Australian Government
Anti-Dumping Review Panel

DECISION OF THE ANTI-DUMPING REVIEW PANEL

WWW.ADREVIEWPANEL.GOV.AU

ANTI-DUMPING REVIEW PANEL
C/O LEGAL SERVICES BRANCH
AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE
5 CONSTITUTION AVENUE
CANBERRA CITY ACT 2601
P +61 2 6275 5868 | F +61 2 6275 6784
ADRP_SUPPORT@CUSTOMS.GOV.AU

REVIEW OF DECISIONS REGARDING DUMPING DUTIES AND COUNTERVAILING DUTIES FOR:

ZINC COATED (GALVANISED) STEEL AND ALUMINIUM ZINC COATED STEEL EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

Contents

Introduction 2
Background 2
Grounds for Review 3
Consideration of Grounds 4
Particular Market Situation 4
Report 177 Analysis 6
The Economics of Supply Analysis 10
Comparative Analysis of HRC Costs 11
Response to Interested Parties 12
Suitability of Sales for Comparison 13
Chinese Exporters Costs of HRC 13
Alleged Subsidy Programs 16
HRC Public Bodies 16
Indicia Two 20
Indicia Three 23
Cocking Coal or Coke Producers 26
BlueScope Submission 26
Conclusion 27

Introduction

1. The Ministry of Commerce on behalf of the People's Republic of China (**GOC**) has applied pursuant to section 269ZZC of the Customs Act (**the Act**) for a review of the decision of the Attorney-General to impose dumping duties in respect of zinc coated (galvanised) steel and aluminium zinc coated steel exported to Australia from the People's Republic of China (**China**) and to impose countervailing duties on such exports.

2. The application for review was accepted and notice of the proposed review as required by section 269ZZI was published on 20 September 2013. The Senior Member of the Review Panel has directed in writing pursuant to section 269ZYA that the Review Panel for the purpose of this review be constituted by me.

3. The application for review included a detailed submission by Moulis Legal, a law firm retained to represent the GOC. A submission was also received from BlueScope Steel Limited (**BlueScope**) on 17 October 2013 and a further submission was received from Moulislegal dated 21 October 2013.

4. In conducting this review, I have had regard to the matters set out in the application for review by the GOC and to the documents to which reference is made in that application. I also had regard to the further submission by Moulislegal and to the submission by Bluescope

Background

5. On 3 August 2012 an application was made by Bluescope pursuant to section 269TB of the Act that the Minister publish dumping notices in respect of, among other things, galvanised and aluminium zinc coated steel exported from China. The application was accepted and an investigation was initiated on 5 September 2012.

6. On 18 October 2012 Bluescope lodged applications for countervailing duties on exports of galvanised and aluminium zinc coated steel from China. The applications were accepted and investigations were initiated on 26 November, 2012.

7. The findings made as a result of the dumping investigation were set out in Report 190 of the International Trade Remedies Branch of the

Australian Customs and Border Protection Service (**Customs**). On 25 July 2013 the Attorney-General accepted the recommendations made in Report 190 and made declarations pursuant to subsections 269TG(1) and (2) of the Act that section 8 of the Customs Tariff (Anti-Dumping) Act 1975 (**the Dumping Duty Act**) applied to galvanised steel and aluminium zinc coated steel exported from, among other countries, China. Notice of the Attorney-General's decision was published on 5 August 2013.

8. Details of the anti-dumping investigation and the reasons for the imposition of anti-dumping measures are set out in Report 190.

9. The findings made as a result of the subsidy investigation were set out in Report 193 of Customs. On 25 July, 2013 the Attorney-General accepted the recommendations made in Report 193 and made a declaration under subsection 269TJ(2) that section 10 of the Dumping Duty Act applied to the exports of galvanised and aluminium zinc coated steel from China, except by certain exporters. Notice of the Attorney-General's decision was published on 5 August, 2013.

10. Details of the subsidy investigation and the reason for the imposition of countervailing duties are set out in Report 193.

11. As the application for the review refers jointly to galvanised steel and zinc coated aluminium steel as coated steel, they will be jointly referred to in that way in this review.

Grounds for Review

12. The GOC contends that the decisions to impose anti-dumping and countervailing duties with respect to exports of coated steel from China were not the correct or preferable decisions and that they should be revoked and substituted for new decisions for the following reasons:

- the situation in the domestic markets for coated steel in China was not unsuitable for determining a price for normal value purposes (or using the term used in the relevant WTO agreement, that there was no "particular market situation" in the Chinese domestic markets) for the coated steel products concerned;
- the Minister should determine that the costs of the Chinese exporters are the costs set out in their financial records, without exception; and

- the alleged subsidy programs (called Programs 1,2 and 3) did not exist.

13. These reasons and the arguments made in the application for review with respect to each of them are considered below.

Consideration of Grounds

Particular Market Situation

14. The GOC's submission takes issue with the finding in Report 190 that there existed a market situation in the domestic market for coated steel in China such that the selling prices in that market were not suitable for use in determining a normal value under subsection 269TAC(1)of the Act.

15. The determination of normal value for the purpose of ascertaining whether or not there is a dumping margin is done pursuant to section 269TAC of the Act. Subsection 269TAC(1) provides that subject to certain exceptions:

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

16. One of the exceptions in section 269TAC to the usual rule for determining normal value is found in subparagraph 269TAC(2)(a)(ii). This subparagraph provides for the normal value to be determined on a different basis where the Minister is satisfied that "the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection(1)".

17. A finding under subparagraph 269TAC(2)(ii) is sometimes referred to as "a particular market situation" finding. This is a reference to the relevant part of the WTO Anti-Dumping Agreement (**the Anti-Dumping Code**)[1]. Article 2.2 of that Anti-Dumping Code provides:

"When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a

[1] WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for the administrative, selling and general costs and for profits."

18. Australia is a signatory to the Anti-Dumping Code and it is accepted that subparagraph 269TAC(2)(a)(ii) was intended to reflect Article 2.2 of the Anti-Dumping Agreement[2].

19. The basis for the finding in Report 190 that the terms of subparagraph 269TAC(2)(ii) applied to the domestic market in China for coated steel, was that the GOC influences in the iron and steel industry distorted the selling prices of hot rolled coil (**HRC**), the main raw material used in the production of coated steel. There was also a finding that the GOC influence on prices equally affected inputs (such as coke, coking coal and iron ore) for HRC such that neither the production inputs nor the transfer price for HRC reflected competitive market costs.

20. The GOC submission contends:

- that there is no valid rationale for the particular market situation finding;
- the finding that "the prices of coated steel in the Chinese market are not substantially the same as they would have been without the influences by the GOC" as a formulation for the test for "unsuitability" or for a particular market situation lacks any relevance to the questions posed under Australian law or under the WTO;
- that the test does not differentiate the Chinese market for coated steel from any other market in the world; and
- that the facts for a particular market situation determination did not exist and do not exist.

21. The GOC submission specifically challenges the findings of Report 190 in five areas. These are:
    a. the adoption by Customs of its findings in Report 177;
    b. the "economics of supply" analysis
    c. the comparative analysis of HRC costs;
    d. the response to the interested parties submissions; and
    e. the suitability of sales for comparison.

[2] Explanatory Memorandum to Customs Legislation (World Trade Organisation Amendments) Bill 1994.

Report 177 Analysis

22. In reaching the findings regarding the unsuitability of the prices in the domestic market in China for determining normal value, Report 190 relied on findings made in Report 177 into the dumping of hollow structural sections (**HSS**) exported from China. In Report 177, it was found that a particular market situation existed in the Chinese iron and steel industry that rendered the domestic selling prices of HSS unsuitable for the determination of normal value. The reason given for relying, at least in part, on the findings in Report 177 was that the coated steel producers were part of the iron and steel industry in China and that HRC was the main raw material for HSS and for the coated steel goods.

23. The GOC contends that the findings in Report 177 were flawed and relies on the rejection of the findings in Report 177 by the then Trade Measures Review Officer (**TMRO**). The GOC submission also referred to its criticism of the findings in Report 177 which were made in its submission to Customs in a letter dated 22 February, 2013 with regard to the reinvestigation following the TMRO decision and also in its submission in response to the Statement of Essential Facts (**SEF**) dated 17 April 2013 in the coated steel investigation.

24. The factors which were regarded by Customs as evidencing the distorting intervention by the GOC, and which were considered by the TMRO in his review of the HSS decision, were:
    - Chinese export tariffs on coke and coking coal;
    - The occurrence of mergers and acquisitions within the Chinese iron and steel industry;
    - The supply of HRC to HSS producers at subsidised prices;
    - The fact that HRC prices in China were lower than in other countries under investigation; and
    - Comments made by some market participants about the GOC policies.

25. The TMRO in his review of the findings in Report 177 came to the conclusion that the evidence currently available to him ” fails to sufficiently establish that the policies and plans of the Government of

China are being implemented and enforced in such a manner as would support the market situation finding."[3]

26. Despite the rejection of the conclusion in Report 177 regarding the market situation in China by the TMRO, I do not agree with the criticisms of Customs' use in Report 190 of its findings in Report 177.

27. While Customs did rely, in part, on Report 177 for the finding in Report 190 as to the unsuitability of the domestic prices in China, it also updated the information in that report and relied on material provided during the investigation into coated steel, particularly information provided by the GOC in response to certain questionnaires. The issue is whether or not there was in Report 190 a sufficient basis for the finding as to unsuitability.

28. The substance of Customs' analysis as to the unsuitability of the domestic prices in China is found Appendix 1 to Report 190. Customs found that the majority of the GOC policies and plans identified in Report 177 remained active and valid in the investigation period for Report 190. The conclusion regarding the effect of these was that they had impacted on the supply, and distorted the cost of, the raw materials to produce HRC and as a result the price of HRC used in the production of coated steel in China was also distorted.

29. The direct cause of the distortion was found by Customs to be the imposition of taxes, tariffs and export quotas, with the most influential factors being the 40% export tax on coke and scrap metal and the 0% VAT rebates on HRC, coke, coking coal and iron ore.

30. The GOC specifically takes issue with the finding in relation to the export tariff on coke and refers to the TMRO decision in which the TMRO stated that:

"…there is no data available about the impact of the export duty on the domestic price of coke, and therefore the impact on the domestic HSS market cannot be ascertained."[4]

31. The data relied upon by Customs for its findings in relation to the export tariffs and quotas and the VAT rebates is set out at pages 148 to 157 of Report 190. The relevant data, which is based on information supplied by the GOC, showed:

[3] TMRO decision dated 14 December 2012, para 111
[4] TMRO decision, para 97

- a VAT of 17% applied to domestic purchases and sales in China which was refunded at various rates for exports, the rebate on exports of coated steel being 13%;
- the rebate on VAT for exported HRC was reduced in mid-July 2010 from 9% to 0%, there was a 3% import tariff on HRC and a negligible volume of exports of HRC;
- there was no VAT rebate on coke, an export tariff of 40% applied from mid 2008 and various export quotas applied (the quotas for 2011 and 2012 being about 2% of the total coke production in China);
- there was no VAT rebate on coking coal and an export tariff of 10% applied;
- there was no VAT rebate on iron ore; and
- there was no VAT rebate on exports of scrap metal (an input in the production of HRC) and an export tariff of 40% applied.

32. There was also information that a 3% import tariff on coking coal applied but the GOC advised that, in practice, the rate was 0%. There was inconsistent information as to whether or not there was an export quota for coking coal.

33. The effect of the above was found by Customs to have increased the supply of coke and coking coal in the domestic market in China which led to a downward pressure on prices. As support for this, Customs found that the domestic price of coke was approximately 38% lower that the export price, on comparable terms of trade, during the investigation period, the export price being comparable to the export price from other major exporting countries. Customs also found that the coking coal price in China during the investigation period was around 8% lower than the export price on comparable terms of trade.

34. Customs also found that the distortion caused to the price of coke and coking coal had a flow-on effect on the price of downstream products in the steel industry, such as on the coated steel products, as coke and coking coal were key raw materials for the industry.

35. Despite the above, the GOC submits that there is still no evidence about the impact of the tariffs on coated steel in Report 190 and therefore the concerns expressed by the TMRO as to the illegitimacy of Customs findings in Report 177 have not been overcome. I do not agree with this submission.

36. The conclusion by Customs in Report 190 as to the distortion in the steel market in China is largely based on data supplied by the GOC . The impact on the prices of steel products is a conclusion based on the data and inferences drawn from that data. The conclusion as to the distorting effect on prices for coke and coking coal in the Chinese market has been supported by the comparison with export prices for those products. Customs also supported its conclusion by doing a comparison between the price of HRC produced in China and the price of HRC produced in Korea and Taiwan. The price of Chinese produced HRC was approximately 15% lower.

37. The use of prices in other markets to confirm the effect of the GOC's policies on the production costs of the coated steel is subject to separate criticism made by the GOC and this is addressed below.

38. It is important to note that, in this review, I am reviewing the findings made in Report 190 and not the findings made in Report 177. Importantly, there were different investigation periods for the two reports and, in the coated steel investigation, further information was available[5]. However, it is possible that I have also used a different test to that which the TMRO used. For this reason, I need to address a reference in the TMRO' review of Report 177 to the applicable test when applying subparagraph 269TAC(2)(a)(ii).

39. At paragraph 85 of his decision, the TMRO states:

"…I do not consider that a market situation that renders domestic sales unsuitable for determining normal values would necessarily arise where a government simply exercised other ordinary functions of government, including by imposing various regulatory controls on market participants that may affect their costs and therefore increase or decrease the prices at which they sell their productive output. The imposition of at least some regulatory controls such as those designed to ensure occupational health and safety, community health and environmental protection must be viewed as part of an ordinary market economy."

40. The TMRO then goes on to quote in support of this statement, an extract from the decision of Justice Lee in *La Doria di Diodata Ferraioli Spa v Beddal*, *Minister for Small Business, Construction and Customs* [6] namely:

" Depressing or inflating factors affecting the price of goods sold in that market will not of themselves establish that there is a situation in the

[5] Report 190, page 164.
[6] [1993] FCA 288

market that makes prices obtained in that market unsuitable for use for the purpose of subs.269TAC(1)."[7]

41. The difficulty with adopting this test is that Justice Lee's decision in this respect was overturned on appeal by the Full Court of the Federal Court[8]. The Full Court (Black C.J. and Lockhart J.) found that a depressing factor (such as the production aid in that case) affecting the price of goods could of itself be enough to make the market unsuitable. As their Honours stated:

"In our opinion the Authority was entitled to rely and rely solely on the fact that the payment of production aid had distorted domestic selling prices in Italy to the extent that canned tomatoes had been consistently sold at prices which were less than the production costs of the Italian canners. "[9]

42. I also do not agree that it is relevant that the GOC's measures were part of the ordinary functions of government or were motivated by environmental or other concerns. I note though that the TMRO at paragraph 110, in my opinion, correctly states the issue:

'Whatever the motives behind policies and industry regulations, the issue for determination is whether the policies and regulations lead to a distortion of competitive market conditions."

43. In its submission following the release of the SEF, the GOC relied on the test as set out by Justice Lee in *La Doria* to which the TMRO referred[10]. I do not consider that the correct test for unsuitability is as described in that submission. As noted above Justice Lee was overruled on that point. The GOC also contends that the situation identified in the market for the purpose of subparagraph 269TAC(2)(a) (ii) has to be one that only affects the sales of the like goods in the domestic market[11]. In the Full Court's decision in *La Doria* it was decided that the approach taken by the Anti-Dumping Authority in that case was correct even though the production aid applied equally to production for domestic and export sales. Accordingly, the contention by the GOC in this respect does not reflect Australian jurisprudence on this issue.

The economics of supply analysis

[7] Paragraph 33
[8] [1994] FCA 24
[9] Ibid page24.
[10] Letter from Moulislegal to Customs dated 17 April 2013, page 3.
[11] Ibid and letter from Moulislegal to the Review Panel dated 21 October 2013 at page 3.

44. At page 52 of Report 190, Customs refers to the economic theory of supply, namely that increasing the supply of a commodity, given all other factors being equal, will lead to lower prices due to excess supply. In the introduction to Appendix 1, Customs states that this theory provides a theoretical framework to understand the implications of increase in the supply of a commodity through direct and indirect government actions.

45. The GOC submission contends that the "economics of supply" analysis cannot show that the prices of raw materials, or the coated steel, in the domestic market of China were artificially low. The criticism is that the analysis was only made from the supply side and ignored other market factors such as demand. The GOC also contends that the analysis was overly simplistic, based purely on assumption and not supported by any actual Chinese data.

46. I do not agree with this criticism. While the usefulness of the theory is limited, it does have a role in the examination of the effect of supply being increased in a market. Of course it is theoretical and assumes that all other factors are equal. The point which is being made in Report 190 is that the effect of the GOC policies to increase supply on the domestic market is that prices are lower than they would otherwise be, consistent with the theory.

Comparative analysis of HRC costs

47. As noted above, Customs did a comparison between the price of HRC produced domestically in China with prices in Korea and Taiwan. The substantial difference found was used to support the conclusion that the cost of raw materials used in the production of HRC in China is lower than would be the case without government influence.

48. The GOC criticism is that there is no logic to such a comparison given that none of the markets can be said to be without government influence. While it is unlikely that any market is without some government influence, this is not to the point. It is the extent and effect of the influence in the market in China of the GOC policies. There is no suggestion that similar policies are in effect in Korea or Taiwan or that there are other policies which are having a distorting effect in those markets to the extent of those in China.

49. The GOC also contends that the price of HRC in Korea cannot demonstrate what the price in the Chinese coated steel market would

be without government influence. This misses the point of the comparison. The comparison was between the HRC prices in the various markets. This comparison is used to demonstrate that the price of HRC in China is lower than the price in Korea. In addition, Customs found that the prices of coated steel in the Chinese market were lower than in the markets in Korea and Taiwan. These comparisons were used by Customs as giving support to the conclusion it had drawn from the data regarding the influence of the GOC policies on the raw material products for HRC and coated steel products.

50. It is important to note that the comparison of the prices for Chinese domestically produced HRC and that for HRC in Korea and Taiwan was not the basis for the finding that the prices in the Chinese domestic market were distorted, but rather as further support for the conclusion Customs had drawn as to the effect of the GOC influence in the steel market in China.

Response to interested parties

51. The GOC takes issue with a comment made by Customs in Report 190 when responding to the submissions to the SEF. This comment was that "The interested parties did not demonstrate that the GOC's export and import tax policies, the macroeconomic policies and plans did not impact the costs of major upstream raw materials that distorted the price of HRC"[12]. The concern is that this statement evidences a reversal of the burden of proof. I do not read Report 190 as indicating that Customs reversed the onus of proof in the investigation. In its report, Customs went through the material it relied upon and the reasons for the conclusions made in the report. The approach it took was in keeping with that required by the legislation.

52. The comment made by Customs could have been better expressed but when read in the context of the report, I understand the comment to be saying that the interested parties did not provide any evidence which would displace the conclusion drawn by Customs from the material before it.

53. There is also a criticism by the GOC that the response by Customs neglects the extensive amount of information provided by the Chinese exporters and the GOC. Again, I do not consider that there was a failure by Customs to have regard to the material provided by the GOC and the exporters. The information is referenced in the analysis by Customs and

[12] Report 190, page 163.

indeed a large part of the analysis is based on information provided in the questionnaire responses. There is some criticism in Report 190 of the questionnaire responses received from the GOC in that they were incomplete or did not provide supporting information. Nevertheless, Customs did base its analysis on an assessment of the relevant information in the GOC responses.

Suitability of sales for comparison

54. The situation identified in the market for the purpose of subparagraph 269TAC(2)(a)(ii) has to be one that makes the sales in that market unsuitable for use in determining a price under subsection 269TAC(1), i.e. the normal value. The GOC contends that Report 190 did not address the unsuitability aspect and that the market situation identified in Report 190 did not disrupt the comparison required, as Chinese exporters were free to price their coated steel products as they wished on both the domestic and export markets.

55. At paragraph 9.3.1 of Report 190 Customs found that the nature of the influence of the GOC in the domestic market in China for the inputs in the production of HRC (such as coke and coking coal) and the transfer prices of HRC did not reflect competitive market costs. This is the situation identified as making the domestic price of the Chinese exports of coated steel unsuitable for determining a normal value. HRC is a key input for the production of coated steel. I consider that Customs did address the issue of the unsuitability of the market prices for determining a price under subsection 269TAC(1), which is what is required.

56. As noted above[13], the situation in the market identified for the purpose of subparagraph 269TAC(2)(a)(ii) does not have to affect the domestic prices differently to the export price. Adjustments are made under subsections 269TAC(8) and (9) for differences affecting the comparability of the export price and normal value.

Chinese exporters costs of HRC

57. The result of the finding that there was a situation in the market in China such that the domestic sales of HRC were not suitable for use in determining normal value under subsection 269TAC(1), meant that the normal value of the exports of coated steel from China were to be

[13] Paragraph 43

worked out in accordance with paragraph 269TAC(2)(c). That paragraph provides that the normal value will be the sum of:

i. such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and
ii. on the assumption that the goods, instead of being exported, had been sold in the ordinary course of trade in the country of export-such amounts as the Minister determines would be the costs associated with the sale and the profit on that sale.

58. Pursuant to subsection 269TAC(5A), the costs to be determined under paragraph 269TAC(2)(a) are to be worked out in accordance with certain regulations. The relevant regulations are Regulations 180,181 and 181A of the *Customs Regulations* 1926. Regulation 180(2) relevantly requires that if an exporter keeps records in accordance with generally accepted accounting principles in the country of export and those records reasonably reflect competitive market costs associated with the production and manufacture of the goods, the Minister must work out the amount of the costs by using the information set out in the records.

59. In Report 190, Customs found that the records of the exporters did not reflect competitive market costs for the HRC and recommended to the Minister that in determining the cost of production of the coated steel in China, the costs of the manufacture of HRC be based on a benchmark. This benchmark was the weighted average domestic price paid by cooperating exporters of coated steel from Korea and Taiwan at comparable terms of trade and conditions of purchase to those observed in China.[14]

60. The GOC takes issue with the finding in Report 190 that the prices of HRC in the records of the Chinese exporters did not reflect competitive market costs. The GOC also submits that the use of the HRC benchmark price was particularly flawed when it was used to replace the costs of HRC in the calculation of the normal value for integrated Chinese coated steel producers.
61. The use of a benchmark for the cost of HRC when calculating the cost of production of the coated steel for the Chinese exporters flows logically from the finding that the prices of HRC in the Chinese domestic market are distorted and do not reflect competitive market costs. The use of a benchmark based on exporters costs in Korea and Taiwan does not

[14] Report 190, page 61.

seem inappropriate and I note that the Minister has a broad discretion under subparagraph 269TAC(2)(c)(i) as to the determination of the costs of production if the terms of regulation 180(2) are not met.

62. The approach taken by Customs to the issue of competitive market costs under Regulation 180(2) is supported by the decision of Justice Nicholas in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [15] In that decision his Honour stated:

"…the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs", but also that government policy aimed at reducing the cost of primary aluminium used in the domestic production of finished goods had distorting effects."[16]

63. The criticism of the use of the benchmark price for the integrated producers is that an integrated producer produces HRC in the process of producing the coated steel and does not purchase it from the market. Consequently, it is submitted that it is not appropriate to look at the price of HRC sold in the market because the integrated producer does not buy that raw material (i.e. the HRC) on the market.

64. The GOC points to the illogicality in Customs reasons for using a benchmark HRC price for the integrated producers as shown by the following excerpt from Report 190:

"Customs and Border Protection has observed that some of the cooperating integrated exporters of galvanised steel and aluminium zinc coated steel also sell HRC to some of the non-integrated producers. Because this selling price is said not to reflect a competitive market cost to the purchaser, and has been substituted by a benchmark, this leads to an inference that the HRC manufacture costs of the integrated producers also do not reflect competitive market costs".[17]

---

[15] [2013] FCA 870.
[16] Ibid, para 91.
[17] Report 190, page 63

65. The reason for using a benchmark price for HRC in the calculation of the cost of production for the integrated producers could have been better expressed than in the section quoted above. When the entire reasoning by Customs is read it is clear that what is being considered is that rather than establish a benchmark for each of the raw materials used by the integrated producers (such as coke, coking coal, iron ore or scrap metal), Customs has used a benchmark price at the HRC level. Given the findings as to the effect of the GOC policies on the prices of raw materials such as coke and coking coal, the difficulty with establishing a benchmark for the raw materials and the absence of sufficiently detailed cost records from the cooperating exporters, the approach by Customs seems reasonable.

Alleged Subsidy Programs

66. The submission by the GOC that the subsidies described as Programs 1, 2 and 3 did not exist attacks four findings of Customs in Report 193. These findings were:
    a. the finding that for the purpose of the alleged subsidy Program 1, enterprises with State investment that produced and supplied coking coal or coke were "public bodies";
    b. the finding that for the purpose of the alleged subsidy Programs 2 and 3, enterprises with State investment that produced and supplied coking coal or coke were "public bodies";
    c. the finding that a countervailable benefit was conferred by public bodies because the subject raw materials were provided at "less than adequate remuneration"; and
    d. the finding that the alleged subsidies were "specific".

67. The first two findings with respect to "public bodies" and the submissions by the GOC with respect to them are considered below. Given the conclusion I have made with respect to those findings, I have not addressed the further issues as they are moot.

HRC public bodies

68. In Report 193, Customs found that state invested enterprises (**SIEs**) that produced and supplied HRC to producers of coated steel in China were public bodies. This finding was part of the finding that the supply of HRC for less than adequate remuneration to the coated steel producers by the SIEs was a "subsidy" within the meaning of section 269T of the Act. This subsidy was described as "Program 1".

69. The GOC takes issue with the finding that the SIEs who supplied HRC to the coated steel producers were public bodies within the meaning of the Act. The GOC referred to the detailed submissions it made in response to SEF 193 on this issue and contends that, as Report 193 did not offer any further reasoning or explanation as to its public body finding, the SEF submission remains relevant.

70. The flaws identified in the SEF 193 submission to which particular reference is made by the GOC are alleged to be:
    a. that Customs has not identified the vesting of government authority in SIEs or the possession of government authority by SIEs, which could characterise them as public bodies";
    b. when given its proper interpretation, the evidence adduced to support the contention that SIEs are vested with government authority shows no such thing;
    c. the finding that SIEs that produce coking coal and coke are public bodies because they are part of the "iron and steel industry" is not supported by evidence or logic.

71. The contention in relation to the coking coal and coke producers is dealt with separately further below.

72. There is no definition of "public body" in the Act. The definition of a subsidy in section 269T of the Act is however based on Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures Agreement (**SCM Agreement**). Customs in its Report, and Bluescope and the GOC in their submissions, reference a decision of the Appellate Body of the WTO known as *US/China* Report DS 379[18] on the issue of what constitutes a public body for the purpose of Article 1.1.

73. The decision in *US/China* Report DS 379 was considered in the *Panasia* decision by Justice Nicholson. The applicability of the decision as the correct test for a public body in Australia was not argued before his Honour as the parties accepted it as being the correct test. The relevant extract from the *US/China* Report DS 379 is set out by Justice Nichlolas in the *Panasia* decision:

> "317. ... We see the concept of "public body" as sharing certain attributes with the concept of "government". **A public body within the meaning of Article 1.1.(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority.** Yet, just as no two governments are

[18] *United States-Definitive Anti-Dumping and Countervailing Duties on certain products from China* WT/DS379/AB/R (11 March 2011).

exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.

318. **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. 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. There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity. **Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice.** It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. We stress, however, that, apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. **In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.**

319. In all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government. An investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant.

(footnotes omitted, emphasis added)"[19]

74. From the above, Customs has extracted indicia for determining whether or not entities are public bodies.[20] The indicia were set out in the Panasia decision as being:

> "• where a *statute or other legal instrument* expressly vests government authority in the entity concerned;
> • 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
> • evidence that a government exercises *meaningful control* over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions."[21]

75. In Report 193 Customs relied on its analysis and findings in Report 203 on the issue as to whether or not these indicia were met. Report 203 set out Customs' findings as a result of its reinvestigation of the finding in Report 177 that SIEs producing and supplying HRC were public bodies. The relevant conclusion in Report 203, relied upon by Customs was:

> "The reinvestigation finds that sufficient evidence exists to reasonably consider that, for the purposes of the investigation into the alleged subsidisation of HSS from China, SIEs that produce and supply HRC and/or narrow strip should be considered to be 'public bodies'. The reinvestigation considers that these SIEs are exercising government functions and that there is evidence that the government exercises meaningful control over SIEs and their conduct. In performing government functions, SIEs are controlling third parties."[22]

76. It is necessary then to consider the findings in Report 203 in order to understand the basis upon which Customs considered that the SIEs were public bodies.

77. In Report 203, Customs excluded the first indicia as being applicable as there was no evidence of any statute or other legal instrument vesting government authority in the SIEs. The analysis focused on whether or not the remaining two indicia were met.

78. Before considering the analysis by Customs of indicia two and three, it should be noted that the reinvestigation followed a review by the TMRO of the imposition of countervailing duties on HSS exports as a result of the recommendations by Customs in Report 177. In order to appreciate

[19] [2013] FCA 870, para 33.
[20] Report 193, page 46
[21] [2013] FCA 870, para 35.
[22] Report 203, page 44; Report 193, page 150.

the findings from the reinvestigation, it is necessary to also have regard to the findings in Report 177 and the TMRO's conclusion with respect to them. This is done below with respect to each of indicia two and three. It is also convenient to consider the findings in the reinvestigation and my consideration of this issue under each of these headings.

79. The findings by Customs with respect to the SIEs in Report 177 are summarised by the TMRO at paragraphs 227 to 240 of his decision. Before considering the analysis in terms of indicia two, it is useful to first note the description of the SIEs in China:

> "SIEs are private enterprises that are part or wholly owned by the Government of China. The Government of China invests in private enterprises through the State-Owned Assets Supervision and Administration Commission (SASAC) at national level. Provincial or regional government bodies may also invest through similar institutions. The Government of China advised that these institutions 'are shareholders in the normal sense'. However, the SASAC is also responsible for 'the implementation of the system for the administration and supervision of the state-owned assets in accordance with the Law on State Owned Assets."[23]

Indicia Two

80. For its analysis of the second indicia, Customs relied in large part on Article 36 of the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, which relevantly provided that:

> "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."[24]

81. Apparently Customs considered that the above amounted to a direction that SIEs carry out a governmental function and that the implementation of the policies referenced in the "particular market finding" constituted a government mandate and function.[25]

82. As further evidence for its finding that the SIEs met the test in indicia two, Customs relied upon:

    - the 2010 Annual Report of Baosteel in which it described itself as "taking an active part in the reorganisation of the industry in accordance with the national policies on the iron and steel industry"[26]
    - the SASAC Guiding Opinion, which indicated that SIEs "played an integral role in implementing Government of China policies and

[23] TMRO decision, para 227, Report 177, page 232
[24] TMRO decision, para 231, Report 177, page 236
[25] TMRO decision, para 232, Report 177, page 238
[26] TMRO decision, para 233, Report 177, page 238

plans, particularly those in relation to 'execut[ing] the spirits of the Third and Fifth PlenarySessions of the Sixteenth CPC Central Committee and the Opinions of the State Council about Deepening the Economic System Reform'".[27]

- Article Article 14 of the Interim Measures for the Supervision of and Administration of the Assets of State-Owned Enterprises, which vests in SASAC certain obligations pertaining to increased controlling and competitive power in the State economy and improving its overall quality.[28]

83. In his review of Customs reasons for finding that the indicia two test was met, the TMRO considered that active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority. I agree with this view. The TMRO went further and noted that:

"It does not evidence the essential element of exercising a power of government over third persons."[29]

84. The requirement for exercising a power over third persons was, according to the TMRO, based on the WTO Appellate Body decision in *US/China* Report DS379 in which government functions and authority were described as being concerned with the power to control, compel, direct or command private bodies and persons. While the TMRO does not footnote this reference to the Appellate Body decision, it is presumably based on comments such as the following:

> "Turning then to the question of what essential characteristics an entity must share with government in the narrow sense in order to be a public body and, thus, part of government in the collective sense, we note, that the term "government" is defined as the "continuous exercise of authority over subjects; authoritative direction or regulation and control". In this vein, the Appellate Body found, in *Canada – Dairy,* that the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority. The Appellate Body further found that this meaning is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions. As we see it, these defining elements of the word "government" inform the meaning of the term "public body". This suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body."[30]

85. With respect to the reliance on section 36 of the Company Law, the TMRO states that in his view "this section requires no more than compliance with the policies of the Government of China. It falls short of

[27] TMRO decision, para 233, Report 177, page 239
[28] TMRO decision, para 234, Report 177, pages 239 to 240.
[29] TMRO decision, para 245
[30] US/China Report DS379, para 290.

establishing that State-Invested HRC producers are invested with the power to control, compel, direct or command private bodies and persons. "[31] Consequently, the TMRO found that there was no basis for Customs to conclude that the second indicia had been met.

86. How did Customs address the issue in its reinvestigation? Customs noted that the National Steel Policy of the GOC evidenced the GOC's plans, policies and measures for the iron and steel industry. According to Custom, "the essential objective of these policies, plans and measures is to advance and improve the Chinese steel industry, demonstrating that it is a government mandate and function."[32] The result of this conclusion was that when SIEs were carrying out this mandate, they were exercising government functions.
87. As evidence that the SIE's were carrying out the mandate, Customs referred to the Maanshan Iron & Steel Company Limited 2010 Annual Report and to the five year plan which that company had developed which was in keeping with the GOC's plan. Customs also referred to the Baosteel 2010 Annual Report and its role in the reorganisation of industry in accordance with national policies for the iron steel industry.

88. After referring to the TMRO's view that compliance with government policies did not equate to the exercise of government functions as it did not equate to the exercise of power over third parties, Customs found that SIE's were not just complying with government policy with respect to which there might be negative consequences for non-compliance but also with aspirational policies. Customs states:

"…the Five-year Plans are considered to be aspirational documents by the GOC that outline its plans for the economy. While these are not enforceable, SIEs are market leaders in their implementation as demonstrated by the quote from Maanshan's annual report above. This indicates that SIE's actions are not simply those of companies seeking to comply with relevant legislation but that they are acting with a purpose. Customs and Border Protection considers that that purpose is to fulfil government functions. "[33]

89. This conclusion appears to conflate the purpose of acting in accordance with a government policy and carrying out government functions. It also does not address the issue identified by the TMRO, namely that to be a public body within the test of indicia two, the entity has to be exercising government functions as evidence that the entity possesses or is vested with government authority. Compliance with government policy does not of itself evidence that an entity possesses, exercises or is vested with government authority. This is the overriding test established by the Appellate Body.

[31] TMRO decision, para 246
[32] Report 203, page 52
[33] Report 203, page 53

90. In order to address the TMRO's view that there needs to be the essential element of exercising a power of government over third persons, Customs concludes that "in implementing the GOC's policies and plans for the Chinese economy SIEs are also carrying out government functions. In addition, SIEs are controlling other market participants to act in certain ways. "[34] It is necessary to consider the evidence upon which Customs relied in finding that the SIEs controlled other market participants.

91. Customs refers to Article 14 of the Interim Measure which vests SASAC with certain obligations with respect to the State economy. This is said to evidence that the SIEs in the iron and steel industry must be maintaining the controlling power of the State economy. However, the reference in Article 14 is to SASAC, not to the SIEs. It does not evidence how, or even if, there is authority delegated to the SIEs to control participants in the iron and steel industry.

92. While Customs was unable to determine the actual proportion of the HRC producers that were SIE's, it determined that they accounted for a significant proportion of the iron and steel sector. From this, Customs concluded that "given their market dominance, the decisions of SIE's to implement or give effect to the GOC's objectives for structural reform in the steel industry are likely to significantly impact downstream producers of manufactured steel goods."[35]

93. Report 203 goes further than this and finds that SIE's producing HRC "have indirect control over private enterprises that are engaged in the manufacture of HSS and other processed goods."[36] It is, however, difficult to see how this conclusion can be made from evidence which indicates that actions of the SIEs (for example, by eliminating some smelting production) have an impact on downstream producers of manufactured steel products. Having an impact on other participants in the industry is not indirectly controlling them. In any event, it is certainly not evidence of the exercise of government authority.

94. In support of its finding that SIE's are controlling other market participants to act in certain ways, Customs refers to evidence that some SIEs seek to develop other market sectors in line with government policies. This evidence though goes no further than showing that SIEs do seek to comply with government policies and while this could be seen as implementing the policy in that regard, it does not follow that they are controlling other market participants in doing so. The most that can be said is that they are likely to have an impact on those other market participants. This is a long way from exercising government authority.

[34] Report 203, page 55
[35] Report 203, page 54
[36] Ibid

95. I am unable to agree with the conclusion that indicia two is established with respect to the HRC producing SIEs.

Indicia three

96. With this test, the TMRO concluded that "even if it were accepted that the Government of China exercises meaningful control over State-Invested HRC-producers, the third test drawn from DS379 would again not be met in my view, because the evidence again fails to establish that the enterprises are exercising governmental authority."[37]

97. In addition to the material relied upon for the original investigation and set out in Report 177, Customs referred to further material which showed the control the GOC had over the iron and steel producing SEIs. These were:
    - the Directory Catalogue on Readjustment of Industrial Structure, which categorises certain industries into encourage, restricted and eliminate
      investment industries;
    - the Decision of the State Council on Promulgating the 'Interim Provisions on Promoting Industrial Structure Adjustment for Implementation' , which outlines how the GOC promotes and restricts the development of industries in the categories listed above. For example, investments are prohibited in restricted and eliminated industries;
    - the Notice of the State Council on Further Strengthening the Elimination of Backward Production Capacities which outlines the penalties for non-compliance with the GOC's plans for eliminating certain production capacities. This can include the revocation of the production licence; and
    - the Standard Conditions of Production and Operation of the Iron and Steel Industry, which outlines the requirements for iron and steel producers in China including certain production size requirements. Companies that do not meet these requirements can be prevented from getting credit and new production licences.

98. Customs also refers to extracts from Annual Reports of Baosteel to show that there is a need to comply with the GOC's policies.

99. The material relied upon by Customs does demonstrate that the GOC does regulate the iron and steel industry and that there is a degree of control by the GOC over the participants in that industry. Whether the

[37] TMRO Report, para 248.

control amounts to meaningful control in the sense intended by the Appellate Body such as to meet indicia three is not shown by the material. As was stated in *US/China* Report DS379:

> "As we have said above, being vested with governmental authority is the key feature of a public body. State ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority." [38]

100. The material relied upon in Report 203 does not, in my view meet the test of indicia three. There is not shown that the control the GOC exercises over the SIEs in the iron and steel industry is such that those SIEs are in effect exercising government authority.

101. The above analysis is based on the decision by the Appellate Body in US/China DS379 being the test under Australian law. As noted above, the parties in the *Panasia* decision accepted that it was the test and so Justice Nicholas did not have to specifically decide whether that was the case. However, I have considered whether his Honour did apply a different test. When addressing the argument that Customs had mistaken the regulator (CHINALCO) for CHALCO, in finding that CHALCO was a public body, his Honour stated:

"In particular, I am not satisfied that the CEO confused CHINALCO or CHALCO, or mistakenly characterised CHALCO as regulator, rather than an entity that is regulated. Clearly, the CEO recognised that CHALCO was itself the subject of regulation, but he also recognised, and found, that CHALCO and its subsidiaries served as instruments through which, and by extension, the Chinese Government could give effect to its economic and social policies through the aluminium industry as a whole."[39]

102. The effect of what his Honour concluded is that it is not sufficient that the entity is being regulated. They have to be more than this. If the above quote is considered in light of other findings, it is, I consider, consistent with the approach taken by the Appellate Body. The following passage from his Honour's judgment shows that there is a need for the control of the government entity to be a delegation of authority (although not in the strict sense of delegation):

"…the Chinese Government, through its control of primary aluminium producers and suppliers, bestowed them with its authority to give effect to

[38] At para 310.
[39] [2013] FCA 870 , para 70

the Chinese Government's economic, industrial and social policies by providing or withholding financial support of various kinds to the domestic manufacturers which they supplied."

103. There is no material in the HSS reinvestigation or which is relied upon by Customs in Report 193 which demonstrates that there has been a delegation of governmental authority to the SIEs to impose State-mandated policies on participants in the iron and steel industry in China. The material also does not, in my view, support a finding that the control exercised over the SIEs by the GOC was such that they were "instruments" of the GOC.

Coking Coal or Coke Producers

104. This issue relates to the allegation that coated steel manufacturers in China were benefiting from the provision of raw material in the form of coking coal and coke by the GOC at less than adequate remuneration. In order for this to amount to a subsidy within the meaning of section 269T of the Act, the SIEs that produce coke and coking coal have to be public bodies as that term is used in the definition of subsidy in section 269T.

105. The applicable finding by Customs in Report 203 is at Appendix 1 to the report. Customs considers that the evidence and findings regarding the HRC producers and suppliers set out in Report 203 apply equally to the SIE producers and suppliers of coking coal and/or coke. This is on the basis of the finding in Report 203 that the GOC exercised meaningful control over iron and steel producing SIEs. As coking coal and coke producers are part of the iron and steel industry, Customs concludes that SIE producers and suppliers of coking coal and coke in China should be considered public bodies.

106. As I have found that the material upon which reliance was made in Report 203 did not support a finding that the SIEs which are HRC producers were public bodies, it follows that there is no basis for the finding that the SIEs producing coking coal or coke could be considered public bodies. However, even if the finding in relation to the HRC producers was valid, it does not follow logically that just because coking coal and coke are raw materials used in the iron and steel industry, that SIEs producing such raw materials are part of the iron and steel industry and therefore public bodies.

Bluescope Submission

107. Bluescope's submission of 18 October 2013 on the public body issue relies on the findings by Customs in Report 193 and Report 203 and does not add further to them. Bluescope notes the finding by Customs that the HRC suppliers in China are "constrained by, and abiding by, GOC policies, plans and measures" and that indicia two and three were satisfied and supportive of the public bodies finding.

108. For the reasons set out above, I do not agree that indicia two and three were satisfied. The fact that the HRC suppliers are complying with the GOC's policies, plans and measures cannot of itself meet the criteria for finding that they are public bodies.

Conclusion

109. I consider that the decisions of the Attorney-General under subsections 269TG(1) and 269TG(2) of the Act with respect to the exports of coated steel from China were the correct and preferable decisions. Pursuant to subsection 269ZZK(1) of the Act, I recommend to the Minister that he affirm the decisions.

110. I consider that the decisions of the Attorney-General under subsection 269TJ(2) of the Act with respect to the exports of coated steel from China was not the correct or preferable decision and pursuant to subsection 269ZZK(1) of the Act, I recommend to the Minister that he revoke that decision.

111. As described in Report 193 at page 146, in this case where both countervailing duty and dumping duty was imposed on exports, the interim dumping duty was reduced by an amount for the applicable subsidy rate, so as to eliminate any overlap or double-counting that may arise from the combined measures. Consequently, if the Minister accepts the above recommendations, there may need to be an adjustment to the amount of the interim dumping duty and dumping duty rate to remove any deduction for the subsidy rate that will no longer apply.

Joan Fitzhenry
Anti-Dumping Review Panel Member
15 November 2013