market situation".

In particular, the TMRO Reports notes the interpretation by the Federal Court of Australia in *Enichem Anic Srl v Anti -Dumping Authority*[5] ("Enichem Anic") and *Hyster Australia Pty Ltd v Anti-Dumping Authority (No 2)*[6] ("Hyster"). In both cases, the Federal Court found that a "particular market situation' may arise for the purposes

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

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

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),[7] 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'*[8][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).*

Further, The TMRO provided some hypothetical examples to demonstrate what can and cannot establish a "particular market situation".[9]

> *68. 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*

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7 *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).

8 Ibid, para 17

9 Paras 68 to 70

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.

69. 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.

70. 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.

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. In 2009, when the GOC made submissions to Australian Customs in its policy consultations on this matter,[10] 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.*[11]

MOFCOM steadfastly maintains its position that the particular market situation involves a consideration of whether there is a distortion in the comparison of domestic and export sales.

Australian Customs did not apply a test in the original investigation which resembles the test that the TMRO described in his report as being the correct test. 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 ultimately applied, which was either:

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

or,

> *[that] Government of China (GOC) has significantly influenced the Chinese aluminium industry, and this influence is likely to have materially distorted competitive conditions and both directly affected the price of the main raw*

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[10] 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*".

[11] *Customs Assessment of Submissions regarding Exposure Draft Dumping Manual*, page 7.

material used in the manufacture of ARWs, as well as likely affecting supply within 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.[12]

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 ARW 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 might have on costs does not affect the comparison of domestic prices and export prices. Government actions such as these do not create conditions which could be said to render domestic sales unsuitable for determining normal value.

The GOC welcomes these analyses. The GOC considers that the TMRO's finding in relation to the definition of "particular market situation" and the consideration required to make a finding regarding "particular market situation" shows that Customs did not apply the appropriate test in its investigation.

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[12] MOFCOM reiterates that an "artificially low input price" will never create non-comparability, because that same "artificially low input price" is in both the domestic sales and the export sales, and affects them exactly equally. It does not create a difference in their comparison.

[13] TMRO Report, paras 82 to 84

2 Application of the definition of "particular market situation"

The GOC notes that none of the definitions and tests as explained by the TMRO were actually applied by the TMRO himself in his review of this matter. There was no real discussion or analysis in the TMRO Report as to why GOC policies or some other factor or factors were considered to *so distort* the ARW market that sales in the market were not suitable for ascertaining domestic prices. There was no discussion in the TMRO Report as to whether the GOC's allegedly "distortive" policy had rendered arms-length transactions in the ordinary course of trade *unsuitable* to give a true normal value. There was no discussion as to whether the alleged "situation" in the domestic market of the goods under consideration had a different effect on the domestic sales as opposed to the export sales of the goods under consideration.

The TMRO concluded that *"almost all markets will be affected to some degree by government policy"*, and that *"the inquiry as to whether government intervention has resulted in a 'situation in the market', such that sales are 'unsuitable' for determining a normal value, becomes one of degree"*. This "test" seems to be significantly different from the test established by the TMRO having considered the legislation, ADA and the Federal Court cases in great length as noted above. This is because the TMRO appears to have diverted himself solely to inquiring about the alleged "degree" of the policy itself. In so doing the TMRO has failed to consider the effect of the policy and whether that effect created a differentiating impact to the domestic sales as compared to the export sales.

The TMRO said:

> *I am satisfied that Customs found not just mere statements of policy but sufficient examples of governmental intervention in the aluminium market that might reasonably be relied upon to conclude that the prices in the Chinese ARW market were distorted to a sufficient degree such that they were unsuitable to give a true normal value. In reaching this conclusion, I rely primarily on the intervention that occurred in the form of tax and tariff policy and, to a lesser extent, intervention in the form of provision of subsidies.*

In this passage, the TMRO notes that the GOC's policies, or the alleged "Program 1" (which was rejected by the TMRO), were sufficient foundations for any "particular market situation" finding. These were heavily relied upon by Australian Customs in making its particular market situation finding. Primarily the TMRO relied on GOC tax and tariff policy as the basis for not disrupting Australian Customs particular market situation finding. He further explains:

> *95. In my view, the taxes and tariffs described above would have exerted downward pressure on the domestic price of primary aluminium in China. These taxes and tariffs do not appear to be aimed at achieving any policy within the ordinarily accepted business of government, such as occupational health and safety, public safety, or avoidance of environmental damage.*

> *Rather, it appears that they are directed solely toward enhancing the international competiveness of Chinese industries producing processed aluminium products. The combination of low or no export taxes on processed aluminium products and high export taxes on primary aluminium and bauxite discourages the export of these inputs and encourages the manufacture of such products in China. The achievement of this objective is also assisted through the provision of VAT export rebates to processed aluminium products whilst primary aluminium and bauxite attracted no export rebates.*

The GOC takes issue with the comment that its tariff and tax policies are not *"ordinarily accepted business of government"* because they may *"enhance the international competitiveness of Chinese industries producing aluminium products."* With due respect, enhancing business competitiveness, workplace efficiency and productivity - whether domestically or internationally - are considered to be a policy goal for most governments. In the TMRO Report there seems to be no substantive discussion or use of evidence to support the conclusion that the GOC's tariff and tax policies did have the effect as mentioned above. Nor is there any consideration as to how the tariff and taxes have had any different impact on the domestic sales of ARW on the one hand, and the export sales of ARW on the other, such that domestic prices of ARW are not suitable to compare with the export prices for normal value purposes. The only discussion was that the tariffs may have affected *"export of the[ ] inputs"* to ARW differently to the domestic sales of the inputs.

Further, at para 96:

> *On balance, I am satisfied that this policy implementation resulted in a significant increase to the supply of aluminium in China which in turn exerted marked downward pressure on the domestic price of primary aluminium in China which, given the significance of aluminium input costs in ARW production, would have materially lowered domestic ARW prices in China...*

The GOC sees no "balance" because the factors necessary to achieve an imbalance have not been weighed. There is no evidence for the "significant increase to the supply of aluminium in China" There is no evidence for "materially lowered domestic ARW prices in China". The "materiality" or "significance" of the effect of these alleged factors - which are necessary to work out their "degree" – are not present.

The TMRO report follows:

> *While the underlying policy of the Government of China may be the best interests of China, it is accepted that other countries whose industries are thereby adversely affected are entitled in such circumstances to take action to redress those effects.*

This is a sweeping comment which is detached from the law, and the GOC cannot agree with it. WTO Agreements and Australian laws do not "accept" that one country

can simply "take action to redress… effects" arising from the competitiveness of Chinese industries or against the GOC's encouragement of competitiveness – this is blatant protectionism and bias against the GOC and Chinese exporters. Whether or not GOC policy has improved the competitiveness of Chinese producers in the aluminium industry is irrelevant to the consideration of whether a "particular market situation" exists in the market for the like goods to those exported which affects their comparison with those exported goods. The fact that Australian industry may have been "adversely affected" in competing with Chinese exporters is also not a relevant consideration in determining whether a "particular market situation" existed in the Chinese ARW market at the relevant time. It cannot be used as a justification to impose dumping duty against Chinese ARW exporters without first establishing that dumping has occurred. The GOC urges that the Australian review and investigating authority to properly conduct its investigations in accordance with the relevant law and WTO Agreements, not in accordance with policy.

3 Lack of evidence of "particular market situation"

Indeed, the GOC notes that the TMRO acknowledged that there was no evidence to find that the tax and tariffs had any impact on domestic price of aluminium. Therefore, how could they have been considered as the primary sufficient examples for the finding of a "particular market situation?

> *98. ...I am also conscious that there is no direct evidence of the precise extent to which these tariffs (and associated rebates) impacted on the domestic price of aluminium. Customs' analysis was limited to a comparison between the domestic price of aluminium against a competitive market benchmark, the LME. Whilst this analysis demonstrated that the Chinese domestic price of aluminium was materially lower than the LME, the analysis did not attempt to isolate the extent to which the tariffs contributed to these lower prices. I can understand Customs not attempting such an analysis as it would be an extremely difficult exercise to attempt to isolate the contribution of individual policy implementations....*

Nonetheless, the TMRO proceeded to say:

> *99. However, I am satisfied that it is reasonable to infer that these tariffs and taxes were a significant contributing factor, especially given the high proportion of aluminium in overall ARW costs....*

The GOC is concerned to note that the TMRO readily made a positive finding even though he admitted that *"there [was] no direct evidence"* and that the analysis had not been undertaken because *"such analysis ...would be an extremely difficult exercise"*.

By contrast, when the GOC presented evidence to show that the "lower prices of aluminium in China" are prices of a competitive market and are not due to a "particular market situation", the TMRO said:

> *The only alternative explanation suggested for lower prices of aluminium prevailing in China, as opposed to the LME, was the competitiveness of the Chinese aluminium industry. Whilst this may have been a factor, I am not satisfied that there is evidence that it materially contributed to the lower price such that government intervention cannot be assessed as a material contributing factor. Firstly, if competition alone was responsible for the lower prices it would be expected that the prices of the competitive market benchmark, the LME, would be comparable. Secondly, if the lower prices of aluminium were materially lower as a result of competition alone, it would suggest that greater amounts of aluminium would be exported. However, Customs' analysis indicated that export volumes of aluminium were not high and the export tariffs are a reasonable explanation for this result. Accordingly, even in the absence of an analysis of the extent to which export tariffs contributed to the lower domestic price in China, I am satisfied that it is reasonable to infer that it had a material impact on the price of aluminium. Further, I am satisfied that it had a material impact on the domestic price of ARWs.* [underlining supplied]

Further, at para 103:

> *Whilst it might also be the case that other factors, such as a high degree of competition, led to lower prices, this does not preclude a finding that there is a market situation, unless that other factor or factors could be said to be so significant that they are primarily responsible for the lower prices of aluminium that prevailed in the domestic market. The alternative proposition suggested by the Government of China, that the lower prices were due to a high degree of competition cannot be the preferred explanation for the reasons set out at paragraph 99.*

The GOC considers that these statements demonstrate a biased and imbalanced treatment of evidence. They appear to admit that the finding that a particular market situation existed in the Chinese ARW market was not supported by any evidence or analysis. In fact the TMRO said that he could be satisfied with this conclusion *"even in the absence of an analysis of the extent to which export tariffs contributed to the lower domestic price in China"*. The GOC notes that even if such an analysis had been carried out, it would not have been an analysis about ARW or the ARW market. It would have been an analysis about the market for an input to the goods subject to the anti-dumping investigation and not the goods themselves.

It is not clear to the GOC how one explanation can be selected over another without evidence which at least favours one over the other. When an investigating authority

does not have the evidence before it to make a finding, a finding must not be made. The explanations of the GOC were disregarded, and a finding that was detrimental to Chinese producers was willingly endorsed.

4 Explanation of difference between ARW report and HSS report is not convincing

The TMRO notes that his finding in relation to ARW is at odds to his finding in relation to HSS. The TMRO said:

> *Lest it be thought that the position I took in HSS is incompatible with the position I am now taking in ARWs, I note the following:*
>
> > *100.1. First, the evidence of implementation of overarching government policies here is, in my view, far stronger than was present in HSS, where relevant tariffs applied to a input to an input or to an input to an input to an input. Here, Government of China tariff and tax action impacts far more directly on the goods under consideration;*
> >
> > *100.2. Second, there was in HSS a plausible explanation and rationale for the relevant tariff action as the ordinary business of government in environmental protection, which is lacking in the present case; and*
> >
> > *100.3. Third, because of the significance of aluminium as a direct ARW input, it is far easier to conclude that the effect of tariff and tax policies would be material than it was in HSS where they impacted at a lesser level far higher in the production chain.*

The GOC notes that this explanation amounts to no more than a description of the existence of GOC tariffs and taxes on the inputs to the goods concerned, and an acknowledgement of the fact that aluminium accounts for a large proportion of the cost of ARW. According to the TMRO's thinking, the inquiry is "one of degree". However the GOC does not see any assessment of the alleged "degree". The GOC does not see any inquiry into the degree of interference of the GOC policy, or into the degree of distortions that the policies are alleged to have created in the domestic market for ARW. The degree of "unsuitability" of prices in the domestic sales of the goods for the purpose of comparing them to the export prices of ARW is not considered. The conclusions are built on assertions relating to upstream inputs.

Further, the GOC notes that the TMRO seem to distinguish the GOC's policy in aluminium industry to that the policies in the iron and steel industry on the basis that the GOC's policies in the aluminium industry is not ordinary business of government in environmental protection. The GOC notes that the export tax on ARW is 0%. The only export tax identified by the TMRO is the 15% export tax in relation to certain aluminium. The GOC considers that the export tax on the basic raw material is an emanation of the GOC's policy objectives of environmental protection and sustainable development, and is not inconsistent with the policies that a responsible government would follow in pursuing those objectives.

5 Use of alleged "subsidies" as element of "particular market situation" finding

The TMRO also relied on the alleged effect of subsidy programs in endorsing Australian Customs' particular market situation finding. The GOC is totally mystified by this.

The TMRO stated:

> *In being satisfied that a market situation existed in China in relation to aluminium, as noted above, I also had regard to the subsidy programs identified by Customs that were designed to increase the competitiveness of the Chinese ARW industry. Whilst on their own I think these programs would not have been sufficient to give rise to a market situation finding, particularly given the conclusions I have reached in relation to Program 1 (see Part 4), in combination with the tax and tariff policies of the Government of China, I consider these subsidy programs to be evidence of intervention in the market that resulted in a significant distortion in price, sufficient that domestic transactions were unsuitable to give a reliable normal value for dumping assessment purposes.*

The alleged Program 1, which the TMRO found did not exist, was by far the "largest" of the programs identified by Customs. Without this "program", the effects of other subsidies are minimal to any particular ARW producer. Further, there is no evidence whatsoever that each of the other subsidy programs, or the majority of them, indeed benefited each and every ARW producer – and it would be ridiculous to make any contrary assertion.

The TMRO's statement may be based on the finding that by Australian Customs that all non-cooperative exporters benefited from all of the subsidy programs identified by Australian Customs, despite the fact that many of the programs are restricted by geographic regions or by the type of enterprise ownership. Regrettably, this position is supported by the TMRO:

> *253. I am satisfied that it was not unreasonable for Customs to decide that exporters that did not co-operate were conferred a benefit under all countervailable subsidies that it identified...*
>
> *254. In reaching this decision, I have had regard to the fact that some of the programs were limited in operation to specific regions in China. However, in the absence of information being provided by exporters or the Government of China to the effect that they did not receive benefits under particular programs because of geographical eligibility constraints, I consider it was reasonable for Customs to assume that they did receive a benefit under each these programs. Even if a particular entity had a head office in a particular region and this information was publicly available, this would not rule out an entity*

having a branch or interest in another region of China potentially making it eligible for that program.

The GOC takes issue with the TMRO's endorsement of the findings of Australian Customs in this regard. The GOC notes that information regarding the location of exporters as not "absent". We draw your attention again to:

- GOC Attachments 1, 143 and 145 - which provide the addresses of the responding companies as well as the top ARW exporters operating in China, and explains whether those exporters operate in any "zone"; and
- the GOCs response to Question C3.11 - which provides the addresses of certain entities involved in exports of ARW.

Programs 5, 6, 11, 17, 21, 22, 29, 36, 38, 39, 40,42, 43, 44, 46, 50, 51, 53 and 56 are only available to producers in a certain region. It must not be assumed that these entities have received benefits under each of the above mentioned programs, having regard to "the available relevant facts".

Similarly, the GOC also provided information about enterprise ownership in its submissions to Australian Customs during the original investigation. This is relevant information in relation to the alleged Programs 2, 6, 7, 8, 9,11, 17, 21, and 22, 27, 32, which are identified as programs limited to foreign-invested entities.

The GOC considers that the TMRO's endorsement of Australian Customs findings on "particular market situation" and of the finding that non-cooperative exporters are somehow omnipresent across all cities and provinces of China are unprincipled, unreasonable and in some respects nonsensical.

D 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 findings:

1 That Chinese State-invested aluminium or alloy producing enterprises are not public bodies.

2 That even if Chinese State-invested aluminium or alloy producing enterprises were to be considered as public bodies, there is no evidence that goods were provided by them to ARW 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 there is no "Program 1" subsidy.

Yours sincerely

Wu Dan

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