Australian Government

Australian Customs and Border Protection Service

R E P O R T

CUSTOMS ACT 1901 - PART XVB

INTERNATIONAL TRADE REMEDIES BRANCH REPORT TO THE MINISTER No. 204

REINVESTIGATION OF CERTAIN FINDINGS IN REPORT No. 181

CERTAIN ALUMINIUM ROAD WHEELS

EXPORTED TO AUSTRALIA FROM THE PEOPLE'S REPUBLIC OF CHINA

16 APRIL 2013

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ABBREVIATIONS

the Act	*Customs Act 1901*
ACDN	Australian Customs Dumping Notice
ARWs	Aluminium Road Wheels
CEO	Chief Executive Officer
China	The People's Republic of China
Customs and Border Protection	Australian Customs and Border Protection Service
GOC	Government of China
the goods	the goods the subject of the application
the Minister	the Minister for Home Affairs
Tariff Act	*Customs Tariff Act 1995*
TCOs	Tariff Concession Orders
TMRO	Trade Measures Review Officer
YHI	YHI Manufacturing Co Ltd

1 SUMMARY AND RECOMMENDATIONS

This report provides the results of the reinvestigation by the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs and Border Protection) of certain findings in International Trade Remedies Report No. 181 (**REP181**), which resulted in the imposition of anti-dumping measures on certain aluminium road wheels (ARWs) exported to Australia from the People's Republic of China (China).

1.1 Recommendation

Customs and Border Protection recommends that, in accordance with section 269ZZM(1)(a) of the *Customs Act 1901* (the Act)[1], the Minister for Home Affairs (Minister) affirm his decision to publish dumping and countervailing duty notices in respect of ARWs exported to Australia from China.

Customs and Border Protection further recommends that, in accordance with s.269ZZM(3)(b), the Minister vary the countervailing duty notices in respect of ARWs exported to Australia from China by YHI Manufacturing Co Ltd (YHI).

1.2 Reasons

Division 9 of Part XVB of the Act sets out procedures for review by the Trade Measures Review Officer (TMRO) of certain decisions made by the Minister.

1.2.1 The role of Customs and Border Protection

Where the Minister has accepted a recommendation by the TMRO that a finding or findings should be reinvestigated, the Minister must, in writing, require the CEO of Customs and Border Protection to reinvestigate a finding or findings.[2]

Customs and Border Protection is required to:

- make further investigation of the finding or findings, having regard only to the information and conclusions to which the TMRO was permitted to have regard;
- within a specified period, report the result of the further investigation to the Minister affirming the finding or findings; and
- set out any new finding or findings and the evidence or other material on which the new finding or findings are based and the reasons for that decision.

1.2.2 The role of the Minister

Division 9 empowers the Minister, after receiving Customs and Border Protection's reinvestigation report, to:

- affirm the reviewable decision concerned; or
- revoke that decision and substitute a new decision.

Depending on the Minister's decision[3], the Minister may[4]:

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[1] A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901,* unless otherwise stated.
[2] Under s.269ZZL(2)(a)

- publish a dumping duty notice or countervailing duty notice; or
- vary a dumping duty notice or countervailing duty notice; or
- revoke a dumping duty notice or countervailing duty notice and substitute another dumping or countervailing duty notice (as the case requires).

1.2.3 The reviewable decision

In the investigation, REP181, Customs and Border Protection found that dumping and subsidisation of ARWs exported to Australia from China caused material injury to the Australian industry producing like goods.

Customs and Border Protection therefore recommended to the Minister that:

1. a dumping duty notice be published in respect of ARWs exported to Australia from China by all exporters[5], other than Zhejiang Shuguang Industrial Co. Ltd (PDW); and
2. a countervailing duty notice be published in respect of ARWs exported to Australia from China by all exporters[6], other than CITIC Dicastal Wheel Manufacturing Co., Ltd (CITIC Dicastal) and PDW.

The Minister accepted the recommendations contained in REP181, including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings. To give effect to these recommendations, dumping and countervailing duty notices were published on 5 July 2012 imposing dumping and countervailing duties on ARWs exported to Australia from China.

The Minister's decision to publish the dumping and countervailing duty notices is the reviewable decision.

1.2.4 What must be reinvestigated

On 16 January 2013, the Minister directed the CEO to reinvestigate certain findings[7] made in REP181 and to report the results of the reinvestigation by 16 April 2013. The findings in the following areas are to be reinvestigated.

- the calculation of the dumping margin for 'selected non-cooperating exporters';
- that YHI Manufacturing Co Ltd (YHI), an exporter of the goods received a benefit under all countervailable subsidies identified by Customs and Border Protection; and
- That there is a countervailable subsidy of the type described as 'Program 1'.

In the report to the Minister, the Review Officer commented on specific issues in each of these areas. These issues are identified and addressed in the relevant sections of this report

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[3] Under s.269ZZM(1)

[4] Under s.269ZZM(3)

[5] Under s.269TG(1) and s.269TG(2)

[6] Under s.269TJ(1) and s.269TJ(2),

[7] Section 269ZX of the *Customs Act 1901* defines findings as "a finding on a material question of fact or on a conclusion based on that fact in relation to reviewable decisions under Subdivision 3 [Review of Ministerial decisions]"

1.2.5 Reinvestigation findings and conclusions

Customs and Border Protection has considered all relevant information and conclusions based on relevant information.[8]

Customs and Border Protection is of the view that the reviewable decision to publish dumping duty and countervailing duty notices be affirmed. In reaching this conclusion, Customs and Border Protection made the following findings:

- all exporters from China were investigated and therefore meet the definition of “selected exporter” pursuant to section 269T, so that export prices and normal values can be determined having regard to all relevant information;
- YHI did not receive a benefit under all countervailable subsidies identified by Customs and Border Protection, the programs that YHI received a benefit under are Programs 1,11,13,31,32,35,39,41,47.
- there is a countervailable subsidy of the type described as ‘Program 1’

[8] Under s.269ZZL(2)(a)(i) the reinvestigation can only have regard to the information and conclusions to which the TMRO was permitted to have regard. Section 269ZZK(4) states that the TMRO ‘must only have regard to the relevant information [as defined] and conclusions based on relevant information that are contained in the application for the [TMRO] review, or in any submissions received from interested parties within 30 days’ of the publication of the dumping duty notice. Section 269ZZK(6)(a) defines relevant information ‘…as the information to which the CEO has had regard, or was…required to have regard, when making findings set out in the report…to the Minister in relation to the making of the reviewable decision’. The “conclusions” which the TMRO could consider were set out in the application for review to the TMRO and submissions to the review.

2 BACKGROUND

2.1 Original Investigation – Investigation 181

2.1.1 The application

Following assessment of an application[9] made by Arrowcrest Group Pty Ltd (Arrowcrest), an investigation was initiated into the alleged dumping and subsidisation of certain ARWs exported to Australia from China. Notification[10] of initiation of Investigation 181 was made on 7 November 2011; Australian Customs Dumping Notice (ACDN) 2011/54 was also issued advising of procedures relating to the investigation. Consideration Report 181 details the assessment of the applicant and the reasoning for initiation of the investigation.

2.1.2 The goods under consideration

The goods under consideration (the goods) are aluminium road wheels for passenger motor vehicles, including wheels used for caravans and trailers, in diameters ranging from 13 inches to 22 inches. For clarification, the goods include finished or semi-finished ARWs whether unpainted, painted, chrome plated, forged or with tyres and exclude aluminium wheels for go-carts and All-Terrain Vehicles.

The application also contained additional information to assist in understanding the goods. Further description of the goods is included in ACDN 2011/54.

The goods may be classified to the following subheadings in Schedule 3 of the *Customs Tariff Act 1995*:

8708.70.91/ 78	Road wheels of a kind used as components in passenger motor vehicles
8708.70.99/ 80	Road wheels other than of a kind used as components in passenger motor vehicles;
8716.90.00/ 39	Road wheels for trailers and caravans.

2.1.3 Statement of essential facts SEF181

The Minister extended the deadline for publishing the statement of essential facts (SEF) from 27 February 2012 to 27 April 2012, Customs and Border Protection placed SEF181 on the public record on 27 April 2012. The SEF set out the facts on which Customs and Border Protection proposed to base its recommendation to the Minister.

2.1.4 Preliminary affirmative determination PAD181

On 31 May 2012 Customs and Border Protection made a preliminary affirmative determination (PAD) that there appeared to be sufficient grounds for the publication of a dumping duty notice and countervailing duty notice in relation to ARWs exported from China. Customs and Border Protection decided to require and take securities[11] in respect of any interim dumping and countervailing duty that may become payable in

[9] Lodged under s.269TB(1)
[10] Under s.269TC(4)
[11] S.42

respect of ARWs from China that were entered into home consumption on or after 31 May 2012.

PAD Report 181 (PAD181) was placed on the public record.

2.1.5 Termination of part of an investigation TER181

On 8 June 2012 Customs and Border Protection terminated the dumping investigation so far as it related to PDW[12], the CEO was satisfied that there had been no dumping by PDW.

On 8 June 2012 Customs and Border Protection terminated the countervailing investigation so far as it related to CITIC Dicastal and PDW[13], the CEO was satisfied that the amount of countervailable subsidies received by CITIC Dicastal and PDW were negligible.

Termination Report 181 (TER181) was placed on the public record.

2.1.6 Report to the Minister REP181

On 12 June 2012 Customs and Border Protection made its final report (REP181) and recommendations to the Minister. In that report, Customs and Border Protection recommended that:

- a dumping duty notice be published in respect of ARWs exported to Australia from China by all exporters, other than PDW; and
- a countervailing duty notice be published in respect of ARWs exported to Australia from China by all exporters, other than CITIC Dicastal and PDW.

2.1.7 The Minister's decision

The Minister accepted the recommendations contained in REP 181 including the reasons for the recommendations, the material findings of fact on which the recommendations were based and the evidence relied on to support those findings.

The Minister published a dumping duty notice[14] and a countervailing duty notice[15] imposing dumping duties and countervailing duties on the goods exported to Australia from China after 31 May 2012. Notice of the Minister's decision was published in *The Australian* on 5 July 2012 and *The Government Notices Gazette*. ACDN 2012/33 was issued on that day.

2.2 Review of a Ministerial decision by the TMRO

The TMRO may review certain decisions by the Minister, including decisions to publish a dumping or countervailing duty notice.[16] These reviews are conducted only as a result of an application from relevant interested parties.[17]

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[12] Under s269TDA(1).
[13] Under s269TDA(16).
[14] Under s269TG(2).
[15] Under s269TJ(2).
[16] Under s.269TG(2)
[17] As defined in s.269ZX

In making a recommendation to the Minister, the TMRO is only to have regard to "relevant information"[18] and any conclusions in applications and submissions to the TMRO based on the relevant information. The TMRO must only have regard to the information available to Customs and Border Protection during the course of the original investigation, information contained in REP181 and applications and submissions to the TMRO review.[19] The information in the application for review and submissions to the review to which the TMRO may have regard is also limited to conclusions based on the relevant information.

2.2.1 Applications to the TMRO

Interested parties had until 30 days after publication of the notices by the Minister to lodge an application for review of the Minister's decision with the Review Officer. The Review Officer accepted applications for review from the following parties:

- Speedy Corporation Pty Limited;
- Taleb Tyres & Wheels;
- GM Holden Limited;
- Samad Tyres Pty Ltd t/as Motorsport Wheels and Tyres;
- Ford Motor Company of Australia Limited;
- YHI Manufacturing (Shanghai) Co Ltd and YHI (Australia);
- StarCorp Holdings Pty Ltd;
- CITIC Dicastal Wheel Manufacturing Co Limited; and
- Jiangsu Shenzhou.

2.2.2 TMRO review process and decision

The TMRO published notification on 17 September 2012 advising that he would conduct a review and inviting interested parties to make submissions to the review within 30 days from that notification.

The TMRO had regard to submissions received within time from:

- Arrowcrest;
- Show Wheels Pty Ltd;
- Boss Wheels Pty Ltd; and
- Ninbo Motor Industrial Co Ltd.

The TMRO did not have regard to other submissions received out of time.

The TMRO recommended that certain findings in REP 181 be reinvestigated. A finding[20] in relation to a reviewable decision means a finding on a material question of fact or on a conclusion based on that fact.

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[18] In accordance with s.269ZZK(6)
[19] In accordance with s.269ZZK(4)
[20] As defined under s.269ZX

Copies of the TMRO's report and public applications and submissions to the review are available from the TMRO. The TMRO's report is available on the TMRO's website, www.tmro.gov.au.

On 16 January 2013, the Minister accepted the TMRO's recommendations and directed Customs and Border Protection to reinvestigate certain findings in REP 181 and to report the results of the further investigation to him within 90 days.

On 23 January 2013 a notice was published in *The Australian* newspaper advising of the Minister's acceptance of the TMRO's recommendations and the reinvestigation requirements.

2.3 Reinvestigation by Customs and Border Protection

ACDN 2013/14 was published on 5 February. The ACDN advised that:

- the reinvestigation could only have regard to the information and conclusions to which the TMRO was permitted to have regard;
- no new information or conclusions could be considered in a reinvestigation;
- all relevant information was in the public domain and available to interested parties through the public record of the original investigation or the public record of the review maintained by the TMRO; and
- the report of the reinvestigation is to be provided to the Minister by 16 April 2013.

2.3.1 The reviewable decision

The reviewable decision is the Minister's decision to publish dumping and countervailing duty notices[21].

2.4 The reinvestigation report

The following sections of this report set out:

- the reinvestigation methodology;
- further investigation of the information and conclusions to which the TMRO was permitted to have regard;
- reinvestigation of the findings central to the original recommendation to the Minister;
- conclusions on whether the original findings should be affirmed or new findings be made;
- evidence or other material on which the findings of the reinvestigation are based; and
- the reasons for the recommendation to the Minister in relation to the reviewable decision.

[21] Under s.269TG(2)

2.5 The Reinvestigation Framework

In conducting a reinvestigation, Customs and Border Protection must have regard only to information and conclusions to which the TMRO was permitted to have regard.[22] That is, relevant information and conclusions based on relevant information.

Relevant information is from the original investigation that the CEO had regard to or was required to have regard to and comprises information such as the original application, submissions to the original investigation, visit reports, SEF181, submissions to SEF181, PAD181, TER181 and REP181.

Conclusions based on relevant information are conclusions based on the relevant information contained in the applications to the TMRO and submissions received by the TMRO within 30 days of notification of the review.

As a result of the TMRO's recommendations, the CEO has been directed to reinvestigate three findings. Customs and Border Protection examined the documents from the original investigation (relevant information) and applications and submissions to the TMRO received within the specified timeframes (conclusions based on relevant information) for the purposes of conducting the reinvestigation.

2.5.1 The calculation of the dumping margin for 'selected non-cooperating exporters'

The TMRO considered that those exporters who Customs and Border Protection regarded as 'selected non-cooperating exporters' were residual exporters in terms of section 269T. The TMRO considered that the rate set for those exporters must be set in accordance with section 269TG(3B) and that Customs and Border Protection had failed to apply section 269TG(3B) in setting that rate.

2.5.2 That YHI received a benefit under all countervailable subsidies identified by Customs and Border Protection

The TMRO noted that there was no evidence that Customs and Border Protection had considered information provided by YHI before determining the financial benefits received by YHI. The TMRO considered that Customs and Border Protection should have given consideration to information provided by YHI before assessing financial benefits received by YHI.

2.5.3 That there is a countervailable subsidy of the type described as 'Program 1'.

The TMRO considered that his analysis showed that aluminium producers in China were not public bodies and that there was no evidence that their sale prices led to less than adequate remuneration.

2.6 Submissions to the reinvestigation

ACDN 2013/14 advised interested parties that no new information or conclusions may be considered in a reinvestigation. Therefore, interested parties wishing to lodge submissions in response to the findings the subject of this reinvestigation, were advised to make their comments on the information contained on the public record maintained

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[22] s.269ZZL(2)(a)(i)

by Customs and Border Protection, or the public record of the review maintained by the Review Officer, and not reproduce that information, but rather refer to it by its public record folio reference.

Submissions were received from Arrowcrest, the Government of China and Holden in response to the reinvestigation; non-confidential versions were placed on the public record.

3 BACKGROUND INFORMATION FROM REP181

The following information is provided as background to the matters under reinvestigation.

The Applicant

The applicant for anti-dumping and countervailing duties was Arrowcrest.

The goods under consideration

The goods under consideration (the goods) are aluminium road wheels for passenger motor vehicles, including wheels used for caravans and trailers, in diameters ranging from 13 inches to 22 inches. For clarification, the goods include finished or semi-finished ARWs whether unpainted, painted, chrome plated, forged or with tyres and exclude aluminium wheels for go-carts and All-Terrain Vehicles.

The Australian industry

There is an Australian industry producing like goods. Arrowcrest is the main Australian manufacturer of ARWs, manufacturing an estimated 95% of Australian produced ARWs during the investigation period. Two other manufacturers of ARWs, Performance Wheel Nominees Pty Ltd and Dragway Performance Engineering Pty Ltd, were identified who indicated in submissions their support for Arrowcrest's claims. Customs and Border Protection formed the view that due to the volume of Australian industry held by Arrowcrest, any injury found to Arrowcrest would be considered as injury to the Australian industry as a whole.

Australian market

The Australian market for ARWs consists of ARWs manufactured by the Australian manufacturers and imported ARWs from China and other countries. There are two major distribution channels for ARWs, the Original Equipment Manufacturer (OEM) segment and the Aftermarket (AM) segment.

Importers

ARWs are imported by distributors and end users, Customs and Border Protection identified 181 importers from its database. Imports from China supplied both the OEM and AM markets.

Exporters

Customs and Border Protection found there were 117 entities from China that exported ARWs to Australia in the investigation period. Customs and Border Protection did not undertake a sampling exercise but sought to determine exporter-specific dumping and subsidy margins for all exporters, whether or not they cooperated with the investigation. Customs and Border Protection regarded all exporters to be 'selected exporters' in relation to section 269T.

Investigation period

The period 1 July 2010 to 30 June 2011 was used to examine exports from China to determine whether dumping and subsidisation had occurred.

Injury analysis period

Customs and Border Protection examined the Australian market and the economic condition of the industry from 1 July 2006 for the purpose of injury analysis.

Dumping and subsidy investigation

In REP 181, Customs and Border Protection found that:

- with the exception of one exporter, PDW, ARWs exported from China to Australia were dumped with margins ranging from 5.6% to 29.3%; and
- with the exception of two exporters, CITIC Dicastal and PDW, ARWs exported from China to Australia were subsidised with margins ranging from 2.8% to 58.8%

4 CALCULATION OF DUMPING MARGIN FOR 'SELECTED NON-COOPERATING EXPORTERS'

4.1 Summary of the reinvestigation findings

Customs and Border Protection recommends that the Minister affirms the finding of the original investigation that dumping margins for ARWs exported from China were correctly determined for those exporters that Customs and Border Protection regarded as 'selected non-cooperating exporters'.

4.2 The original investigation

4.2.1 Calculation of dumping margins for exports of ARWs from China

Background

Section 6 of REP 181 identified the determination of dumping margins for exportations of ARWs from China.

Customs and Border Protection identified 117 entities[23] from China that exported ARWs to Australia in the investigation period. Despite this relatively large number, the number of exporters who provided information in relation to the application was not so large that it was not practicable to determine the existence of dumping and to work individual dumping margins for each of them. Therefore, Customs and Border Protection did not undertake a sampling exercise in terms of subsection 269TACB(8). Rather, Customs and Border Protection sought to determine exporter-specific dumping (and subsidy) margin calculations for all exporters, after investigating the exportations of all exporters in the investigation period, whether or not they cooperated with the investigation.

Therefore, Customs and Border Protection regarded all exporters to be 'selected exporters' in relation to section 269T.[24]

Exporter questionnaires were sent to all known suppliers of ARWs from China.

In the case of those exporters that provided an adequate and timely response to the exporter questionnaire, Customs and Border Protection based the dumping margin (and subsidy) calculations on the data submitted and verified. In some instances, the data submitted by these exporters was verified in on-site visits to the exporters' premises. In other cases, Customs and Border Protection satisfied itself as the accuracy of the information supplied by undertaking remote verification.

In the case of those exporters that did not respond, did not provide complete and adequate responses to the exporter questionnaire, or did not make themselves known to the investigation, their exportations were investigated using all relevant information. For determining export prices, Customs and Border Protection examined the following sources of information:

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[23] It is difficult to estimate the number of exporters accurately because in some cases Customs and Border Protection is only aware of the identities of the suppliers, which can be trading entities or manufacturers. Customs and Border Protection usually regards the manufacturer to be the exporter. Where the supplier details for particular importations in the Customs and Border Protection import database relate to traders, this means the identities and number of the exporters (manufacturers) are unknown.

[24] Section 269T(1) provides that "selected exporter, in relation to a dumping duty notice or a countervailing duty notice in respect of goods, means an exporter of goods the subject of the application or like goods whose exportations were investigated for the purpose of deciding whether or not to publish that notice."

- import information from the Customs and Border Protection import database;
- importation information gathered from importer visits;
- export price estimates submitted by Arrowcrest in its application, and
- verified export prices established for other selected exporters.

The import data from Customs and Border Protection's import database did not contain sufficient detail to identify the type of wheel being imported or the size of the wheel. Therefore unit export prices derived from that data was not considered a reliable basis for calculating export price by diameter.

The import data verified with importers did not provide a sufficient coverage of the goods exported by the relevant exporters. Whilst it was possible to identify a small volume of the goods exported, this information was not considered reliable as it represented only a small proportion of the total volume of ARWs exported by those relevant exporters.

Export prices submitted in the application were based on individual quotes at a specific point in time and were not considered reliable for determining export prices for the investigation period. Customs and Border Protection considered the most directly relevant and therefore best information available would be verified export prices from other exporters. After having regard to all relevant information, export prices were established in accordance with s.269TAB(3) of the Act.

Specifically, Customs and Border Protection used the lowest verified weighted average export price for the entire investigation period for each diameter, excluding any part of that price that relates to post-exportation charges.

For the purpose of establishing normal values for those exporters that did not furnish information, the following information was examined and considered:

- estimates of normal values in China contained in the application, and
- verified normal values from other exporters.

In its application, Arrowcrest provided two estimates of normal values using different methodologies. The first was based on domestic selling prices in China and the second a constructed price using LME prices as the basis for raw material costs, and estimates of overheads and SG&A based on the applicant's own production.

While these constructed normal values were suitable for initiation purposes, Customs and Border Protection considered that the most directly relevant and therefore best available information would be that verified for cooperating exporters. After having regard to all relevant information, normal values for exporters that did not furnish information, including those exporters whose information that was considered insufficient, were established in accordance with s.269TAC(6) of the Act. Specifically, Customs and Border Protection used the highest verified weighted average normal value for each diameter over the investigation period from other exporters.

4.3 Issue identified by the TMRO

The issue the TMRO raised in relation to the determination of dumping margins for non-cooperating exporters from China related to whether they fell within the definition of 'selected exporters' or 'residual exporters' for the purposes of Part XVB of the *Customs Act*.

In his report, the TMRO stated:

> It therefore seems that Customs considered that those exporters it named 'selected non-cooperating exporters' are not 'residual exporters' but 'selected exporters' for the purposes Part XVB of the *Customs Act*. As is apparent from the above quoted definitions (noted below), *whether or not this is correct turns upon whether or not the exportations of the so-called 'selected non-cooperating exporters' were "investigated".*

The TMRO noted that the terms 'selected cooperating exporters' and 'selected non-cooperating exporters' are not found in the *Customs Act*, which provides for only three categories of exporters - namely new exporters, residual exporters and selected exporters. These terms are defined in section 269T as follows:

> ***new exporter***, in relation to goods the subject of an application for a dumping duty notice or a countervailing duty notice or like goods, means an exporter who did not export such goods to Australia at any time during the period:
>
> (a) starting at the start of the investigation period in relation to the application; and
>
> (b) ending immediately before the day the CEO places on the public record the statement of essential facts in relation to the investigation of the application.
>
> ***residual exporter***, in relation to a dumping duty notice or a countervailing duty notice in respect of goods, means an exporter of goods the subject of the application or like goods, other than:
>
> (a) a selected exporter; and
>
> (b) a new exporter of such goods.
>
> ***selected exporter***, in relation to a dumping duty notice or a countervailing duty notice in respect of goods, means an exporter of goods the subject of the application or like goods whose exportations were investigated for the purpose of deciding whether or not to publish that notice.

The TMRO considered that conceptually exporters can be classified in a number of ways:

> a. those exporters who provided information which the CEO of Customs considered adequate to allow an exporter specific decision on whether or not there was dumping, and if so, as to the rate;
>
> b. those exporters who were willing to or may in fact have provided adequate information to allow the CEO to reach such decisions, but in respect of whom such decisions were not made in reliance on s 269TACB(8).
>
> c. those exporters who provided some information but not information that was reliable enough to allow the CEO of Customs to reach such decisions;
>
> d. those exporters who were requested to provide information but simply failed to do so;
>
> e. those exporters who existed but were unknown to the CEO of Customs and who may or may not have been aware of his request to make themselves known; and

f. those exporters who did not exist at the relevant time, but later become exporters during the period a dumping notice is operative.

The TMRO also noted that consistent with the views he expressed in his review of the dumping duty notice in relation to clear float glass exported from the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand dated 13 February 2012 ('the Clear Float Glass decision'), he considers that it is simply not correct to say that the exportations of exporters falling within categories (c), (d), (e) and (f) above have been "investigated". They thus cannot be classified under the Customs Act as "selected". They must therefore be either "residual" or "new". If they are "residual" then the rate set for them must be set in accordance with s 269TG(3B).

The TMRO further noted that so far as exporters within category (c) are concerned, he considers that the proper analysis is that the information they have provided is to be viewed as disregarded under the discretions in ss 269TAB(4) and 269TAC(7) and that, while their exportations may have been considered up to a point, that consideration does not amount to an investigation. As he noted in the Clear Float Glass Decision, a contrary view would require that information deemed unreliable should be used in determining the residual rate under s 269TG(3B).

The TMRO concluded that that Customs and Border Protection has failed to apply s.269TG(3B) in the calculation of the dumping margin for residual exporters. Section 269TG(3B) requires that in ascertaining a normal value and export price for goods of the residual exporter, the Minister must ensure that:

(a) the normal value does not exceed the weighted average of normal values for like goods of selected exporters from the same country of export; and

(b) the export price is not less than the weighted average of export prices for like goods of selected exporters from the same country of export.

4.4 The reinvestigation

4.4.1 Categories of "exporter" pursuant to section 269T

The Act defines three categories of exporter in section 269T, being a selected exporter, a residual exporter and a new exporter.

A selected exporter is "an exporter of goods the subject of the application or like goods whose exportations *were investigated* for the purpose of deciding whether or not to publish that notice".[25] A residual exporter is "an exporter of goods the subject of the application or like goods other than: (a) a selected exporter; and (b) a new exporter of such goods."[26]

The central issue for this reinvestigation then is whether the exportations of non-cooperating exporters from China were investigated so as to meet the definition of a selected exporter for the purpose of section 269T.

4.4.2 Investigation for the purpose of section 269T

Customs and Border Protection addressed the issue of what constitutes an investigation in REP 159D, the reinvestigation of certain findings relation to clear float

[25] s.269T, emphasis added

[26] s.269T

glass exported from the People's Republic of China, the Republic of Indonesia and Thailand.

In REP 159D Customs and Border Protection noted:

> The terms "investigated" and "investigation" are not defined in the Act, the Explanatory Memorandum or the Anti-Dumping Agreement. Customs and Border Protection is therefore guided by available WTO and Federal Court decisions to determine what constitutes "investigation".
>
> The WTO asserts that the term "to investigate" should take its ordinary meaning.[27] To investigate means to "search or inquire into; examine a matter systematically or in detail; [or] make an (official) inquiry into"[28]. The Appellate Body also applied the ordinary meaning of "investigation" which:
>
> …suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" of the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information. [29]
>
> The duties of investigation and evaluation also preclude an investigating authority from "remaining passive in the face of possible short-coming in the evidence submitted…"[30] Thus, in conducting an investigation, an investigating authority should undertake an "evaluative, comparative assessment" [31] of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations…"[32].
>
> As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to subsection 269TAB(4)[33] and 269TAC(7)[34].

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[27] Appellate Body, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* WT/DS295/R (29 November 2005) at para 7.185

[28] Definitions taken from the New Shorter Oxford Dictionary at p 1410 and quoted in WT/DS295/R at para 7.185

[29] Appellate Body, *United States – Definitive Safeguard Measures on imports of Wheat Gluten from the European Communities* WT/DS166/AB/R (22 December 2000) at para 53

[30] Appellate Body Report, *US – Wheat Gluten,* WT/DS166/AB/R_ at para 57

[31] Appellate Body Report, *Mexico – Beef and Rice* WT/DS295/R at para 7.167

[32] Appellate Body Report, *Mexico – Beef and Rice* WT/DS295/R at para 7.167

[33] For the determination of export prices

[34] For the determination of normal values

4.4.3 Non-cooperating exporters

In determining export prices and normal values for non-cooperating exporters in REP 181, Customs and Border Protection actively sought out and had regard to the following relevant information:

- export price data from the Customs and Border Protection import database;
- export price data from importer visits where that data related to exports from the selected non-cooperating exporters;
- export price data from the application for a dumping duty notice and a countervailing duty notice;
- export price data from the selected cooperating exporters.
- information from YHI and its related importer YHI Australia
- normal value data from the application; and
- normal value data from the selected cooperating exporters.

Section 6 of REP 181 and section 4.2.1 of this report outlines the assessment undertaken by the original investigation in considering the reasonableness of the relevant information available to Customs and Border Protection for the purposes of determining export prices and normal values.

The reinvestigation considers that the process undertaken by Customs and Border Protection constitutes an "investigation" for the purpose of the definition of "selected exporter". Customs and Border Protection made an official inquiry into all known exporters from China. As non-cooperating exporters did not provide Customs and Border Protection with information so that an individual dumping margin could be determined, all relevant information was actively sought from interested parties, including importers and industry. This information was then critically assessed by Customs and Border Protection to ascertain whether it could be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively.

If the information was considered to be unreliable, it was disregarded pursuant to subsection 269TAB(4)[35] and 269TAC(7)[36]. This process of information gathering, critical analysis and determination constitutes an investigation as ordinarily defined.

Conclusion

The reinvestigation finds that non-cooperating exporters were investigated so as to be categorised as "selected exporters" for the purpose of subsection 269T.

The reinvestigation also finds that after having regard to all relevant information, export prices and normal values for all non-cooperating exporters were correctly established in accordance with s.269TAB(3) and s.269TAC(6) respectively.

The reinvestigation further finds that dumping margins for selected exporters were correctly established in accordance with section 269TACB(2)(a), by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

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[35] For the determination of export prices

[36] For the determination of normal values

5 THAT YHI RECEIVED A BENEFIT UNDER ALL COUNTERVAILABLE SUBSIDIES IDENTIFIED

5.1 Summary of the reinvestigation findings

Customs and Border Protection recommends that the Minister vary the finding of the original investigation that YHI received financial contributions that have conferred a benefit under all programs found to be countervailable in relation to ARWs. The reinvestigation finds that YHI did not receive a benefit under all countervailable subsidies identified by Customs and Border Protection, the programs that YHI received a benefit under are Programs 1,11,31,32,35,39,41,47.

5.2 The original investigation

YHI provided a response to the exporter questionnaire which was considered to initially be deficient. Following a list of those deficiencies being provided to YHI, the company subsequently provided sufficient reasoning and information for Customs and Border Protection to consider that those deficiencies had been remedied. Therefore YHI was found to have provided a complete and verifiable questionnaire response.

Following this, Customs and Border Protection advised YHI that it had decided to test the accuracy of the information contained in its response by way of a remote verification process. This differed from the verification processes used for other exporters which were conducted at the exporter's premises in China. However, the objective of both verification processes was for Customs and Border Protection to satisfy itself as to the completeness and accuracy of the information supplied.

Whilst YHI initially cooperated with the original investigation's questions and requests for information, ultimately the exporter refused to cooperate. YHI advised that whilst it was willing to participate in a verification visit at its premises, the remote verification process was too onerous and difficult and did not adequately address the issues.

Customs and Border Protection considered whether visiting YHI's related importer, YHI Australia, in combination with benchmarking to other verified data, could address its concerns in relation to the exporter questionnaire response. The visit report to YHI Australia, which can be found on the public record, disclosed that Customs and Border Protection found its data to be unreliable for the purpose of calculating an export price[37].

Based on YHI's refusal to supply further requested information, and the unreliability of YHI Australia's data, the information provided by YHI was assessed as being unreliable.

5.2.1 Subsidy programs

The reinvestigation notes that that there were 32 identified programs that were countervailable as shown in the table at Section 7.3 of REP181. The table is reproduced below with only the identified countervailable subsidies shown.

[37] S.269TAB(4)

No.	Program	Countervailable in respect of ARWs?
1	Aluminium provided by government at less than fair value	Yes
4	preferential income tax for hi-tech enterprises;	Yes
5	preferential tax policies for western development "Go West" strategy;	Yes
6	preferential tax policies for FIEs established in the coastal economic open areas and in the economic and technological development zones;	Yes
7	reduced tax rate for productive FIEs scheduled to operate for a period of not less than 10 years;	Yes
8	preferential tax policies for FIE export enterprises whose annual output value of all export products amounted to 70% or more;	Yes
9	preferential tax policies for FIEs which are technology-intensive and knowledge-intensive;	Yes
11	preferential tax policies for FIEs in State high or new technology industrial development zones, and for advanced technology enterprises invested in and operated by FIEs;	Yes
13	preferential tax policies for enterprises transferring technology;	Yes
14	preferential tax policies for enterprises making little profit;	Yes
21	grants for encouraging the establishment of headquarters and regional headquarters with foreign investment;	Yes
22	preferential tax treatments for new hi-tech enterprises (NHTE) in special zones;	Yes
29	patent award in Guangdong province;	Yes
31	exemption of tariff and import VAT for imported technologies and equipments;	Yes
32	100% refund of VAT to FIEs on purchasing unused domestic equipment with currency in China;	Yes
35	matching funds for international market development for SMEs;	Yes
36	innovative experimental enterprise grant;	Yes
37	special support fund for non-State-owned enterprises (NSOEs);	Yes
38	venture Investment Fund for Hi-Tech Industry;	Yes
39	Superstar Enterprise Grant	Yes
40	one-time awards to enterprises whose products qualify for "Well-known Trademarks of China" or "Famous Brands of China".	Yes
41	Technology assist	Yes
42	Export subsidies	Yes
43	SME assist	Yes
44	Environmental subsidies	Yes

46	Government Incentives for the Top Taxpayer of the Year-Qinhuangdao City	Yes
47	Financial Support from China Postdoctoral Science Foundation	Yes
48	Foreign Trade Public Service Platform Development Fund	Yes
50	Patent Application Fee Subsidy	Yes
51	Enterprise Development	Yes
53	New Product Trial Production	Yes
56	Patent grants	Yes

In the absence of reliable information to identify whether YHI had received financial contributions under each of the investigated subsidy programs, Customs and Border Protection had regard to the available relevant facts and determined that YHI had received financial contributions that have conferred a benefit under all programs found to be countervailable in relation to ARWs.

The subsidy margin for YHI was established in accordance with section 269TACC(7). In calculating the amount of subsidy attributable to that benefit under s.269TACC(7), Customs and Border Protection considered that:

1. where the legislative instrument that establishes the program specifies the maximum financial contribution that can be made under that program, that maximum amount be the amount determined to be the benefit for each program;

2. where the maximum financial contribution grantable under a program is not stipulated in its legal instrument (or where no known legal instrument exists), the amount of the financial contribution shall be considered to be the maximum amount found in relation to point 1.

In attributing the amount of subsidy to each unit of ARW under s.269TACC(10), the benefit under each subsidy program has been attributed using the lowest total sales volume of a selected cooperating exporter, in the absence of reliable sales data for YHI.

The subsidy margin for YHI was determined to be 58.8%.

5.3 Issue identified by the TMRO

The issue the TMRO raised in relation to the determination of the subsidy margins for YHI related to the provision of information by YHI and whether Customs and Border Protection had considered that information.

The TMRO noted that in REP 181 Customs and Border Protection determined whether a benefit had been conferred and the amount of subsidy attributable to non selected exporters by reference to s 269TACC(7). Section 269TACC(7) was applied on the basis that no information was provided by the Government of China or individual exporters regarding whether particular benefits were conferred on these exporters under these programs

YHI in its application to the TMRO submitted that, to the extent this reasoning applied to it, it is wrong because YHI provided a response to the Exporter Questionnaire which stated that it only received benefits under one of the programs identified by Customs as amounting to a countervailable subsidy, being Program 7.

The TMRO noted that there is no evidence that Customs and Border Protection gave any consideration to whether or not it should rely on this information (provided by YHI) for the purpose of determining the financial benefits received by YHI. The TMRO considered that Customs and Border Protection should have given consideration to this information before deciding to assess the financial benefits received by YHI in accordance with s 269TACC on the basis that it received benefits under all identified programs.

5.4 The reinvestigation

The reinvestigation has examined relevant correspondence between Customs and Border Protection and YHI that discussed the proposed verification process of the information contained in the exporter's questionnaire response. It is clear that at the outset, the original investigation focused its attention on the relevant dumping components of the questionnaire. After YHI advised Customs and Border Protection that it was not prepared to participate in the remote verification process, all information contained in YHI's questionnaire response was considered to be unreliable.

The reinvestigation considers that the original investigation erred in not separately assessing and determining the reliability of information contained in YHI's dumping and countervailing responses. The dumping and countervailing investigations are initiated as separate inquiries following separate applications and requiring separate determinations. Therefore, the reinvestigation considers that Customs and Border Protection is required to make separate assessments of the questionnaire responses in deciding whether a party has cooperated with each of the investigations and whether there is sufficient information to determine individual dumping and/or countervailing margins.

As a result it is possible for Customs and Border Protection to conclude that an exporter has provided a complete and verifiable response in relation to the countervailing investigation but not the dumping investigation. Equally possible is for an exporter to agree and cooperate with verification of its countervailing information but opt to not participate with verification of its dumping information.

With that view, the reinvestigation has examined all relevant information submitted by YHI in its questionnaire response relating to the countervailing investigation. It has assessed whether any of the information was reliable for the purposes of determining whether YHI received benefits under each of the countervailable subsidy programs.

The reinvestigation has considered each identified program separately and identified discrepancies and questions in regards to the information and evidence submitted by YHI. In conducting this assessment, the reinvestigation is mindful that to ensure natural justice, in an original investigation Customs and Border Protection would as a matter of practice inform the exporter of any concerns with its information and provide them with an opportunity to respond and present further information.

However in a reinvestigation, Customs and Border Protection is only required to have regard to relevant information which is information to which the CEO had regard to or was required to have regard in the original investigation. In light of these limitations and procedural fairness concerns, the reinvestigation has accepted YHI's information as being reliable where there are no obvious discrepancies or inconsistencies.

5.4.1 Information provided by YHI in respect to subsidies

YHI identified that it had three factories in China that manufactured and exported ARWs, these factories were:

- YHI Manufacturing (Shanghai) Co. Ltd (YHI Shanghai);
- YHI Advanti Manufacturing (Shanghai) Co Ltd (YHI Advanti); and
- YHI Manufacturing (Suzhou) Co Ltd (YHI Suzhou).

YHI in its exporter questionnaire response identified that it only received a benefit under Program 7 for its Suzhou factory. YHI answered that it did not receive a benefit under any of the other 40 programs or under any other programs not previously addressed.

Program 7 was identified in the exporter questionnaire as;

> *Reduced tax rate for productive FIEs scheduled to operate for a period not less than 10 years: "two years of exemption and three years fifty per cent reduction".*

YHI responded to all the questions in regards to Program 7 and provided documents relating to the preferential tax benefit including:

- a tax schedule;
- a blank Corporate income tax reduction application form; and
- Income Tax Relief document (partially translated).

YHI also provided financial statements for the three factories for its 2010 financial year, January to December and completed individual spread sheets for the three factories for the exporter questionnaire.

5.4.2 Benefits claimed to have been received by YHI under Program 7

Program 7 was assessed and examined in REP 181 at Appendix B. In summary the effect of Program 7 was the reduction of income tax from the prevailing rate of 25% to 12.5%. To be eligible the enterprises had to meet certain conditions including it must be a Foreign Investment Enterprise (FIE). REP 181 considered that Program 7 conferred a benefit that met the definition of a subsidy under s.269T and that subsidy was a countervailable subsidy.

In the first instance the reinvestigation examined the information provided by YHI in respect of Program 7 as YHI identified that this was the only program it received a benefit under.

The reinvestigation notes that during the original investigation YHI had been notified by the investigation team in regards to deficiencies in its response to the exporter questionnaire and advised that "*Further, providing only parts of the exporter questionnaire (or not fully translated documents in English) is likely to result in a decision from Customs and Border Protection not to verify the information, and therefore likely to mean the information supplied will not be relied upon.*"

Part I-1 of the exporter questionnaire asked for responses and information to be provided in regards to 18 separate questions for identified Preferential Income Tax Programs that included Program 7.

YHI provided responses and information in regards to all questions, however as noted below there were deficiencies and errors in the information provided.

Question Seven asked “Describe the application and approval procedures for obtaining a benefit under the program.” YHI responded that at the beginning of 2008, it applied tax exempt and reduction to authorised bureau and needed to submit certificate of productive company alongside the audit report of 2006 and 2007.

Question Eight asked for copies of the application form or other documentation used to apply for the program, all attachments and all contractual agreements entered into between your business and the GOC in relation to the program.

YHI provided a 19 page application form in Chinese in its original submission. YHI was contacted during the original investigation and asked to provide an English version, an English version consisting of one page was provided. No other requested documentation, such as agreements, in regards to this question was provided, noting that YHI had identified documents it submitted for its application at Question Seven.

The form in Chinese appears to request detailed information, being 19 pages in total and containing tables throughout, the form is a blank form and does not contain any completed details.

The English version of one page is headed ‘Corporate income tax reduction application form’, this version is also blank and does not contain any completed information. The English version includes questions on:

- tax relief types: for approval or filing purposes;
- regulations the relief bases on;
- duration of relief; and
- amount of relief.

The reinvestigation notes that there were 22 identified Preferential Income Tax Programs that the exporter questionnaire sought information for. Providing a completed application form with attachments would have assisted in confirming what the tax program YHI applied for was.

The reinvestigation does not consider that there is sufficient detail and information in regards to Question Eight to identify the Program.

Question 13 asked for copies of records in regards to the benefit. YHI provided a one page Chinese document that it said was a rate payment certificate in relation to Program 7. There is a part translation of the document which notes it is Income Tax Relief (for) YHI Suzhou from 2009 to 2011, impose half Income Tax.

The reinvestigation does not consider that there is sufficient detail and information in regards to Question Thirteen to identify the Program.

Question 17 asked for a table, labelled “Income Tax” to be completed in regards to each taxation year. YHI provided tables for all three factories as part of the exporter response that were incomplete in the answers.

Question 18 asked for a copy, bearing the official stamp of the appropriate level of the GOC, of all:

- corporate income tax acknowledgement form(s) and the income tax return(s) that your company filed for the 2008, 2009 and 2010 tax years; and
- income tax instalment payment receipts, and all applicable income tax forms and schedules for the 2008, 2009 and 2010 tax years.

YHI provided a spread sheet table “tax-suzhou” showing tax amounts for 2009 and 2010, the 2009 and 2010 balance and a refund amount. Copies of what appear to be “instalment tax payments” for 2009 and 2010 were also provided. No other information in relation to Question 18 was provided. The reinvestigation considers that provision of the requested income tax acknowledgment forms, returns and schedules would have assisted in verifying the amounts of tax paid and benefits received.

The reinvestigation assessed the information provided for Questions 17 and 18.

The individual “instalment tax payments” for 2009 reconciled to the spread sheet “tax – suzhou”, however the total did not reconcile to the “Income Tax” spread sheet for YHI Suzhou. Further verification of the figures was not possible as YHI had not provided any other financial documents in regards to 2009.

The exporter questionnaire asked at Section A-4 3 for financial documents, including audited consolidated and unconsolidated financial statements, for the two most recently completed financial years, for YHI being 2009 and 2010, plus all subsequent monthly, quarterly or half yearly statements. The requested documents for 2009 were not provided. YHI provided translated “annual reports” for 2010 for its three factories; there is no auditors opinion or notes with the reports to certify to the accuracy and reliability of the reports. The other documents requested were not provided.

The individual “instalment tax payments” for 2010 reconciled to the spread sheet “tax – suzhou” and the total reconciled to the “Income Tax” spread sheet for YHI Suzhou.

The reinvestigation then compared the tax payments for 2010 to information in the annual report for 2010 for YHI Suzhou. The tax payments reconciled to the income statement charge at the taxation accounts section of the annual report. The taxation accounts section also shows an amount for “Statutory stepped income tax exemption (12.5%)”, the exemption is greater than the tax payments and greater than 12.5% at approximately 15% of profit before tax.

The available information suggests that YHI is receiving a benefit, being an exemption in taxation. However, the reinvestigation considers that YHI has not adequately provided all of the requested information and considers that the information provided by YHI in regards to Program 7 is unreliable and should be disregarded as:

- documentary evidence asked for, including that at Question 8 Part I-1 of the exporter questionnaire in regards to the identified Program was not provided;
- the information provided is not adequate to identify what the program is;
- financial information asked for, including that at Section A-4 3 and Question 18 Part I-1 of the exporter questionnaire was inadequate and in most instances not provided; and
- the available information contradicts the stated effect of the program as the information shows the exemption is greater than the tax payments and greater than the stated 12.5%.

5.4.3 Benefits claimed to have not been received by YHI under other programs

Program 1

Program 1 related to aluminium provided by government at less than fair value, specifically the provision of aluminium and/or alloy by State Invested Enterprises (SIEs) at less than adequate remuneration

The reinvestigation examined information provided by YHI and notes that public bodies supplied the exporter with aluminium and/or alloy. The reinvestigation considers that YHI received a financial contribution under Program 1.

The reinvestigation is not satisfied that financial information provided by YHI is reliable to enable the calculation of the benefit received under Program 1 using YHIs information.

The reinvestigation considers that in the absence of reliable information from YHI the method used in REP 181 to calculate that benefit for selected non-cooperating exporters should apply to YHI.

The benefit for selected non-cooperating exporters was calculated in REP181 using, the highest percentage uplift found in relation to the selected cooperating exporters, in the absence of reliable information to demonstrate this uplift would have been lower for these exporters.

<u>Programs 4,5,6,7,8,9,11,13,14,22</u>

REP 181 noted that the above programs operated to reduce enterprises' income tax liability. REP181 also noted that the maximum benefit under Program 11 was a zero percentage tax liability.

REP 181 concluded that in the absence of relevant information it was likely that non-cooperating exporters met the eligibility criteria for these programs, had accessed these programs, and therefore received financial contributions under these programs.

For Program 11 REP 181 calculated the maximum amount of benefit that could have been attributed to each of the selected cooperating exporters under this program during the investigation period (zero tax liability on profits, making the benefit 25% of profit) and attributed this amount to ARWs per wheel by dividing this benefit by the total sales volume of each enterprise (in accordance with s.269TACC(10)).

REP181 noted that for the Programs 4,5,6,7,8,9,13,14 and 22 that as the maximum benefit available (of 0% tax liability) had already been applied under Program 11 it calculated a zero amount of subsidy under these programs for selected non-cooperating exporters.

The reinvestigation has primarily examined whether YHI was eligible for and received a benefit under Program 11. A benefit conferred under Program 11 is the maximum benefit available under the identified programs as noted above.

Program 11 provides for reduced tax liability to a level of zero tax liability on profits. Program 11 operates on a national level and is available to FIEs. The reinvestigation considers that based on the available information YHI would be eligible to receive a benefit under Program 11.

The reinvestigation considers that in the absence of reliable financial information from YHI and information to the contrary it was likely that YHI met the eligibility criteria for Program 11, accessed the program, and therefore received a financial contribution under this program.

The reinvestigation considers that the benefit applicable to YHI under Program 11 should be calculated as it was for selected non-cooperating exporters in REP181.

<u>Programs 21,29,36,37,38,40,42,43,44,46,48,50,51,53,56</u>

The above programs are limited to enterprises in specific regions in China.

The original investigation considered that YHI failed to allow for verification of information submitted in its questionnaire response, and as a result its information was unreliable. However the reinvestigation does not consider that this extends to information relevant to the location of YHI's manufacturing operations and/or sales branches. There was no relevant information which caused YHI's locations to be questioned.

Information provided by YHI shows that its manufacturing operations are located in Shanghai and Suzhou and that it has a distribution company located in Guangzhou province. The available information does not show that YHI has operations in any other locations with China. Therefore, the reinvestigation considers that it is reasonable to conclude that YHI would have been eligible for financial contributions and benefits under those location specific programs where YHI had a presence.

Accordingly, the reinvestigation finds the only possible location specific programs relevant to YHI are Programs 21,29 and 40.

Program 21 provides grants for the establishment of headquarters and regional headquarters in the Guangzhou Municipality. The reinvestigation notes that whilst YHI has a presence in the Guangzhou Municipality it cannot be satisfied on the available evidence that this presence constitutes a headquarters that would make it eligible for the grant.

Program 29 provides for grants for patents and Program 40 provides for grants relating to branding and marketing. The reinvestigation notes that whilst YHI has a presence in the Guangzhou Municipality, which is in the Guangdong province, it cannot be satisfied on the available evidence that this presence would make it eligible for the grants.

The reinvestigation considers that the available evidence does not support that YHI was eligible for and received benefits under Programs 21,29,36,37,38,40,42,43,44,46,48,50,51,53,56.

Programs 31,32,35,39,41,47

YHI provided no information or evidence to demonstrate that it did not receive financial contributions and benefits under programs 31, 32, 35, 39, 41 and 47. The reinvestigation considers that from the available information and in the absence of reliable information from YHI to the contrary it is reasonable to consider that YHI met the eligibility criteria for these programs, accessed these programs, and therefore received financial contributions under these programs.

The reinvestigation considers that the benefit applicable to YHI under these programs should be calculated as it was for selected non-cooperating exporters in REP 181.

5.4.4 Assessment and calculation of subsidy programs received by YHI

Consideration of whether YHI has received a benefit under the identified programs has been examined using the available information. A conclusion that YHI has not received a benefit or was not eligible for a benefit under a program does not impede any examination of those programs in subsequent reviews.

The reinvestigation has calculated a subsidy margin for benefits received under Programs 1,11,31,32,35,39,41 and 47 using the relevant methodologies and calculations outlined in REP181. The reinvestigation has calculated the subsidy margin for YHI at **11.7%**.

Calculations for the subsidy margin for YHI are at **Confidential Appendix 1**.

6 THAT THERE IS A COUNTERVAILABLE SUBSIDY OF THE TYPE DESCRIBED AS 'PROGRAM 1'

6.1 Summary of reinvestigation findings

The delegate recommends the Minister affirms the finding of the original investigation that there is a countervailable subsidy of the type described as 'Program 1'.

Program 1 is described in the original investigation as:

> *The Applicant (Arrowcrest) has alleged Chinese exporters of ARWs have benefited from the provision of raw material (in the form of aluminium and aluminium alloy) by the GOC at less than adequate remuneration.*
>
> *In particular it was claimed that aluminium and aluminium alloy, the main raw materials used in the manufacture of ARWs, was being produced and supplied by SIEs in China at less than adequate remuneration.*
>
> *The application alleges that Chinese SIEs that produce aluminium and/or aluminium alloy are public bodies, and that a financial contribution in the form of provision of raw material inputs at less than adequate remuneration by these SIEs to ARW producers constitutes a countervailable subsidy.*

The reinvestigation finds that sufficient evidence exists to reasonably consider that, for the purposes of the investigation into the alleged subsidisation of ARWs from China, SIEs that produce and supply aluminium and/or alloy are 'public bodies'.

The reinvestigation finds that sufficient evidence exists to conclude that the provision of aluminium and/or alloy by these SIEs conferred a benefit in respect of ARWs in that the provision of aluminium and/or alloy was at less than adequate remuneration.

The reinvestigation finds that, in assessing whether the provision of aluminium and/or alloy in China by SIEs was for less than adequate remuneration an external benchmark based on LME prices during the investigation period, with adjustments, should be used to compare with exporters' purchase prices of aluminium and alloy from SIEs.

6.2 The original investigation

Findings in regards to subsidies are summarised in Section 7 of REP 181 whilst a detailed assessment of the individual programs is at Appendix B to the report. Part II of Appendix B addresses Program 1.

Part II.1 to II.8 provides background information, a summary of the findings and application of the subsidy.

Part II.9 contains a detailed assessment of whether aluminium and alloy producers qualify as public bodies under the Act. The definition of a subsidy under s.269T(a)(ii) includes reference to 'a financial contribution by a government or any public body'. If it were to be determined that these SIEs are not 'public bodies', this program would not meet the definition of a 'subsidy' in s.269T.

Part II.10 contains an assessment of adequate remuneration for aluminium and/or alloy in China, that is whether a benefit had been conferred in respect of the goods.

REP 181had regard to the following information in arriving at the conclusions regarding countervailable subsidies in Appendix B of the report:

- information contained within Arrowcrest's application
- the responses from the GOC to the GQ and SGQ;
- responses to the exporter questionnaire by selected cooperating exporters, and information gathered from and verified with these exporters;
- information submitted to Customs and Border Protection's 2009 investigation into aluminium extrusions from China (REP148), and Customs and Border Protection's analysis and findings in this investigation;
- the reinvestigation of the subsidisation of aluminium extrusions exported from China (REP175);
- information in Appendix A of REP181; and
- Appellate Body and Panel Reports of the WTO.

6.2.1 Are aluminium and alloy SIE producers public bodies

Part II.9.1 of Appendix B addressed the issue of what is a public body and notes that:

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

REP181 notes that in light of the WTO Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, dispute (DS379) consideration of the meaning of 'public body' Customs and Border Protection announced in ACDN 2011/27 that countervailing investigations involving allegations of subsidies being granted by public bodies would be conducted in accordance with the findings of the Appellate Body in DS379.

The assessment of public bodies in Appendix B therefore took account of the DS379 findings in arriving at its conclusions.

REP181 noted that the Appellate Body provided further guidance as to how it can be ascertained that an entity exercises, or is vested with government authority, outlining the following indicia that may help assess whether an entity is a public body (vested with or exercising governmental authority):[38]

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

REP181 addressed each of the three indica in its assessment of whether SIEs in China that produce aluminium and/or alloy are public bodies.

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

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38 Ibid at [318]

REP181 was not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing aluminium and/or alloy.

However REP181 contended that agreements detailed in Part II.9.6 constitute legal instruments that 'vest' CHINALCO with the authority to impose on its subsidiaries (including the CHALCO group of companies) state-prescribed pricing policies.

CHALCO, is a subsidiary of a wholly state owned company, CHINALCO. Customs and Border Protection identified that four of the seven suppliers of aluminium to the selected cooperating exporters in the ARWs investigation are CHALCO subsidiaries. CHINALCO owns 38.56% of CHALCO, and CHALCO represents the largest producer of primary aluminium in China[39].

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

The GOC in its submission to SEF181 asserted that the implication that the GOC withheld information, and the assumption that the information would have proved the case against it, are both incorrect and unfairly prejudicial. The GOC submited that the reason why no evidence can be cited of the vesting of government authority in SIEs is because there is no such vesting and no government programs to provide aluminium to ARW producers at inadequate remuneration.

REP 181 acknowledged the submission and noted that the Interim Measures for the Administration of Comprehensive Performance Evaluation of Central Enterprises, Order of the State-owned Assets Supervision and Administration Commission of the State Council (No.14) requires enterprises whose investment contribution duties are performed by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) to undertake comprehensive performance evaluations in respect of financial and management performance.

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

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

REP181 had not encountered direct evidence to suggest that aluminium and/or alloy-producing SIEs in China have expressly been granted the authority to exercise governmental functions (e.g. provided for in the entity's article of association, etc.).

However, Customs and Border Protection observed Article 36 of the SOA Law[40], which requires;

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

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[39] CHALCO Annual Report 2010, Attachment 51 to the GQ

[40] the *Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People* for wholly-state-owned enterprises (the SOA Law)

Customs and Border Protection considered this direction requiring SIEs to comply with national industrial policies, albeit related to investments in this instance, amounts to a direction that SIEs carry out a government function, namely the achievement of the GOC's national industrial policy objectives.

REP181 considered that there is a significant body of circumstantial evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the aluminium industry.

REP181 noted the provisions of:

- the *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (SASAC Guiding Opinion);[41] and
- the *Interim Measures for the Supervision of and Administrate of the Assets of State-Owned Enterprises* (the Interim Measures);[42]

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

REP 181 examined other evidence in relation to indicia 2 and considered that significant evidence exists to suggest that Chinese aluminium industry SIEs, including those that produce aluminium and/or alloy, play a leading and active role in implementing GOC policies and plans for the development of the aluminium industry.

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

It is noted that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g. annual reports of SIEs). REP181 considered that further evidence of this indicia may have been observed in this omitted information.

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

REP181 considered that sufficient evidence exists to determine that the GOC is in fact exercising meaningful control over Chinese SIEs generally, and SIEs that produce aluminium and/or alloy.

REP181 referred to information including the GOC *Guidelines for Accelerating the Restructuring of the Aluminium Industry* (the Guidelines) and information from CHALCO that further highlights to Customs and Border Protection the fact that GOC policies, plans and measures for the aluminium industry places constraints on SIEs, and thus meaningful control is placed over the activities, decisions and conduct of enterprises in this industry by the GOC.

REP181 considered that the GOC is exercising meaningful control over aluminium and/or alloy producers and the impact of these GOC measures was assessed in Appendix A (Allegations of a market situation).

REP181also noted as with Indicia 2, that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g.

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[41] December 5, 2006, General Office of the State Council – provided in relation to REP148, and also the HSS investigation

[42] Referred to, but not provided as an attachment, in the response to the GQ. However provided as Attachment 170 to the HSS investigation

annual reports of SIEs). REP181 considered that further evidence of this indicia may have been observed in this omitted information.

REP 181 Conclusion on Indicia

REP181 considered that evidence exists to show that at least both Indicia 2 (evidence that an entity is, in fact, exercising governmental functions) and Indicia 3 (evidence that a government exercises meaningful control over an entity and its conduct) are satisfied in relation to Chinese aluminium and/or alloy manufacturers.

REP181 noted that although not all 3 indicia have been satisfied in this case, it is noted that the Appellate Body in DS379 stated that 'where the evidence shows that the formal indicia of government control are manifold and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority'.[43]

REP181 considered that the position of SIEs that produce aluminium and/or alloy in China are examples of entities that exhibit some public body characteristics and some private body characteristics.

GOC submissions and evidence suggest there is a certain degree of separation and independence of SIEs from the GOC, and that they are given certain freedoms to behave relatively independently. However, further evidence exists to show that these entities are still constrained by, and abide by, GOC policies, plans and measures.

In noting this, REP181 considered that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of ARWs from China, SIEs that produce and supply aluminium and/or alloy should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

6.2.2 Provision of aluminium and/or alloy at less than adequate remuneration

After determining that SIEs that produced and supplied aluminium and/or alloy in China are in fact 'public bodies' for the purposes of the Act, REP181 considered whether the provision of goods by these SIEs conferred a benefit in respect of the goods (i.e. whether this provision of aluminium and/or alloy was at less than adequate remuneration).

In arriving at the adequate remuneration benchmark for Program 1, REP181 regard to the guidelines and requirements set out in:

- in s.269TACC(4)(d) and (5) of the Act;
- in Article 14(d) of the SCM Agreement; and
- the WTO Appellate Body in the WTO dispute *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (DS257ABR).

REP181 noted the Appellate Body's position in DS257ABR that an internal benchmark (i.e. private prices for sellers of like goods) is the 'starting point' or 'primary benchmark' for establishing an appropriate benchmark to determine the adequacy of remuneration.

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

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[43] Appellate Body Report, ibid, at [318]

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

REP181 considered that the circumstances examined in DS257ABR are an example of where market distortion can lead to the use of external benchmarks and that the material point is that private prices are unsuitable due to market distortion, not the reasons for this distortion.

REP181 noted that there are no corresponding provisions to s.269TACC(5) in the Act or Article 14(d) of the SCM Agreement in the WTO *Anti-Dumping Agreement* (ADA) in relation to establishing what are reasonably competitive market costs.

REP181 further said that the extent to which s.269TACC(5) and Article 14(d) necessarily translate to the calculation of reasonably competitive market costs in constructed normal values is unclear, though it is considered reasonable that the same considerations for establishing adequate remuneration for an input to assess benefit under a subsidy program may also be applicable in determining reasonably competitive market costs for that same input.

REP181 considered that the distortions observed in the Chinese aluminium and/or alloy market as a result of GOC influence is another example (further to that examined in DS257) of where market distortion makes private domestic prices unsuitable for determining adequate remuneration, hence providing for the use of external benchmarks.

REP181 observed that China does not import significant quantities of aluminium or alloy, and none of the selected cooperating exporters imported aluminium or alloy during the investigation period.

REP181 determined that it was reasonable to construct benchmarks for aluminium and alloy using LME data at comparable terms of trade and conditions of purchase to those observed in China.

6.3 Issues identified by the Review Officer

6.3.1 Are aluminium and alloy SIE producers public bodies

The TMRO noted that the Appellate Body meaning (of a public body) comprised three alternative tests, the three indicia that REP181 addressed.

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

The TMRO considered that REP181, rightly in his view, acknowledged that there was no evidence of any legal instrument expressly vesting government functions and authority in any Chinese aluminium producer.

The TMRO then addressed whether REP181 properly applied either the second or third tests propounded by the Appellate Body.

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

The TMRO notes that the Appellate Body in decision DS379 described government functions and authority as being concerned with the power to control, compel, direct or command private bodies and persons. In the TMRO's view, this aptly summarised the nature of government authority.

The TMRO said that the evidence analysed by Customs and Border Protection in REP181 indicates that certain producers of aluminium and/or alloy are actively taking steps to comply with the policies promulgated by the Government of China, and display awareness that there may be negative consequences to their business if they fail to do so.

However, in the TMRO's view, active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. It does not evidence the essential element of exercising a power of government over third persons. Similarly the TMRO's view of s 36 of the Company Law, which requires SIEs making investments to comply with National Industrial Policies requires no more than compliance with the policies of the GOC and falls short of establishing that State-Invested aluminium or alloy producers are invested with the power to control, compel, direct or command private bodies and persons.

The TMRO considered that Customs and Border Protection had no basis to conclude that the second limb of the Appellate Body test (Indicia 2) was met.

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

The TMRO said that even if it were accepted that the GOC exercises meaningful control over State-Invested aluminium or alloy producers, the third test drawn from DS379 would again not be met, in his view, because the evidence again fails to establish that the enterprises are exercising governmental authority.

The TMRO also noted that, whilst Customs and Border Protection did not give express consideration to paragraph 269T(a)(iii) of the definition of subsidy, he considered for the same reason that there is no evidence that any Chinese Aluminium-producer had been entrusted or directed to carry out a governmental function.

6.3.2 Provision of aluminium and/or alloy at less than adequate remuneration

The TMRO considered that the WTO materials to which REP181 referred do not provide support for the interpretation of the phrase "adequate remuneration" used in the report.

The TMRO considered that the term 'adequate remuneration' in s 269TACC(4)(d) requires an assessment of the adequacy of the return on investment, a comparison between the cost to make and sell and the price of sale of the goods.

The TMRO also considered that 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, determined in the particular market context.

The TMRO concluded that REP181 had no evidence as to the rates of return which aluminium producers were achieving and was therefore unable, in his view, to reach any conclusion about the adequacy of the remuneration.

6.3.3 Decision of the TMRO

The TMRO concluded that as aluminium producers were not public bodies and that there was no evidence that their sale prices led to less than adequate remuneration, the finding that there was a countervailable subsidy of the type described as Program 1 should be reinvestigated.

6.4 The reinvestigation

6.4.1 Are aluminium and alloy SIE producers public bodies

In assessing whether aluminium and alloy SIE producers are public bodies the re-investigation has followed the same framework as the original investigation by having regard to the three indicia outlined out lined as guidelines by the Appellate body in DS379.

The information in the CHALCO Annual Report contributes evidence towards the assessment of whether of aluminium and alloy producer SIEs are public bodies.

The original investigation noted that additional information considered likely to be in the possession of the GOC was requested of, and not provided by, the GOC (e.g. annual reports of other SIEs). The original investigation considered that further evidence of the indicia may have been observed in this omitted information.

The original investigation noted that the Interim Measures for the Administration of Comprehensive Performance Evaluation of Central Enterprises, Order of the State-owned Assets Supervision and Administration Commission of the State Council (No.14) requires enterprises whose investment contribution duties are performed by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) to undertake comprehensive performance evaluations in respect of financial and management performance.

The reinvestigation notes that CHALCO is the largest producer of primary aluminium in China and that four of the seven suppliers of aluminium to the selected cooperating exporters in the ARWs investigation are CHALCO subsidiaries. The reinvestigation notes the position of CHALCO as the largest producer and considers that annual reports of other aluminium producing SIEs would have contributed to the assessment.

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

The original investigation was not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing aluminium and/or alloy and did not found provisions in the laws (that the GOC submitted are the key pieces of legislation that govern Chinese SIEs[44]) that expressly vested SIEs with government authority.

The re-investigation has not found and is not aware of available information that shows that SIEs have been expressly vested with government authority.

The Appellate body in DS379 notes that in some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise. In others, the picture may be more mixed, and the challenge more complex. The same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body.

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[44] SOA Law and the *Company Law*

The Appellate body does on to note that "We do not, for example, consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body. What matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved[45].

The GOC submitted that SIEs operate in line with the general principle of separating government functions from enterprise management.

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

The GOC submitted that the major legal documents in this regard are the Company Law and the *Law of Civil Servant*. Article 6 of the SOA Law states that the capital contributors' functions in wholly-owned SIEs must be carried out:

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

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

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

The original investigation found that the evidence provided by the GOC indicated that the capital contributor is, expressly through legislative means, prevented from exercising government functions in the performance of its duties.

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

The original investigation considered that the 2010 Annual Report of CHALCO[46] provided one source of evidence of the existence of a "statute or other legal instrument" vesting government authority in CHINALCO, (CHALCO's majority shareholder, and a wholly-owned SIE).

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[45] Paragragh 318 of DS318

[46] GOC GQ Response, Attachment 51

The original investigation contended that the following agreements constitute legal instruments that 'vest' CHINALCO with the authority to impose on its subsidiaries (including the CHALCO group of companies) state-prescribed pricing policies:

- the general agreement on Mutual Provision of Production Supplies and Ancillary Services;
- Provision of Engineering, Construction and Supervisory Services Agreement;
- Mineral Supply Agreement;
- Comprehensive Social and Logistics Services Agreement; and
- Mutual Supply Agreement

The original investigation noted that the pricing prescriptions associated with the agreements and concluded that the above agreements vest CHINALCO with government authority to impose state mandated pricing policies on its subsidiaries.

The reinvestigation notes the following information from the 2010 Annual Report of CHALCO:

- The Group is the largest producer of alumina, primary aluminum and aluminum fabrication products in the PRC, and also the second largest producer of alumina as well as the third largest producer of primary aluminum in the world (p.2);

- Chinalco is the largest shareholder of the Group, which directly holds 38.56% equity interest and … the Directors of the Company regarded Chinalco as the Company's ultimate holding company (p.30);

- Chinalco is regarded as the controlling shareholder (p.67);

- NYSE (New York Stock Exchange) requires that the board of a listed company must comprise a majority of independent directors. There is no identical corporate governance requirement in the PRC. The Board of the Company currently comprises three independent directors and five non-independent directors which is in compliance with the requirement by the PRC securities regulatory authorities that the board of a listed company shall comprise at least one-third of independent directors (p.93);

- The Company is controlled by Chinalco, the parent company and a state-owned enterprise established in the PRC. <u>Chinalco itself is controlled by the PRC government</u>, which also owns a significant portion of the productive assets in the PRC. In accordance with IAS 24 (revised), "Related Party Disclosures", government-related entities and their subsidiaries, <u>directly or indirectly controlled, jointly controlled or significantly influenced by the PRC government are defined as related parties of the Group</u>. On that basis, related parties include <u>Chinalco and its subsidiaries (other than the Group), other government-related entities and their subsidiaries ("other state owned enterprises"), other entities and corporations in which the Company is able to control or exercise significant influence</u> and key management personnel of the Company and Chinalco as well as their close family members (p.261); [emphasis added]

The reinvestigation considers that the above evidences the control Chinalco has over CHALCO.

The reinvestigation notes that evidence provided by the GOC indicated that the capital contributor is, expressly through legislative means, prevented from exercising government functions in the performance of its duties.

However, the reinvestigation also notes that Article 46 of the *Interim Measures for the Supervision of and Administrate of the Assets of State-Owned Enterprises* (the Interim Measures);[47] states:

> *Units that have not had their government functions separated from enterprise management shall, in accordance with the provisions of the State Council, accelerate the reform to separate government functions from enterprise management. After the accomplishment of the separation of government functions from enterprise management, the State-owned assets supervision and administration authority shall perform the responsibilities of investor and conduct the supervision and management of State-owned assets of the enterprise according to law.* [Emphasis added]

The reinvestigation did not find any evidence in the CHALCO Annual Report to indicate that "their government functions had been separated from enterprise management or that CHALCO was accelerating reform to do so in accordance with the provisions of the State Council. Further the available information does not show whether CHINALCO has separated its government functions from its enterprise management.

The reinvestigation also notes the GOC response to the following in the questionnaire:

D 2.22 Describe the GOC's policy of 'zhengqi fenkai' (政企分开) that formally separates government functions from business operations and provide any related documents.

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

The **Company Law Attachment 12** and the **Law of Civil Servant Attachment 132** are two of the major legal documents in this regard.

Whilst there is no evidence that that shows that the SIEs of CHALCO and CHINALCO have been expressly vested with government authority the available evidence, including submissions by the GOC do not evidence that CHALCO or CHINALCO have divested their selves of their government authority (their government functions).

There does not appear to be evidence setting a time frame of method for SIEs to divest themselves of their government authority nor does their appear to be any set criteria for the SIEs to achieve, meet or show to evidence that they have divested themselves of their government authority or functions.

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[47] Referred to, but not provided as an attachment, in the response to the GQ. However provided as Attachment 170 to the HSS investigation

The reinvestigation also notes that statements in the CHALCO Annual Report point to CHINALCO being controlled by the PRC government and regarded as the controlling shareholder of CHALCO.

The reinvestigation considers the above points to CHINALCO being vested with government authority.

The reinvestigation examined the pricing agreements in the annual report (p.197).

The first agreement the "Comprehensive Social and Logistics Services Agreement" applying to social services details the prices the "Price determination" for the services provided:

(i) according to state-prescribed price;

(ii) if there is no state prescribed price but there is a state-guidance price, then according to the state-guidance price; and

(iii) if there is neither a state-prescribed price nor a state-guidance price, then according to the market price; and

(iv) if none of the above is applicable, then according to the contractual price.

The agreement applies to CHINALCO as the provider and CHALCO as the recipient.

The "Mutual Supply Agreement" for:

- production supplies, including aluminium fluoride;
- transportation and loading services; and
- Supporting and ancillary services.

The above applies to CHINALCO as the supplier to CHALCO.

The following applies to CHALCO as the supplier to CHINALCO:

- Production supplies, including alumina and primary aluminium; and
- Supporting and ancillary services.

The price determination for the supplies and services between CHINALCO and CHALCO is as per the "Comprehensive Social and Logistics Services Agreement".

There are other agreements, as noted in the original investigation, between related parties in the group that reference state prescribed pricing as part of the price determination.

The reinvestigation notes the two way nature evident in some of the agreements in that the state prescribed pricing applies to the companies as both provider and recipient.

The reinvestigation considers that the agreements vest CHINALCO with government authority to impose state mandated pricing policies on its subsidiaries.

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

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

The reinvestigation considers that the information the original investigation analysed in regards to Indicia 2 demonstrated that evidence existed to suggest that Chinese aluminium SIEs, including those that produce aluminium and/or alloy, play a leading and active role in implementing GOC policies and plans for the development of the aluminium industry.

The reinvestigation also considers that this development is considered to be a 'governmental function', and it is therefore considered these SIEs are in fact exercising governmental functions.

Information that the original investigation noted in support of its assessment was Article 36 of the Law of the People's Republic of China on the State-Owned Assets of Enterprise Law (Law of State Owned Assests)*,* which requires;

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

The original investigation considered this direction requiring SIEs to comply with national industrial policies, albeit related to investments in this instance, amounts to a direction that SIEs carry out a government function, namely the achievement of the GOC's national industrial policy objectives.

The original investigation also observed the provisions of:

- the *Guiding Opinions of the SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises* (SASAC Guiding Opinion);[48] and
- the *Interim Measures for the Supervision of and Administrate of the Assets of State-Owned Enterprises* (the Interim Measures);[49]

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

The original investigation said that the purpose of the Interim Measures is to establish a State-owned assets supervision and management system that suits the needs of a socialist market economy, to better run State-owned enterprises, push forward the strategic adjustment to the layout and structure of the State economy, develop and expand the State economy, and realise the preservation of and increase in the value of State-owned assets[50].

48 December 5, 2006, General Office of the State Council – provided in relation to REP148, and also the HSS investigation

49 Referred to, but not provided as an attachment, in the response to the GQ. However provided as Attachment 170 to the HSS investigation

50 Interim Measures, preamble

The GOC questioned "how compliance with a law (Law of State Owned Assets Article 36) which is an emanation of government policy can be characterised as the exercise of a government function, or can in anyway be considered to constitute the vesting of government authority". The GOC reasoned that if this is the criteria for the determination of a public body, every Australian company which is required to partake in any regulatory framework could be characterised as a public body.

The reinvestigation considers that compliance with policies and laws that could be generally expected to apply on a company wide basis, such as social services, could be viewed as the normal activities of a company complying with a regulatory framework of the government.

An example of this could be the "Comprehensive Social and Logistics Services Agreement" in the CHALCO report which applies to the provision of Social Welfare Services including public security, education, schools and training and Logistics Services including property management, greenery, nurseries and kindergartens. However, whilst this agreement is directed at social services it is still subject to state pricing being the prime determinant in the provision of those services with a market price to be considered after state pricing.

The other agreements in the CHALCO report such as the Mutual Supply Agreement, the Provision of Aluminium and Aluminium Alloy Ingots and Aluminium Fabrication Services Agreement, and the Provision of Engineering, Construction and Supervisory Services Agreement could be viewed as the exercise of a government function due to the Price Determination in those agreements that reference a state prescribed price and a state guidance price as the primary options in the agreements.

These agreements reference the supply and pricing of aluminium related products and support services, including utilities and engineering at state pricing and are more specific than what could be expected as compliance with general government policy such as social services.

The reinvestigation also notes Article 26 of the SOA Law.

> *The enterprise shall have the right to determine for itself the prices of its products and the charges for its services, <u>except for those which, as stipulated by the State Council, are under the control of the price authorities and the relevant competent departments.</u>*

The reinvestigation considers that this further evidences that CHALCO is acting with government authority by imposing state pricing policy between itself and its subsidiaries.

Note 36 to the CHALCO ANNUAL Report 2010 includes the following:

> *During the year ended December 31, 2010, the <u>Group's significant transactions with other state-owned enterprises (excluding Chinalco and its subsidiaries) are a large portion of its sales of goods and purchases of raw materials, electricity, property, plant and equipment and services.</u>*
>
> *All transactions with related parties are conducted on prices and terms mutually agreed by the parties involved, and determined based on the following:*
>
> *(i) Sales of materials and finished goods comprised sales of alumina, primary aluminum, copper and scrap materials. Transactions entered are covered by*

general agreements on mutual provision of production supplies and ancillary services. The pricing policy is summarized below:

(1)Adoption of the price prescribed by the PRC government ("Stated-prescribed price");

(2)If there is no State-prescribed price then adoption of state-guidance price;

(3)If there is neither State-prescribed price nor state-guidance price, then adoption of market price (being price charged to and from independent third parties); and

(4) If none of the above is available, then adoption of a contractual price.

(ii) Utility services, including electricity, gas, heat and water, are supplied at Stated prescribed price.

The reinvestigation considers the nature of transactions also evidences that CHINALCO indeed if not CHALCO itself are exercising government functions by the nature of the agreements subjected to state pricing with other SIEs as disclosed in the annual report. The evidence points to CHINALCO directing through the agreements that state pricing be the primary consideration in those agreements.

The original investigation noted from Article 14 of the Interim Measures vests as one of SASAC's main obligations the responsibility to:

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

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

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

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

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

The reinvestigation also notes Article 13 and Article 14 of the Interim Measures, Article 13 talks of the responsibilities of State owned assets supervision, whilst Article 14 talks of the obligations:

***Article 13** The main responsibilities of a State-owned assets supervision and administration authority are as follows:*

(1) perform the responsibilities of investor for the invested enterprises in accordance with the Company Law of the People's Republic of China and other related laws and regulations, and safeguard the rights and interests of the owner;

(2) guide and push forward the reform and restructuring of State-owned enterprises and State-owned holding enterprises;

(3) dispatch supervisory panels to the invested enterprises pursuant to the relevant regulations;

(4) appoint or remove the responsible persons of the invested enterprises and evaluate their performance in accordance with the statutory procedures, and grant rewards or impose punishments based on the evaluation results;

(5) supervise and administer the preservation of and increase in the value of State-owned assets of enterprises by means of statistics or auditing;

(6) perform other responsibilities of investor and undertake other tasks assigned thereto by the government at the corresponding level.

Besides the responsibilities set forth in the preceding paragraph, the State-owned assets supervision and administration authority of the State Council may formulate rules and systems on State-owned assets supervision and administration of enterprises.

***Article 14** The main obligations of a State-owned assets supervision and administration authority are as follows:*

(1) promote the reasonable flow and optimized allocation of State-owned assets, and propel the adjustment of the layout and structure of the State economy;

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

(3) explore effective systems and ways for the management of State-owned assets of enterprises, enhance the work of supervision and management of State-owned assets of enterprises, promote the preservation of and increase in the value of State-owned assets of enterprises, and prevent the loss of State-owned assets of enterprises;

(4) guide and promote the establishment of modern enterprise system in State-owned enterprises and State-owned holding enterprises, improve corporate governance, and advance the modernization of management;

(5) respect and safeguard the operational autonomy of State-owned enterprises and State-owned holding enterprises, safeguard the legitimate rights and interests of enterprises according to law, impel enterprises to operate and manage according to law, and strengthen their competitive power;

(6) offer guidance and coordination to State-owned enterprises and State-owned holding enterprises in overcoming difficulties and solving problems in the process of their reform and development.

[Emphasis added]

The reinvestigation considers the wording of Article 14 is stronger than that of Article 7 and Article 13. Article 14 places an obligation on the bodies which is a course of action which must be followed, whilst Article 13 places a responsibility on the bodies which is duties that should be followed. The wording in Article 7 uses shall strictly abide and

shall not and also persists in the separation, this wording especially the use of persist indicates a less proscriptive direction than that of Article 14.

The original investigation considered that there is a significant body of circumstantial evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the aluminium industry. Given the predominance of SIE aluminium producers in the domestic market, the decision of these SIE's to implement or give effect to the GOC's objectives for structural reform in the aluminium sector are likely to significantly impact downstream producers of manufactured aluminium products.

To that extent, the reinvestigation considers that it is reasonable to conclude that SIE's producing aluminium have indirect control over private enterprises that are engaged in the manufacture of ARW and other aluminium processed goods.

The original investigation referred to the purpose of the SASAC Guiding Opinion which is to further economic reform through the adjustment of state-owned capital, reorganisation of state-owned enterprises as well as improvement of the mechanism of entry-withdrawal and rational movement of state-owned capital[51].

The original investigation considered the document indicates that SIEs have played an integral role in implementing GOC policies and plans, particularly those in relation to '*execute(ing) the spirits of the Third and Fifth Plenary Sessions of the Sixteenth CPC Central Committee, and the Opinions of the State Council about Deepening the Economic System Reform*.

The original investigation also noted that Appendix A of REP181 outlined evidence that the GOC actively implements and monitors the progress of its policies, plans and implementing measures. It is considered this activity is in line with Article 36 of the SOA Law.

The original investigation concluded that significant evidence exists to suggest that Chinese aluminium industry SIEs, including those that produce aluminium and/or alloy, play a leading and active role in implementing GOC policies and plans for the development of the aluminium industry. This development is considered to be a 'governmental function', and it is therefore considered these SIEs are in fact exercising governmental functions.

The reinvestigation considers that it was reasonable for the original investigation to come to that conclusion based on the evidence before it which included the GOC policies and plans for the aluminium industry and the role of the SIEs in implementing those plans.

The reinvestigation considers the evidence supports that SIEs are exercising government functions.

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

The original investigation noted evidence that SIEs are leaders in the implementation of the GOCs policies and plans, this evidence at Appendix A quotes information from three SIEs.

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[51] SASAC Guiding Opinion, preamble

CITIC Group is the ultimate controlling shareholder of Dicastal Wheel Manufacturing Co. Ltd, one of the exporters of ARWs to Australia. CITIC group is wholly owned by the Government of China. CITIC Group's 2009 annual report note the role it plays in carrying out the GOC's policies:

> *Over the past three decades, CITIC Group has grown into China's largest conglomerate while fulfilling its historic responsibility of piloting China's economic reform and showcasing the country's opening programme. Looking into the future, we will explore and build a business model that fits our needs as a large conglomerate. We will operate in a more systematic, routinized, specialized and sophisticated way, enhancing existing strengths and creating new ones. Our shift from just being big to also being strong in pursuit of sustainability will help us better serve China's economic and social development as an enterprise directly under the central government*[52]*.*

Yunnan Aluminium Co. Ltd is a SIE involved in the manufacture of various aluminium products, including alloy. Customs and Border Protection was unable to obtain its annual reports from the English version of the website[53], however the company information states its role in implementing the objectives of the Yunnan Province 9th and 10th Five Year Plans.

CHALCO is a SIE and the largest supplier of aluminium in China. The following statements are taken from its Form 20-F filing with the SEC for 2010[54]:

> *As a significant majority of our assets and operations are located in the PRC, we are subject to a number of risks relating to conducting business in the PRC, including the following:*
>
> *The central and local PRC government continues to exercise a substantial degree of control and influence over the aluminum industry in China and shape the structure and development of the industry through the imposition of industry policies governing major project approvals, preferential tax treatment and safety, environmental and quality regulations. If the PRC government changes its current policies or the interpretation of those policies that are currently beneficial to us, we may face pressure on profit margins and significant constraints on our ability to expand our business operations.*
>
> *Although China has been transitioning from a planned economy to a market-oriented economy, a substantial portion of productive assets in China are still owned by the PRC government. It also exercises significant control over China's economic growth through the allocation of resources, control of payments of obligations denominated in foreign currencies and monetary and tax policies. Some of these measures benefit the overall economy of China, but may have a materially adverse impact on us.*
>
> *The annual production capacity of Liancheng branch and Lanzhou branch decreased by a total amount of 85,000 tonnes because we ceased the operation of some obsolete smelters in compliance with the energy-saving and*

52 GOC response to the GQ p 33 and Attachment 52, pg 45

53 Provided in GOC response to the GQ, Attachment 133

54 http://www.chalco.com.cn/zl/html/144/2011/20110416055559079742570/20110416055645799590983.pdf.pdf

emission reduction policy carried out by local governments in the fourth quarter of 2010.

In order to improve the efficiency and competitiveness of the Chinese alumina industry as well as to protect the environment, NDRC published "Entrance Conditions for Aluminum Industry" (the "Entrance Conditions") in November 2007. According to the Entrance Conditions, new bauxite projects must be approved by the provincial authority or the relevant department of the State Council of China depending on the amount of total investment, and any new alumina project must be approved by the relevant department of the State Council of China. The Entrance Conditions also provide detailed requirements for capital size, service period and resource utilization rate for a new bauxite or alumina project to be approved. The Entrance Conditions has established a high entry barrier for new alumina producers in China.

The PRC government's encourages consolidation in the Chinese primaryaluminum industry to create larger, more efficient producers that are better positioned to implement measures to reduce emissions. Accordingly, the larger smelters are granted preferential treatment, including priority in the allocation of raw materials and electricity supplies, which give them a competitive advantage over small domestic smelters. Moreover, according to the Entrance Conditions, effective from 2007, new aluminum projects must have secured a supply of alumina to seek approval from the relevant department of the State Council of China. As of the date of the annual report, the relevant department of the State Council of China is not expected to approve any new aluminum projects except those environmental protection upgrade projects and expired equipment exchange projects planned by the PRC government.

PRC Regulation Affecting the Aluminum and Other Non-ferrous Metal Products Industries.

The central and local PRC government continues to exercise a substantial degree of control and influence over the aluminum and other non-ferrous metal product industry in China and shape the structure and development of the industry through the imposition of industry policies governing major project approvals, preferential tax treatment and safety, environmental and quality regulations, including but not limited to the "Aluminum Industry Development Policy", "Notice on Guiding Opinions for Accelerating Aluminum Industrial Restructuring", "Environmental Protection Guide for Developing Circular Economy in Aluminum Industry", "Notice of the State Council of China on Further Strengthening the Elimination of Obsolete Production Capacities" and "Non-ferrous Metals Industry Restructuring and Revitalization Planning", etc. Certain existing laws and regulations involve barriers to entry, production quotas, setting, amending or abolishing import tariffs and limitations and duties on the export of aluminum and certain non-ferrous metals and related products. If PRC government changes its current policies or the interpretation of those policies that are currently beneficial to us, we may face pressure on profit margins and significant constraints on our ability to expand our business operations.

The original investigation also referred to the GOC *Guidelines for Accelerating the Restructuring of the Aluminium Industry* (the Guidelines) and noted the Guidelines are prescriptive in their policy direction.

They (the Guidelines) prescribe which aluminium industry participants should be supported by Chinese Government departments and entities, for example:

> *"financial departments should continue providing financial support to … aluminium enterprises which are conformed to the state industrial policy, credit policy and the industrial access conditions. As to the enterprises, which are not conformed to the industrial policy and market access conditions, or which have been eliminated by the laws or regulations due to backward technology or techniques, the financial departments should not provide any support in any form. If any support has been provided to the enterprises by mistake, the financial departments should withdraw it to avoid financial risk."*

The directions are considered highly prescriptive and designed to achieve compliance by primary aluminium producers and suppliers, with the consequence of a withdrawal of support for non-compliance.

The original investigation also noted the impact of GOC policies on aluminium industry SIEs in the following statements from the Form 20-F Return of CHALCO for 2010:

> *"As a significant majority of our assets and operations are located in the PRC, we are subject to a number of risks relating to conducting business in the PRC,including the following:*
>
> ** The central and local PRC government continues to exercise a substantial degree of control and influence over the aluminum industry in China and shape the structure and development of the industry through the imposition of industry policies governing major project approvals, preferential tax treatment and safety, environmental and quality regulations. If the PRC government changes its current policies or the interpretation of those policies that are currently beneficial to us, we may face pressure on profit margins and significant constraints on our ability to expand our business operations.*
>
> ** Although China has been transitioning from a planned economy to a market-oriented economy, a substantial portion of productive assets in China are still owned by the PRC government. It also exercises significant control over China's economic growth through the allocation of resources, control of payments of obligations denominated in foreign currencies and monetary and tax policies. Some of these measures benefit the overall economy of China,but may have a materially adverse impact on us."*[55]
>
> *"PRC Regulation Affecting the Aluminum and Other Non-ferrous Metal Products Industries.*
>
> *The central and local PRC government continues to exercise a substantial degree of control and influence over the aluminum and other non-ferrous metal product industry in China and shape the structure and development of*

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[55] p13

> *the industry through the imposition of industry policies governing major project approvals, preferential tax treatment and safety, environmental and quality regulations, including but not limited to the "Aluminum Industry Development Policy", "Notice on Guiding Opinions for Accelerating Aluminum Industrial Restructuring", "Environmental Protection Guide for Developing Circular Economy in Aluminum Industry", "Notice of the State Council of China on Further Strengthening the Elimination of Obsolete Production Capacities" and "Non-ferrous Metals Industry Restructuring and Revitalization Planning", etc. Certain existing laws and regulations involve barriers to entry, production quotas, setting, amending or abolishing import tariffs and limitations and duties on the export of aluminum and certain non-ferrous metals and related products."*[56]

The original investigation concluded the above extracts further highlights to Customs and Border Protection the fact that GOC policies, plans and measures for the aluminium industry places constraints on SIEs, and thus meaningful control is placed over the activities, decisions and conduct of enterprises in this industry by the GOC.

The reinvestigation considers that it was reasonable for the investigation to consider that the GOC is exercising meaningful control over aluminium and/or alloy producers. The reinvestigation notes that the original investigation put forward evidence that SIEs are implementing government policy, that that policy is highly prescriptive in their directions as per the Guidelines and place constraints on SIEs as evidence by the CHALCO statements which demonstrates meaningful control over the decisions and conduct of an SIE.

The reinvestigation considers that the Price Agreements that reference state pricing between CHALCO, CHINALCO and the related SIEs are also evidence of the government exercising meaning control. The reinvestigation is not aware of non-SIEs in the investigation that reference state pricing in price agreements and is not aware of evidence showing the GOC has imposed state pricing on non-SIEs.

Conclusion

The reinvestigation considers that the above analysis for the three Indicia in relation to Chinese aluminium and/or alloy manufacturers provide evidence that vest SIEs with government authority, evidence that SIEs are exercising government functions and that the GOC is exercising meaningful control over those entities.

The reinvestigation notes that the Appellate Body in DS379 stated that 'where the evidence shows that the formal indicia of government control are manifold and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority'.[57]

The reinvestigation notes the original investigation statement that, GOC submissions and evidence suggest there is a certain degree of separation and independence of SIEs from the GOC, and that they are given certain freedoms to behave relatively

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[56] p45

[57] Appellate Body Report, ibid, at [318]

independently. However, further evidence exists to show that these entities are still constrained by, and abiding by, GOC policies, plans and measures.

The original investigation concluded that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of ARWs from China, SIEs that produce and supply aluminium and/or alloy should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

The reinvestigations concludes after considering the available information that sufficient evidence exists to reasonably consider that, for the purposes of its investigation into the alleged subsidisation of ARWs from China, SIEs that produce and supply aluminium and/or alloy should be considered to be 'public bodies', in that the GOC exercises meaningful control over SIEs and their conduct.

6.4.2 Provision of aluminium and/or alloy at less than adequate remuneration

The reinvestigation had regard to the available material previously mentioned, in addition the reinvestigation also had regard to the material available in the WTO Panel finding WT/DS257/R regarding WTO dispute *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada.*

The panel report DS1257R is the report preceding the Appellate Body report referred to earlier, DS257ABR.

The reinvestigation does not consider that DS257ABR limits the assessment of adequate remuneration to an adequate return on investment.

In DS257ABR the Appellate Body considered that there may be different options in assessing adequate remuneration.

> *We agree with the Panel that the term "shall" in the last sentence of the chapeau of Article 14 suggests that calculating benefit consistently with the guidelines is mandatory. We also agree that the term "guidelines" suggests that Article 14 provides the "framework within which this calculation is to performed", although the "precise detailed method of calculation is not determined".* [58] *Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but <u>they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government</u>. Thus, we find merit in the United States' submission that the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance"*[59] *(emphasis added)*

This is emphasised by the Appellate Body's further statement as it considered what constitutes an appropriate benchmark to be used to determined adequate remuneration:

> *We agree with the submissions of the participants and third participants that alternative methods for determining the adequacy of remuneration could include*

[58] *Ibid.*

[59] Para 92

proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs[60]

While the Appellate Body was careful not to endorse any specific benchmarking methodology and noted that the benchmark used had to reflect the prevailing market conditions, its agreement that both prices and costs could be used to determine a benchmark for adequate remuneration shows that it did not interpret the phrase to solely refer to return on investment.

The reinvestigation considers that there may be instances in which the level of return on investment is inconclusive in determining whether remuneration for goods was adequate. For a commodity product such as aluminium, goods could be sold at a high price with a high level of profit in a booming market but nonetheless may still be at a price which does not represent adequate remuneration taking into account the prevailing market conditions.

The reinvestigation also notes the following from DS257R in regards to adequate remuneration.

> According to the United States, "adequate remuneration" in the context of Article 14 (d) SCM Agreement must mean remuneration that is sufficient to eliminate any benefit. Benefit is something more favourable than would otherwise be available in the commercial market, i.e. fair market value. Logically, therefore, "adequate" remuneration is fair market value. United States First Written Submission, para. 42. The United States asserts that the proper benchmark is thus an independent market-driven price for the good, which is also the standard applied under Canadian law. United States Second Written Submission, para. 26. See Canadian Special Import Measures regulations, C.R.C SOR/84-927. (US –10). [61] [emphasis added]
>
> According to the United States, market prices are prices between independent buyers and sellers in a competitive market where prices are determined by the forces of supply and demand – not driven by the government's financial contribution.[62] [emphasis added]
>
> As the EC states in its third-party submission, “market” conditions exist where prices are “determined by independent operators following the principles of supply and demand.”[63]
>
> In each market, price is determined in accordance with the relationship between demand and supply. Therefore, in principle, product prices are determined in the market, independently from production costs. [emphasis]
>
> In the NAFTA proceeding, for example, it (the US) specifically describes adequate remuneration as, “the price that the purchaser would pay in an open

60 Para 106 DS257ABR

61 Para 7.38 DS257R

62 Footnote to para. 7.40 DS257R

63 Para 4.154 DS257R

> and competitive market *but for the government's financial contribution*."
> [emphasis added].[64]

The reinvestigation considers that the above shows that price alone may be used as an option for determining adequate remuneration.

The reinvestigation considered the benchmark established by the REP181.

The reinvestigation considers that it was reasonable for REP181 to conclude that as a result of GOC influence market distortion made private domestic prices unsuitable for determining adequate remuneration in that all prices in the market had been distorted and the did not reflect market prices.

The reinvestigation considers that it was reasonable for REP181 to not use import prices as a benchmark due to the limited available information and import quantities as noted in the report.

The reinvestigation notes the following statement from REP181 in regards to the USE of the LME as the benchmark established.

> In the aluminium extrusions investigation Customs and Border Protection found that the London Metal Exchange (LME) prices could be used as a benchmark for a price in a competitive market. This is due to the LME being an open and transparent stock exchange that operates without any restrictions. The benchmark price of most metals worldwide are based on the LME prices. (p.44)

The reinvestigation considers that it was reasonable for REP181 to use LME prices as a benchmark for establishing adequate remuneration. The reinvestigation notes that adjustments to the LME benchmark were done to compare this price with exporters purchase prices of aluminium and alloy from SIEs and considers those adjustments reasonable.

The reinvestigation considers that the original investigation in REP181 was not unreasonable in assessing the benchmark using the methodology it did. The reinvestigation affirms the finding of the original investigation that the provision of aluminium and/or alloy was for less than adequate remuneration.

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[64] Para 4.208 DS257R

7 RECOMMENDATIONS

Customs and Border Protection recommends that the Minister affirm the following findings of REP181 subject to the investigation.

Finding 1 – the calculation of the dumping margin for 'selected non-cooperating exporters

The reinvestigation finds that non-cooperating exporters were investigated by Customs and Border Protection so as to be categorised as "selected exporters" for the purpose of subsection 269T.

The reinvestigation finds that after having regard to all relevant information, export prices for all selected non-cooperating exporters were correctly established in accordance with s.269TAB(3) of the Act.

The reinvestigation finds that after having regard to all relevant information, normal values for all selected non-cooperating exporters were correctly established in accordance with s.269TAC(6) of the Act. export prices for all selected non-cooperating exporters were correctly established in accordance with s.269TAB(3) of the Act.

The reinvestigation finds that dumping margins for 'selected non-cooperating exporters' were correctly established in accordance with section 269TACB(2)(a), by comparing the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the whole of that period.

Finding 2 – that YHI received a benefit under all countervailable subsidies identified by Customs and Border Protection.

The reinvestigation finds that in the in the absence of relevant and reliable information and information to the contrary to identify what financial contributions YHI had received under each of the investigated subsidy programs, Customs and Border Protection has had regard to the available relevant facts and determined that YHI received financial contributions that have conferred a benefit under Programs 1,11,31,32,35,39,41,47.

The reinvestigation has calculated a subsidy margin for benefits received under the identified programs. The methodology used to calculate the margin for YHI is that used in REP181 for selected non-cooperating exporters.

The subsidy margin calculated for YHI is **11.7%**.

Finding 3 - that there is a countervailable subsidy of the type described as 'Program 1'.

The reinvestigation finds that aluminium provided at less than fair value, described as 'Program1' is a countervailable subsidy under the Act.

The reinvestigation finds that sufficient evidence consists to conclude that SIEs that produce and supply aluminium and/or alloy are 'public bodies' under the Act.

The reinvestigation finds that the provision of SIEs of aluminium and/or alloy was for less than adequate remuneration.

The reinvestigation finds that, in assessing whether the provision of aluminium and/or alloy in China by SIEs was for less than adequate remuneration an external benchmark based on LME prices during the investigation period, with adjustments, should be used to compare with exporters' purchase prices of aluminium and alloy from SIEs.

8 EVIDENCE OR OTHER MATERIAL RELIED ON

In making its findings, the reinvestigation had regard to the following material or other evidence:

- REP181, TER181, SEF 181, PAD181 and TMRO Report December 2012 and appendices;
- Relevant information provided to Customs and Border Protection's original investigation by Australian industry, importers, exporters, manufacturers, other parties and Customs and Border Protection's commercial database; and
- Submissions to the TMRO as far as they relate to the relevant information or conclusions based on the relevant information.