FEDERAL COURT OF AUSTRALIA

Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs [2015] FCA 885

Citation:	Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs [2015] FCA 885
Parties:	**DALIAN STEELFORCE HI-TECH CO LTD and STEELFORCE TRADING PTY LTD (ACN 110 146 515) v MINISTER FOR HOME AFFAIRS OF THE COMMONWEALTH OF AUSTRALIA and CHIEF EXECUTIVE OFFICER AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE**
File number:	NSD 1074 of 2012
Judge:	**NICHOLAS J**
Date of judgment:	21 August 2015
Catchwords:	**ADMINISTRATIVE LAW** – Part XVB of *Customs Act 1901* (Cth) (the Act) – anti-dumping measures – normal value – hollow steel sections (HSS) exported from China to Australia – determination of normal value pursuant to s 269TAC(1) - whether "market situation" in Chinese HSS market within s 269TAC(2)(a) – whether decision-maker erred in determining that domestic sales not suitable for determining normal value by reason of Government of China (GOC) policies and implementation measures – approach taken to determination of normal value where market situation exists – application of reg 180(2) of *Customs Regulations 1926* (Cth) - whether decision-maker erred in determining that costs incurred by HSS manufacturers not reflective of competitive market costs – whether decision-maker applied incorrect benchmark to reflect competitive market costs for purpose of constructing normal value **ADMINISTRATIVE LAW** – Part XVB of Act – anti-dumping measures – countervailable subsidy – whether Stated-invested enterprises (SIEs) producing raw materials used to make HSS were "public bodies" within meaning of term as used in s 269T – whether decision-maker misinterpreted or misapplied the phrase "public body" as used in s 269T – whether subsidy "specific" – whether open to decision-maker to make

	determination that subsidy was specific pursuant to s 269TAAC(4) – whether goods supplied for "less than adequate remuneration" – whether open to decision-maker to use external benchmark to determine adequacy of remuneration – whether open to decision-maker to use weighted average "basket" of costs incurred by various cooperating HSS exporters from other countries within region as benchmark for determining adequacy of remuneration
Legislation:	*Customs Act 1901* (Cth) ss 269T, 269TAA, 269TAAC, 269TAB, 269TAC, 269TACA, 269TACB, 269TACC, 269TAE, 269TG, 269TJ, 269ZZK, 269ZZM *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16 *Judiciary Act 1903* (Cth) s 39B *Customs Regulations 1926* (Cth) reg 180 *Migration Act 1958* (Cth) s 109(1)(c)
Cases cited:	*Commissioner of Police (NSW) v Industrial Relations Commission* (NSW) [2009] NSWCA 198; (2009) 185 IR 458 *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 *Enichem Anic SRL v Anti-Dumping Authority* (1992) 39 FCR 458 *Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372; (2009) 78 NSWLR 265 *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 *Minister for Small Business, Construction and Customs v La Doria di Diodata Ferraiolli SPA* (1994) 33 ALD 35 *Panasia Aluminium (China) Ltd v Attorney-General of the Commonwealth* (2013) 217 FCR 64 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153
Date of hearing:	4 and 5 February 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	117

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Solicitor for the Respondents:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1074 of 2012**

BETWEEN:	**DALIAN STEELFORCE HI-TECH CO LTD** **First Applicant**
	STEELFORCE TRADING PTY LTD (ACN 110 146 515) **Second Applicant**
AND:	**MINISTER FOR HOME AFFAIRS OF THE COMMONWEALTH OF AUSTRALIA** **First Respondent**
	CHIEF EXECUTIVE OFFICER AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE **Second Respondent**

JUDGE: **NICHOLAS J**

DATE OF ORDER: **21 AUGUST 2015**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The applicants serve their proposed short minute of orders on the respondents by 28 August 2015.
2. The respondents serve their proposed short minute of orders by 4 September 2015.
3. The parties file and exchange brief written submissions (limited to 4 pages in length) attaching a copy of their proposed short minute of orders by 25 September 2015.
4. The proceeding stand over to a date to be fixed for the making of final orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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	CHIEF EXECUTIVE OFFICER AUSTRALIAN CUSTOMS AND BORDER PROTECTION SERVICE **Second Respondent**
JUDGE:	**NICHOLAS J**
DATE:	**21 AUGUST 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 In this proceeding the applicants challenge the validity of various decisions made by the Minister for Home Affairs ("the Minister") and other officers of the Commonwealth under the provisions of Pt XVB of the *Customs Act 1901* (Cth) ("the Act"). The applicants seek relief under s 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), ("ADJR Act") and s 39B of the *Judiciary Act 1903* (Cth). It was not suggested by the applicants that there is any relief available under s 39B that was not also available to them under s 16 of the ADJR Act.

2 The first applicant ("Dalian") is a manufacturer of hollow steel sections ("HSS"). Dalian manufactures HSS in China which it exports to Australia. Dalian's HSS are imported into Australia by the second applicant ("Steelforce").

3 The principal relief claimed by the applicants are declarations that various decisions are invalid and orders setting such decisions aside. The relevant decisions are as follows:

- The decision, made by the Minster on 12 June 2012 and published on 3 July 2012, to accept the recommendations of the second respondent, the Chief Executive Officer ("CEO") of Australian Customs and Border Protection Services ("Customs") made in Report to the Minister No 177 ("Report 177") and to publish a notice under subss 269TG(1) and (2) of the Act in relation to certain HSS exported from China.
- The decision, made by the Minister on 12 June 2012 and published on 3 July 2012, to accept the recommendations of the CEO made in Report 177 and to publish a notice under s 269TJ(2) of the Act in relation to HSS exported from China.
- The decision, made by the CEO, to make the recommendations in Report 177 to the Minister.
- The decision, made by the Minister on 26 April 2013 and published on 13 May 2013, to accept the recommendations of the CEO made in Report to the Minister No 203 (Report 203) and to publish a notice under s 269ZZM of the Act affirming his decision to publish dumping duty notices and countervailing duty notices on 3 July 2012 in regards to HSS exported from China.
- The decision, made by the CEO, to make the recommendations in Report 203.

LEGISLATIVE BACKGROUND

4 In *Panasia Aluminium (China) Ltd v Attorney-General of the Commonwealth* (2013) 217 FCR 64 ("*Panasia*") I decided a number of issues similar to those that arise in this proceeding and it will be necessary for me to refer to that decision in the course of these reasons. The applicants submitted that *Panasia* was wrongly decided in one particular respect (to which I will return) but otherwise relied upon the explanation it contains of the relevant legislative background at [7]-[19] and the four inter-related international agreements referred to in Pt XVB of the Act including the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement") and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-Dumping Agreement").

5 As explained in *Panasia* at [14], Pt XVB of the Act contains an elaborate set of provisions which regulate the imposition of dumping duties including various provisions concerned with the determination of export price (s 269TAB), normal value (s 269TAC), "the non-injurious price of goods" (s 269TACA) (these being the three values referred to in the Act as the "variable factors") and dumping margins (s 269TACB). Other provisions of Part XVB of the Act that may be relevant for the purposes of determining the variable factors and,

ultimately, dumping margins, include s 269TAAD (ordinary course of trade) and s 269TAA (arms length transactions).

6 Section 269TACB establishes how the variable factors, once ascertained in accordance with other relevant provisions of the Act, are to be used in determining whether dumping has occurred. Section 269TG is the provision of the Act that permits the Minister to impose dumping duty by the publication of a dumping duty notice if dumping has occurred. However, the circumstances in which the Minister may impose dumping duty are closely confined by the terms of the section and related provisions including, in particular, s 269TAE (material injury to industry).

7 Section 269TJ allows the Minister to impose countervailing duty where he or she is satisfied that a countervailable subsidy has been received and, because of that, material injury to an Australian industry producing like goods has been caused or is threatened or the establishment of an Australian industry producing such goods has been or may be materially hindered. The Minister does this by the publication of a countervailing duty notice.

8 Report No 177 entitled "Certain Hollow Structural Sections Exported from the People's Republic of China, the Republic of Korea, Malaysia, Taiwan and the Kingdom of Thailand" included recommendations by the CEO to the Minister recommending that notices be published under s 269TG and s 269TJ of the Act. These recommendations were accepted by the Minister on 12 June 2015. On 3 July 2012 the Minister published a dumping notice and a countervailing duty notice in the *Australian Government Gazette* and *The Australian* newspaper.

9 Thereafter, the Trade Measures Review Officer ("TMRO") conducted a review of the Minister's decision in accordance with Div 9 of Pt XVB of the Act. On 14 December 2012 the TMRO made two relevant recommendations pursuant to s 269ZZK(1)(b) of the Act that the Minister direct the CEO to reinvestigate certain matters. The first of these, which related to the decision to publish the dumping notice, was as follows:

- the finding that there was a particular situation in the Chinese iron and steel market such that sales in that market were not suitable for use in determining a normal value under s 269TAC(1); and
- the calculation of the benchmark used to construct a normal value for Chinese HSS producers under s 269TAC(2)(c) of the Act.

10 The second matter the subject of the CEO's recommendation, which related to the decision to publish the countervailing duty notice, was as follows:

- the finding that State-invested enterprises ("SIEs") providing hot-rolled coil steel ("HRC") to HSS producers under Program 20 are "public bodies"; and
- the finding that HRC supplied under Program 20 was provided for less than adequate remuneration.

11 On 14 January 2013 the Minister accepted these recommendations and required the CEO to reinvestigate those matters. The reinvestigation is the subject of Report 203 dated 15 April 2013.

THE AGREED STATEMENT OF ISSUES

12 The issues to be decided in this proceeding are set out in the further amended agreed statement of issues dated 14 January 2014 ("the SOI"). At the commencement of the hearing Senior Counsel for the applicants informed me that Issue 5 in the SOI was no longer pressed. The remaining issues (renumbered by me) are as follows:

(1) Whether the respondents erred in construing or applying s 269TAC(2)(a) of the Act by finding that there was a situation in the Chinese HSS market such that sales in that market were not suitable for use and could not be used in determining normal value.

(2) Whether the finding that there was a situation in the Chinese HSS market such that sales in that market were not suitable for use in determining normal value under s 269TAC(1) of the Act involved:

  (a) a constructive failure to exercise jurisdiction;

  (b) a failure to take into account relevant considerations;

  (c) the making of a finding without any evidence to justify it.

(3) Whether the respondents erred in construing or applying reg 180(2) of the *Customs Regulations 1926* (Cth) ("the Regulations") by finding that the costs incurred by HSS manufacturers in China for HRC and narrow strip steel ("narrow strip") did not reasonably reflect competitive market costs.

(4) Whether, having found that the costs incurred by HSS manufacturers in China for HRC and narrow strip did not reasonably reflect competitive market costs, the respondents erred in construing or applying s 269TAC(2)(c)(i) by seeking and

purporting to apply a benchmark that reasonably reflected competitive market costs for HRC and narrow strip in China for the purpose of constructing a normal value.

(5) Whether the respondents erred in construing or applying the term "public body" in s 269T of the Act by finding that SIEs which produce HRC and narrow strip are public bodies.

(6) Whether the respondents misconstrued s 269TAAC of the Act by finding that Program 20 was specific so as to amount to a countervailable subsidy.

(7) Whether the respondents erred in construing or applying subss 269TACC(4) and (5) of the Act by finding that an external benchmark could be used to determine the adequacy of the remuneration received by manufacturers of HRC and narrow strip in China.

(8) Whether the respondents erred in construing or applying subss 269TACC(4) or (5) of the Act by finding that a weighted average "basket" of costs incurred by verified selecting cooperating HSS exporters was an external benchmark suitable for determining the adequacy of the remuneration received by manufacturers of HRC and narrow strip in China.

Issue 1: Market Situation

13 Section 269TAC of the Act relevantly provides:

> **Normal value of goods**
>
> (1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.
>
> (1A) For the purposes of subsection (1), the reference in that subsection to the price paid or payable for like goods is a reference to that price after deducting any amount that is determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of the sales.
>
> (2) Subject to this section, where the Minister:
>
> (a) is satisfied that:
>
> (i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or
>
> (ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);

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

(b) is satisfied, in a case where like goods are not 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, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);

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

(c) except where paragraph (d) applies, 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 for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and, subject to subsection (13), the profit on that sale; or

(d) …

…

(5A) Amounts determined:

(a) to be the cost of production or manufacture of goods under subparagraph (2)(c)(i) or (4)(e)(i); and

(b) to be the administrative, selling and general costs in relation to goods under subparagraph (2)(c)(ii) or (4)(e)(ii);

must be worked out in such manner, and taking account of such factors, as the regulations provide for the respective purposes of paragraphs 269TAAD(4)(a) and (b).

(5B) The amount determined to be the profit on the sale of goods under subparagraph (2)(c)(ii) or (4)(e)(ii), must be worked out in such manner, and taking account of such factors, as the regulations provide for that purpose.

…

14 In Report 177 Customs found that there was a "market situation" in the Chinese HSS market during the investigation period such that sales in that market are not suitable for use in determining normal value under s 269TAC(1): see p 42. Customs considered that all domestic sales of HSS in China were unsuitable for determining normal value under s 269TAC(1) and that normal values in respect of HSS exported to Australia should be undertaken in accordance with s 269TAC(2)(c) of the Act. This in turn led Customs to undertake its assessment of normal value by reference to reg 180.

15 Customs stated its conclusions in relation to this issue in Report 177 as follows (at p 166):

> Customs and Border Protection considers that the GOC has exerted numerous influences on the Chinese iron and steel industry, which are likely to have materially distorted competitive conditions within that industry and affected the supply of HSS, HRC, narrow strip, and upstream products and materials.
>
> The impact of these GOC influences on supply are extensive, complex and manifold, and their resulting impact on the price of HSS is not able to be easily quantified. However, as discussed in Section I(ii) of this appendix, it is not considered that the quantification of price effects is necessary in assessing the suitability of prices for normal value under s.269TAC(1).
>
> Customs and Border Protection's analysis of the information available indicates that prices of HSS in the Chinese market are not substantially the same (likely to be artificially low), as they would have been without the GOC influence. Customs and Border Protection considers that GOC influences in the Chinese iron and steel industry have created a 'market situation' in the domestic HSS market, such that sales of HSS in that market are not suitable for determining normal value under s.269TAC(1).

16 Similar findings were made by Customs in Report 203 where it was said by way of conclusion (at pp 25-26):

> After due consideration of the evidence considered in relation to the investigation of the domestic market for HSS in China, the reinvestigation is of the view that the body of evidence presented in REP177 is sufficient to satisfy the CEO that the GOC has distorted supply and demand conditions in the Chinese steel sector. Further, Customs and Border Protection is also of the view that the distorted market conditions have had a considerable impact on the costs and prices of HSS products sold on the domestic market, such that it is reasonable to conclude that domestic prices are not set according to normal market forces.
>
> Therefore, the reinvestigation affirms the finding of the original investigation that because of the situation in the iron and steel market, which includes HSS producers, domestic sales in that market are not suitable for use in determining normal value under s.269TAC(1) of the Act.

17 The applicants submitted that Customs misinterpreted s 269TAC(2)(a)(ii) by equating government influence on the market with unsuitability within the meaning of s 269TAC(2)(a)(ii).

18 The applicants accepted that Customs identified a number of Government of China ("GOC") "macro-economic policies in relation to the iron and steel industry, and related implementing measures" (Report 177 p 158) which were said to have created the "market situation". These were identified by Customs as follows:

- measures to drive structural adjustment;

- technological, efficiency and environmental development measures;
- export restrictions on coke; and
- subsidisation of encouraged practices and products.

19 However, it was submitted by the applicants that the fact that government policies affected prices in the iron and steel industry in China could not, of itself, make sales in that market unsuitable for the purposes of s 269TAC(2)(a)(ii). If that were correct, according to the applicants' submission, a market situation would exist in anything other than a perfect market.

20 In support of their submission the applicants contrasted the circumstances said to have resulted in a finding that a market situation existed in this case with those referred to in other cases. Reference was made to the Full Court's decision in *Enichem Anic SRL v Anti-Dumping Authority* (1992) 39 FCR 458 at 467 where Hill J (with whom Gummow and O'Connor JJ agreed) instanced the existence of a government monopoly of the trade, or the existence of government control of the domestic price, as circumstances where arms length sales in the market might not be suitable for use in determining normal value. The applicants also referred to *Minister for Small Business, Construction and Customs v La Doria di Diodata Ferraiolli SPA* (1994) 33 ALD 35 ("*La Doria*") in which the Full Court dealt with a case in which canned tomatoes had consistently been sold at prices less than the canning company's costs of manufacturing and selling them, which was made possible by direct cash subsidy payments paid to tomato growers.

21 In *La Doria*, Black CJ and Lockhart J observed at 45 that "… [t]he exercise in which the decision-maker must engage under s 269TAC(2)(a)(ii) is essentially a practical one" raising matters for determination by the decision-maker that "requires a broad judgment … on questions of fact."

22 In the present case Customs did not merely identify a number of GOC policies and implementing measures and find that domestic prices were likely to have been influenced by them. It sought to ascertain whether the GOC's involvement in the iron and steel market materially distorted prices for key raw materials used in the manufacture of HSS.

23 In Report 177 (at pp 112-113) Customs referred to the Dumping and Subsidy Manual and said:

> In relation to market situation, the Dumping and Subsidy Manual states:

> *Sales that would otherwise be relevant for determination of normal value may be unsuitable because the price does not reflect a fair price in normal market conditions. The legislation does not define market situations that would render domestic sales as unsuitable. The investigation and analysis of each case must fully set out the reasons for the unsuitability of sales before determining normal value under succeeding provisions of s.269TAC of the Act.*
>
> *In considering whether sales are not suitable for use in determining a normal value under s. 269TAC(1) of the Act because of the situation in the market of the country of export, Customs and Border Protection may have regard to factors such as:*
>
> - *whether the prices are artificially low; or*
> - *whether there is significant barter trade; or*
> - *whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1) of the Act.*
>
> *Government influence on prices or costs could be one cause of 'artificially low pricing'. Government influence means influence from any level of government.*
>
> *In investigating whether a market situation exists due to government influence, Customs and Border Protection will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.*
>
> [Emphasis added]
>
> It is considered that the underlined text reflects the nature of Customs and Border Protection's assessment in this appendix in relation to the existence of a market situation in the Chinese HSS market.

(footnotes omitted)

24 Customs went on to note (at p 113) that the assessment it was required to make as to whether a market situation existed involved a positive test and that, before actual selling prices were rejected, Customs needed to be satisfied that there was a market situation that rendered the sales in that market unsuitable for the purpose of determining normal value. Customs further explained its approach to the issue of market situation in Report 177 at p 159 where it said:

> In examining whether a market situation existed in the Chinese HSS market, Customs and Border Protection has focussed particularly on an economic assessment of the likely impact of these GOC influences on the determinants of supply of HSS, and the resulting likely impact on the price of HSS in China.

25 Customs then proceeded to consider the impact of the GOC influences including each of the matters referred to at p 158 of Report 177. Customs considered (at p 164) that the impact of a combination of these influences on the Chinese iron and steel market was likely to have affected the determinants of the price of HSS in China.

26 I do not think Customs either misconstrued or misapplied s 269TAC(2)(a)(ii). In particular, I am satisfied that Customs did not equate government influence on a market with unsuitability within the meaning of s 269TAC(2)(a)(ii). Rather, Customs' finding on this issue was in my view the result of a considered assessment of a factual question requiring "a broad judgment" namely, whether the impact of the various GOC influences on the Chinese iron and steel industry rendered domestic sales of HSS "not suitable" for use in determining normal value under s 269TAC(1) of the Act.

27 Another argument advanced by the applicants in the context of Issue 1 focused on the absence of any explicit finding by Customs that the normal value of the relevant goods "cannot" be ascertained under s 269TAC(1). The applicants submitted that in the absence of a finding by Customs that the normal value of the relevant goods cannot be ascertained under s 269TAC(1), Customs could not proceed to construct a normal value in reliance on s 269TAC(2)(a)(ii).

28 I do not accept this argument. Section 269TAC(1) is expressed to be "[s]ubject to this section". Subsection (2) is engaged if (inter alia) the decision-maker is satisfied that, because the situation in the relevant domestic market is such that domestic sales are not suitable for use in determining a price under subs (1), the normal value of goods exported to Australia cannot be ascertained under subs (1). Here it is clear from a reading of Report 177 as a whole including, in particular, those parts to which I have previously referred, that the decision-maker concluded domestic prices were not suitable for such use and that, therefore, the normal value could not be ascertained under subs (1).

Issue 2: Failure to exercise jurisdiction or to take into account a relevant consideration

29 In the course of the reinvestigation the applicants submitted to Customs that domestic sales of HSS could only be "not suitable" for use in ascertaining the normal value of HSS exported to Australia where, because of a market situation, such sales do not allow for a proper comparison of domestic prices with export prices. In submissions in this Court the same argument was relied upon. It was submitted, in particular, that the whole purpose of ascertaining normal value in accordance with s 269TAC(1) is to determine whether export

prices are less than domestic prices so that, if domestic prices and export prices are equally influenced by the same government interventions, this cannot possibly amount to a market situation. It was also submitted that Customs failed to consider whether, or to what extent, government interventions in the Chinese iron and steel industry had an influence on HSS export prices that was different from the influence such interventions had on domestic prices for HSS.

30 I do not accept these submissions. They ignore the broad language used in s 269TAC(2)(a) of the Act. If the Minister (or other relevant decision-marker) is satisfied that sales in the domestic market are "not suitable" for use in determining normal value then the normal value of the goods exported to Australia must be determined otherwise than by reference to domestic prices as specified in s 269TAC(1). The fact that government intervention in one market (for example the domestic market for coke in China) may drive down the price of steel in China and, therefore, the price of goods made from steel (for example HSS) does not preclude a finding by the Minister that the domestic prices for such goods are not suitable for determining normal value. In particular, s 269TAC does not equate normal value with domestic prices such that it must necessarily follow that there never can be a market situation where there is no material difference between domestic prices and export prices.

31 I have previously set out Customs' conclusion at paragraph 3.5.5 of Report 203. Another matter referred to by Customs in Report 203 concerned knowledge on the part of Chinese producers and exporters of the GOC's policies and implementing measures for the domestic steel industry. Customs said (at p 25):

> In this case, the reinvestigation is of the view that Chinese producers and exporters of HSS are making decisions about their domestic selling prices entirely aware of the GOC's policies and measures for the domestic steel industry and the distorting and suppressing impact on competitor's costs and corresponding selling prices. This compares to prices of Chinese exports of HSS into the Australia market, which are set free of such distortions.

32 The applicants criticised this part of Report 203 on the basis that it involved a finding made without any evidence to support it.

33 The relevant paragraph is somewhat curious. It suggests that Customs was of the view that domestic prices are being determined by producers of HSS in the knowledge that the GOC has put in place policies in relation to the domestic steel industry aimed at suppressing prices. This knowledge, as I read the paragraph, is said by Customs to impose

downward pressure on domestic prices for HSS, but not export prices. This is because exporters of HSS will not feel constrained to act in a manner consistent with the GOC policies, and will be free to set their export prices at a level that might be higher than what producers in the domestic market might feel constrained to adopt.

34 If my reading of the relevant paragraph is correct, then I would see it as involving an inference which it was open to Customs to draw from the whole of the evidence before it. I do not accept it was a finding made without evidence.

35 In any event, the finding that Customs is said to have made in the absence of evidence does not appear to me to have had any effect on Customs' ultimate determination that there was a market situation in China that rendered domestic prices for HSS "not suitable" in accordance with s 269TAC(2)(a)(ii) of the Act. I say this because it is clear from a reading of Report 203 as a whole that Customs was satisfied that domestic prices for HSS were not suitable for determining normal value because such prices had been artificially suppressed by GOC policies and implementing measures.

Issue 3: Proper construction of reg 180(2) of the Regulations

36 Section 269TAC(2)(c) defines the approach to be taken to the determination of normal value in circumstances where Customs was satisfied that a market situation existed which rendered domestic prices not suitable for that purpose.

37 Section 269TAC(2)(c)(i) required the decision-maker to determine the cost of production or manufacture of the goods in the country of export. Section 269TAC(5A)(a) required that this be done as the regulations provide for the purposes of s 269TAAD(4)(a) and (b).

38 At the relevant time, reg 180 of the Regulations relevantly provided:

> (1) For subsection 269TAAD(5) of the Act, this regulation sets out:
>
> (a) the manner in which the Minister must, for paragraph 269TAAD(4)(a) of the Act, work out an amount (*the amount*) to be the cost of production or manufacture of like goods in a country of export; and
>
> (b) factors that the Minister must take account of for that purpose.
>
> (2) If:
>
> (a) an exporter or producer of like goods keeps records relating to the like goods; and
>
> (b) the records:

> (i) are in accordance with generally accepted accounting principles in the country of export; and
>
> (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
>
> the Minister must work out the amount by using the information set out in the records.

…

39 In the present case Customs did not work out the relevant cost of production or manufacture by using information set out in Dalian's records because it found that Dalian's records did not reflect competitive market costs associated with the production or manufacture of like goods.

40 The applicants submitted that it was not open to Customs to disregard Dalian's records because, contrary to Customs' finding, the costs disclosed therein reflected competitive market costs. In particular, it was submitted that because the applicants operated in a competitive market, their costs of production were necessarily "competitive market costs".

41 It was accepted by the applicants that their submission was contrary to the view expressed by me in *Panasia* when rejecting a similar submission. In *Panasia* it was submitted that the existence of government policies and measures that suppressed the price of aluminium used in the manufacture of aluminium extrusions did not justify a finding that the records of the exporter of aluminium extrusions did not reflect competitive market costs. I held at [91]:

> [91] … 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" …

42 Nothing that was put to me in the present case leads me to think that what I said in *Panasia* in relation to reg 180 was incorrect or that it should not be applied in this case. I

therefore reject the applicants submission that Customs misinterpreted or misapplied reg 180(2).

Issue 4: Use of benchmark for purpose of ascertaining normal value

43 Having determined that the costs of HRC and narrow strip incurred by exporters did not reflect competitive market costs for such goods, Customs sought to replace the costs of HRC and narrow strip as recorded in Dalian's records with a benchmark consisting of an adjusted weighted average. For this purpose Customs drew on HRC costs incurred by various co-operating exporters which exported HSS from Korea, Malaysia and Taiwan, with the weighted average being adjusted to take account of a number of variables.

44 The applicants submitted that, even if it was open to Customs to disregard Dalian's records, Customs should have investigated whether Dalian's records reflected the actual costs of producing HSS (including the costs to it of acquiring HRC for that purpose) before resorting to use of a benchmark of the kind that was used.

45 The applicants made two points in support of their submission. First, they said that their submission found support in Article 2.1.1.1 of the Anti-Dumping Agreement.

46 Article 2.2 of the Anti-Dumping Agreement relevantly provides:

> 2.2 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 proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
>
> 2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.
>
> 2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records

> are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

(footnotes omitted)

47 I do not think Art 2.2.1.1 assists the applicants. It relevantly states that costs should normally be calculated on the basis of the records kept by the exporter, but this is subject to the same qualifications that are found in reg 180(2)(b). The balance of Art 2.2.1.1 is concerned with cost allocation associated with capital expenditure, development or start-up costs. Article 2.2.1.1 has nothing to say about how the raw materials used in the production process are to be costed if the cost of the raw materials, as shown in the exporter's records, do not reasonably reflect the costs associated with the production and sale of the product under consideration.

48 The applicants also submitted that their approach to the determination of costs of manufacture found some support in s 269TAC(4). In particular, it was submitted that s 269TAC(4) specifies alternative methods for ascertaining normal value in circumstances where it applies, suggesting that there is no reason why a normal value cannot be constructed under s 269TAC(2)(c) using a manufacturer's actual costs even though those costs are distorted by government policies and measures and are therefore not competitive market costs.

49 There is a logical difficulty with this argument. I accept that the decision-maker may, if he or she so decides, use the manufacturer's records for the purpose of determining normal value even if satisfied that the costs disclosed do not reflect competitive market costs. Thus, in a given case the decision-maker might use those costs after making what he or she considers to be an appropriate adjustment or allowance. However, there is nothing in the Act

or the Anti-Dumping Agreement to suggest that the decision-maker is bound to proceed in this way.

Issue 5: Public Body

50 The next issue is whether Customs erred in construing or applying the term "public body" in s 269T of the Act by finding that Chinese SIEs which produce HRC and narrow strip are "public bodies". The phrase "public body" appears in para (a)(ii) of the definition of "subsidy" in s 269T which provides:

> ***subsidy***, in respect of goods that are exported to Australia, means:
>
> (a) a financial contribution:
>
> (i) by a government of the country of export or country of origin of those goods; or
>
> (ii) by a public body of that country or of which that government is a member; or
>
> (iii) by a private body entrusted or directed by that government or public body to carry out a governmental function;
>
> that is made in connection with the production, manufacture or export of those goods and that involves:
>
> (iv) a direct transfer of funds from that government or body to the enterprise by whom the goods are produced, manufactured or exported; or
>
> (v) a direct transfer of funds from that government or body to that enterprise contingent upon particular circumstances occurring; or
>
> (vi) the acceptance of liabilities, whether actual or potential, of that enterprise by that government or body; or
>
> (vii) the forgoing, or non collection, of revenue (other than an allowable exemption or remission) due to that government or body by that enterprise; or
>
> (viii) the provision by that government or body of goods or services to that enterprise otherwise than in the course of providing normal infrastructure; or
>
> (ix) the purchase by that government or body of goods provided by that enterprise; or
>
> (b) any form of income or price support as referred to in Article XVI of the General Agreement on Tariffs and Trade 1994 that is received from such a government or body;
>
> if that financial contribution or income or price support confers a benefit in relation to those goods.

51 The phrase "public body" is not defined in the Act. However, it is used in Art 1.1 of the SCM Agreement which provides that a "subsidy" shall be deemed to exist if there is a "financial contribution by a government or any public body within the territory of a Member" and "a benefit is thereby conferred": see *Panasia* at [32].

52 Reference was also made in *Panasia* to the report of the World Trade Organization Appellate Body ("the WTO Appellate Body") published on 11 March 2011 entitled "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379)" ("the USA/China Report") in which the WTO Appellate Body considered the meaning of the phrase "public body" as used in Art 1.1(a)(1) of the SCM Agreement.

53 The WTO Appellate Body said at [317]-[319]:

> 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 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)

54 It is useful to refer once again to some observations of my own in *Panasia* concerning the question whether a particular entity possesses, exercises or is vested with government authority so as to render it a public body for the purposes of s 269T of the Act. Having noted that, as emphasised in the US/China Report, the question may present a mixed and complex picture, I said at [55]-[56]:

> [55] The Appellate Body held that for an entity to be a "public body" for the purposes of Article 1.1(a)(1) of the SCM Agreement, it must possess, exercise, or be vested with, governmental authority. However, it is clear that "authority" in this context is not confined to "authority" in the sense that word is usually understood in the context of Anglo-Australian law. In particular, it is not an essential characteristic of a "public body" that it be an agent of government in the sense that a narrow view of the word "authority" might imply. There is nothing in the US/China Report to suggest that for an entity to be a "public body" for the purposes of Article 1.1(a)(1) it must be an agent of government in any technical sense.
>
> [56] Besides the straightforward cases involving an entity that is the subject of an express grant or delegation of governmental authority pursuant to a legislative instrument, it may not be possible to identify any such instrument or other formal record evincing the grant or delegation of authority by government in favour of an entity through which it seeks to give effect to its economic or social policies. As the Appellate Body made clear, different types of evidence may be relevant to show that governmental authority has been conferred on a particular entity. One type of evidence that might demonstrate that this has occurred is "[e]vidence that an entity is, in fact, exercising governmental functions". Another type is that which shows that a government exercises "meaningful control" over an entity which may demonstrate that an entity both possesses and exercises governmental authority in the performance of governmental functions.

55 The respondents relied upon what was said in these paragraphs as accurately describing a key aspect of the Appellate Body's reasoning. The respondents did not dispute the correctness of these paragraphs and I adopt them for the purposes of my analysis in this case.

56 In Report 203 Customs referred to the following three indicia drawn from relevant paragraphs of the USA/China Report which are essentially the same as those discussed in *Panasia* at [40]-[42]:

- The existence of a 'statute or other legal instrument' which 'expressly vests government authority in the entity concerned'.
- Evidence that an entity is, in fact, exercising governmental functions.
- Evidence that a government exercises meaningful control over an entity and its conduct.

Indicium 1

57 In Report 203 Customs said (at pp 49-50) that it was not aware of any statute or other legal instrument which expressly vests government authority in any SIE producing HRC and/or narrow strip nor any legislative provisions that govern Chinese SIEs that expressly vested SIEs with such authority. However, Customs also said (at p 51) that the relevant legislative provisions do not expressly prevent SIEs from being vested with government authority or exercising government functions.

Indicium 2

58 In Report 203 Customs found (at pp 51-55) that SIEs exercise government functions as they play a leading and active role in "implementing GOC policies and plans for the development of the iron and steel industry". Customs gave various examples of how this occurred.

59 In Report 203 Customs said (at pp 51-52)

> However, as outlined below, the reinvestigation considers that the information the original investigation gathered in regards to Indicia 2 to sufficiently demonstrate that show that Chinese steel SIEs, including those that produce HRC/narrow strip, exercise government functions as they play a leading and active role in implementing GOC policies and plans for the development of the iron and steel industry. In carrying out these functions, they compel private bodies to act in certain ways.
>
> A number of GOC documents comprehensively outline the GOC's aims and

> objectives for the iron and steel industry in China, which includes manufacturers of HRC and/or narrow strip. The overall aim of these policies, plans and measures is summarised in the *National Steel Policy*:
>
> > *… to elevate the whole technical level of the iron and steel industry, promote the structural adjustment, improve the industrial layout, develop a recycling economy, lower the consumption of materials and energy, pay attention to the environmental protection, enhance the comprehensive competitiveness of enterprises, realize the industrial upgrading and develop the iron and steel industry into an industry with international competitiveness that may basically satisfy the demand of the national economy and social development in terms of quantity, quality and varieties.*
>
> Thus, 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.
>
> The reinvestigation considers that when SIEs carry out the GOC's mandate for the economy they are exercising government functions.

60 Customs also referred to statements appearing in the various annual reports of Chinese SIE steelmakers. These included the 2010 Annual Report for China's largest steelmaker (also an SIE) in which it was said that the steelmaker had been "taking an active part in the reorganization of the industry in accordance with the national policies on iron and steel industry."

61 Customs also referred to what it called (at p 52):

> … a significant body of evidence to suggest that SIEs play an integral and leading role in the implementation of various GOC policies and plans in relation to the iron and steel industry.

62 Customs referred in Report 203 to the TMRO's conclusion in his review of Customs' original findings and, in particular, the TMRO's view that compliance by SIEs with GOC policies "did not equate to exercise of government functions, as it did not equate to the exercise of power over third parties." The TMRO concluded that the evidence indicated that producers of HRC were merely complying with GOC policies with an awareness of such policies and an appreciation that there may be negative consequences for such producers if they failed to comply with them.

63 In response to the TMRO's views, Customs acknowledged that some of the GOC's policies are enforced by the imposition of penalties, and that in such circumstances, adherence to GOC policy may merely be the result of companies complying with the law. Nevertheless, Customs was satisfied that the existence of penalties (or other "negative consequences") did not fully explain SIEs' adherence to GOC policy. It found that SIEs were

also adhering to aspirational policies that were intended to shape the Chinese economy and that (at p 53):

> SIE's actions are not simply those of companies seeking to comply with relevant legislation but that they are acting with a purpose. Customs … considers that that purpose is to fulfil government functions.

Indicium 3

64 Customs was also satisfied that the GOC exercises meaningful control over SIEs generally including SIEs producing and supplying HRC and narrow strip. In Report 177 it referred again to annual reports of China's largest iron and steel producer and a considerable amount of other material which is described in Appendix A, Part II. This material included the GOC's national steel policy and national and regional five-year plans for the economic and social development of the nation and a revitalisation plan for the steel industry. Customs also referred to the ability of the GOC to revoke licences or block credit if companies do not take certain action.

65 The conclusion reached by Customs in Report 177 was that Chinese SIEs that produce and supply HRC or narrow strip were "public bodies" because they are bodies over which the GOC exercises meaningful control that perform government functions in relation to the iron and steel sector.

66 The applicants made three principal submissions in relation to Issue 5. I will deal with them in the order in which they were advanced in oral submissions.

67 The applicants' first submission was that, when an SIE complies with a government direction, it is not exercising government authority or exercising a government function. This was, in substance, the submission accepted by the TMRO who considered that "active compliance with governmental policies and/or regulation does not equate to the exercise of governmental functions or authority."

68 There is no reason why it could never be open to find that an SIE that engages in particular conduct in accordance with government regulations might be exercising a government function. Whether or not such a body is exercising government functions will depend upon the facts and circumstances of the case.

69 There is a circularity in the argument that an SIE could never be considered a "public body" because it is merely complying with government regulations. If, for example, it is the object of the government to use SIEs to implement economic policies and measures using

price controls, then government regulations imposing price controls on SIEs may be one means by which this object is achieved. Thus, if such a body is a monopoly supplier of an essential commodity (eg. steel) and it supplies that commodity in quantities and at prices fixed by government regulation, it *might* be seen to be exercising a governmental function especially if the commodity is scarce and of strategic or macro-economic significance.

70 In any event, Customs found the relevant SIEs were not merely acting in accordance with government directions or regulations, but were acting for the purpose of exercising government functions. That finding is inconsistent with the proposition underlying the applicants' submission that the relevant SIEs were doing no more than complying with government directions or regulations by which they were legally bound.

71 The applicants' second submission was that Report 203 reveals the absence of any analysis of why complying with government policies and plans amounts to exercising government functions. I do not accept this submission. I have already referred to those parts of Report 203 where the relevant analysis can be found.

72 The applicants' third submission was that it was not sufficient for Customs to conclude, merely because it was satisfied that Indicium 2 and Indicium 3 were present, that the relevant SIEs were "public bodies". It was submitted that Customs misapplied the legislation by "looking at intermediate indicia and jumping to an ultimate conclusion" the suggestion being, as I understood the submission, that Customs was engaged in a mere "box ticking" exercise.

73 It is clear from Report 203 (at p 57) that Customs' conclusion was based upon its consideration of the whole of the information available to it. It is also apparent from Report 203 (at p 44) that Customs understood the indicia referred to by the WTO Appellate Body in the US/China Report were not determinative of the question whether a particular entity was a "public body" but that they may be of assistance in answering that question. Accordingly, I do not accept the applicants' submission that Customs misapplied the legislation or the WTO Appellate Body decision in holding that the relevant SIEs were public bodies.

Issue 6 – The application of s 269TAA(4) to Program 20

74 Customs found that "Program 20" was the provision of HRC and narrow strip, for less than adequate remuneration. A contention raised by the applicants that Program 20 was not a "subsidy" even if the relevant SIEs were "public bodies" was not pressed at the hearing.

However, the applicants contended that even if Program 20 was a subsidy, it was not a countervailable subsidy because it was not "specific".

75 A subsidy must be "specific" for it to be a countervailable subsidy. At the relevant time, s 269TAAC of the Act provided:

> (1) For the purposes of this Part, a subsidy is a ***countervailable subsidy*** if it is specific.
>
> (2) Without limiting the generality of the circumstances in which a subsidy is specific, a subsidy is specific:
>
> (a) if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or
>
> (b) if, subject to subsection (3), access is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority; or
>
> (c) if the subsidy is contingent, in fact or in law, and whether solely or as one of several conditions, on export performance; or
>
> (d) if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.
>
> (3) Subject to subsection (4), a subsidy is not specific if access to the subsidy:
>
> (a) is established by objective criteria or conditions set out in primary or subordinate legislation or other official documents that are capable of verification; and
>
> (b) those criteria or conditions do not favour particular enterprises over others and are economic in nature; and
>
> (c) those criteria or conditions are strictly adhered to in the administration of the subsidy.
>
> (4) Despite the fact that access to a subsidy is established by objective criteria, the Minister may, having regard to:
>
> (a) the fact that the subsidy program benefits a limited number of particular enterprises; or
>
> (b) the fact that the subsidy program predominantly benefits particular enterprises; or
>
> (c) the fact that particular enterprises have access to disproportionately large amounts of the subsidy; or
>
> (d) the manner in which a discretion to grant access to the subsidy has been exercised;
>
> determine that the subsidy is specific.
>
> (5) In making a determination under subsection (4), the Minister must take account of:

(a) the extent of diversification of economic activities within the jurisdiction of the subsidising authority; and

(b) the length of time during which the subsidy program has been in operation.

76 Customs found that Program 20 was specific on the ground that it benefited a limited number of particular enterprises. In Report 177 Customs said (at p 225):

> As provided for in s.269TAAC(4)(a), the Minister may determine that a subsidy is specific, having regard to the fact that the subsidy program benefits a limited number of particular enterprises.
>
> Given that HRC and/or narrow strip is a key input in the manufacture of downstream products (including HSS) it is clear that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration.
>
> For this reason the subsidy is determined to be specific.

77 It is apparent from this part of Report 177 that Customs (and subsequently the Minister) made a determination under s 269TAAC(4) that Program 20 was specific. The stated reason for this determination was that Program 20 benefited only those enterprises engaged in the manufacture of products made from HRC or narrow strip.

78 The applicants submitted that Customs misapplied s 269TAAC in two respects.

79 The applicants submitted that s 269TAAC(4) only applies to subsidies which would otherwise fall within the scope of s 269TAAC(3). They submitted that s 269TAAC(4) could not apply to Program 20 because access to it is not established by objective criteria or considerations set out in any legislation or other official document.

80 The respondents accept that access to Program 20 is not established by objective criterion or conditions set out in any legislation or official document. It follows that s 269TAAC(3) does not apply to Program 20.

81 However, the respondents submitted that the operation of s 269TAAC(4) is not confined to circumstances in which s 269TAAC(3) applies because, properly construed, the opening words of s 269TAAC(4) serve to expand the operation of the subsection rather than limit it. Hence, on the respondents' construction of s 269TAAC, it is open to the Minister to make a determination under s 269TAAC(4) even when subs (3) does not apply.

82 Section 269TAAC has the following basic structure:

- Subsection (1) says that a subsidy is a countervailable subsidy if it is specific. Without limiting the generality of subs (1), subs (2) specifies circumstances in which a subsidy *will be* considered specific.
- Subsection (3) specifies particular circumstances in which a subsidy *will not be* considered specific.
- Subsection (4) authorises the Minister to determine that a subsidy is specific *even if* it is within the exclusion contained in subs (3) having regard to any of the matters referred to in subparas (a)-(d) of subs (4).
- In making a determination under subs (4) the Minister *must* take into account the conditions referred to in subs (5).

83 It is also worth noting the different treatment within s 269TAAC(2) of (a) and (b) compared to (c) and (d). Subparagraphs (c) and (d) are directed at situations involving subsidies of a kind that are expressly prohibited by Art 3 of the SCM Agreement regardless of whether or not they produce any adverse effect.

84 In support of their submissions the respondents relied upon Art 2.1 of the SCM Agreement which provides:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying

> this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
>
> [Footnotes:
>
> (2) Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.
>
> (3) In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.]

85 The respondents suggested that s 269TAAC is intended to operate in much the same way as Art 2.1 in that, on the respondents' construction of the section, subs (4) allows for a subsidy to be treated as specific in certain circumstances even if the application of subs (1), (2) or (3) may yield a different result.

86 The difficulty with the respondents' argument is that it is contrary to the clear language of subs (4) and the broader context in which such language is used. The introductory words of subs (4) limit the Minister's power to make a determination under subs (4) to those situations in which subs (3) applies.

87 The scheme of s 269TAAC is such that the power conferred on the Minister under subs (4) may only be exercised so as to determine that a subsidy is specific in circumstances where subs (2) would require, subject to the operation of subs (3), that it be considered specific.

88 Importantly, subs (4) provides its own criteria against which to determine whether the Minister may make a determination under that subsection, but this is in addition (not in place of) the criterion specified in subparas (a) and (b) of subs (2). Equally importantly, subs (5) imposes obligations on the Minister when making a determination under subs (4) that the Minister would not otherwise be bound to take into account when determining whether a subsidy is specific.

89 In the result, I am satisfied that the Minister's determination that Program 20 was specific was not authorised by s 269TAAC(4) of the Act.

90 The respondents also submitted that, even if their construction of s 269TAAC(4) was rejected, the decision to issue the notice imposing countervailing duty should not be set-aside

because it was not materially affected by the Minister's reliance upon that subsection. In particular, the respondents submitted that if the circumstances of the case were not within subs (2), (3) or (4), the Minister would still be free to determine the issue of specificity without express guidance or restraint, and there would be no error in having regard, or failing to have regard, to the matters set out in subs (4).

91 I do not accept the respondents' submission. In my view, the Minister has exercised a power which he considered to be available to him pursuant to s 269TAAC(4). Further, Customs' reasons indicate that the sole basis upon which the Minister found Program 20 to be specific was because it benefits a limited number of particular enterprises. That seems to me to reflect a very narrow approach to the question whether Program 20 is specific for the purposes of s 269TAAC(1). Certainly one consideration that Customs might have taken into consideration (even if not bound to) for the purpose of deciding whether Program 20 was specific, was that the subsidy was not within any category mentioned in s 269TAAC(2) and that this, although not determinative of the question, might at least suggest that Program 20 was not specific within the meaning of s 269TAAC(1).

92 The applicants' second submission is that, even if it was otherwise open to the Minister to make a determination pursuant to s 269TAAC(4) in this case, Program 20 is not within the scope of subs (4)(a) because it benefits every entity which purchases HRC or narrow strip and not a limited number of particular enterprises.

93 The respondents accepted that Program 20 benefits every entity which purchases HRC or narrow strip, but submitted that there will only be a limited number of enterprises that do so and that Program 20 therefore benefits "a limited number of particular enterprises" within the meaning of s 269TACC(4)(a).

94 Article 2.1 of the SCM Agreement makes clear that a subsidy may be specific to an enterprise, a group of enterprises, or an industry or group of industries. In the present case Customs made a determination that the subsidy benefits those enterprises engaged in the manufacture in China of products made from HRC or narrow strip. Although the number of enterprises so engaged is no doubt large, and their activities span a range of industries, it does not follow that the subsidy does not benefit "a limited number of particular enterprises" within the meaning of s 269TAAC(4)(a). I therefore do not accept the applicants' submission on this issue.

Issue 7: Use of external benchmark to determine adequate remuneration

95 In Report 177 Customs found (at p 254) that the market in China for HRC and narrow strip were distorted by the influence the GOC exerted on the Chinese iron and steel industry. It also found (at p 255) that all domestic prices of HRC and narrow strip in China (whether or not produced by an SIE) were not suitable for use in determining a benchmark with which to determine the adequacy of the remuneration received by providers of HRC and narrow strip. Customs affirmed these findings in Report 203 (at p 61). The applicants submitted that Customs' findings on these matters involved a misapplication of s 269TACC.

96 Section 269TACC establishes the method for determining whether a "benefit" (see the definition of "subsidy" set out at [50] above) has been conferred in relation to goods and, if so, the amount of subsidy attributable to that benefit.

97 Of most relevance for present purposes are subss 269TACC(4) and (5) which at the relevant time provided:

> (4) In determining whether a financial contribution confers a benefit, the Minister must have regard to the following guidelines:
>
> (a) the provision of equity capital from the government or body referred to in subsection (3) does not confer a benefit unless the decision to provide the capital is inconsistent with normal investment practice of private investors in the country concerned;
>
> (b) the making of a loan by the government or a body referred to in subsection (3) does not confer a benefit unless the loan requires repayment of a lesser amount than would be required for a comparable commercial loan;
>
> (c) the guarantee of a loan by the government or a body referred to in subsection (3) does not confer a benefit unless, without the guarantee, the enterprise receiving the loan would have to repay a greater amount;
>
> (d) the provision of goods or services by the government or body referred to in subsection (3) does not confer a benefit unless the goods or services are provided for less than adequate remuneration;
>
> (e) the purchase of goods by the government or body referred to in subsection (3) does not confer a benefit if the purchase is made for more than adequate remuneration.
>
> (5) For the purposes of paragraphs (4)(d) and (e), the adequacy of remuneration in relation to goods or services is to be determined having regard to prevailing market conditions for like goods or services in the country where those goods or services are provided or purchased.

98 Both sides referred to Art 14 of the SCM Agreement. It requires that the method used by the investigating authority shall be provided for in legislation or regulations and that "its application to each particular case shall be transparent and adequately explained." It also provides that the method shall be consistent with a number of guidelines which relevantly include Art 14(d):

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

99 I was also referred to the report of the WTO Appellate Body published on 19 January 2004 entitled "United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (DS257)" ("the US/Canada Report") in which Art 14 was considered.

100 Section 269TACC(4)(d) requires the Minister to consider, in determining whether a financial benefit is conferred by the provision of goods, whether or not the provision of such goods is for "less than adequate remuneration". If they are not provided for less than adequate remuneration then no benefit will have been conferred.

101 Section 269TACC(5) makes clear that, for the purposes of s 269TACC(4), adequacy of remuneration is to be determined having regard to prevailing market conditions for like goods in the country where the goods are provided.

102 The first error in the application of s 269TACC of which the applicants complain is that Customs did not have regard to "prevailing market conditions" when considering adequacy of remuneration. In particular, they submitted that subs (5) required the Minister to give weight to prevailing market conditions on the basis that this constituted a fundamental element in the decision-making process or, put another way, that the Minister was required to make prevailing market conditions the focal point of that process: see *Commissioner of Police (NSW) v Industrial Relations Commission* (NSW) [2009] NSWCA 198; (2009) 185 IR 458 at [73] per Spigelman CJ, Macfarlan and Young JJA agreeing. This interpretation of s 269TACC(5) was said by the applicants to be supported by the terms of Art 14(d) of the SCM Agreement which requires that adequate remuneration "be determined in relation to prevailing market conditions".

103 In *Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372; (2009) 78 NSWLR 265 Basten JA said at [25]:

> It may be remarked by way of exegesis that a statutory requirement to "have regard to" a particular matter will obtain its force and effect from its context. The particular matter will become a fundamental element or focal point where it is the only matter, or one of a small number of identified matters, to be taken into account. Thus, in *R v Toohey; Ex parte Meneling Station* (1982) 158 CLR 327, a matter, namely the "strength or otherwise of the traditional attachment by the claimants to the land claimed" was the sole matter to which the Commissioner was obliged to "have regard", four other matters being identified as matters for comment, by Mason J (at 336 and 338). Similarly, in *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329, Mason J explained in relation to the operation of s 40AA(7) of the *National Health Act 1953* (Cth), dealing with the fixing of fees charged for nursing home care:
>
> > "When sub (7) directs the Permanent Head to 'have regard to' the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination. There are two reasons for saying that the costs are a fundamental element in the making of the determination. First, they are the only matter explicitly mentioned as a matter to be taken into account. Secondly, the scheme of the provisions is that, once the premises of the proprietor are approved as a nursing home, he is bound by the conditions of approval not to exceed the scale of fees fixed by the Permanent Head in relation to the nursing home. In many cases it is to be expected that the scale of fees will be fixed by ascertaining the costs necessarily incurred and adding to them a profit factor. In the very nature of things, the costs necessarily incurred by the proprietor in providing nursing home care in the nursing home are a fundamental matter for consideration.
> >
> > However, the subsection does not direct the Permanent Head to fix the scale of fees exclusively by reference to costs necessarily incurred and profit."

104 In *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 (Stone, Foster and Nicholas JJ) the Full Court, which was in that case concerned with the operation of s 109(1)(c) of the *Migration Act 1958* (Cth), said at [60]-[61]:

> [60] In some cases it may be apparent that amongst the factors to which a decision-maker is bound to have regard, there is one factor (or perhaps more than one) which is critical or fundamental to the making of the decision in question. This was true of the particular matter referred to by Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 338. As his Honour's reasons in *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 show, the relevant statutory provisions may make clear that a particular factor is "a fundamental matter for consideration". But the converse is also true. The relevant statutory provisions may show that a particular matter to which a decision-maker must have regard is not fundamental to the decision-making process in the sense discussed by his Honour: see, for example, *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [57] (per Sackville J).
>
> [61] We respectfully agree with Sackville J in Singh where his Honour pointed out that the expression "have regard to" is capable of different meanings

depending on its context. As his Honour said at [54]:

> … a statutory obligation to have regard to specified matters when making an administrative decision may require the decision-maker to take the matters into account and "give weight to them as a fundamental element in making his [or her] determination": *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J. Indeed, this is the meaning that was given to the predecessor of s 501(6)(c) of the *Migration Act* (relating to the character test): *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 at 194. But the phrase "have regard to" can simply mean to give consideration to something (Shorter Oxford English Dictionary). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process.

105 I do not understand the respondents to contend that the reasoning of Mason J in *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 (*Sean Investments*) does not apply to s 269TACC(5) and I am, in any event, satisfied that it does. However, the respondents submitted that it does not follow that the Minister did not comply with the requirements of s 269TACC(5). In particular, they submitted that what the Minister was required to do in this case was to make the consideration of prevailing market conditions a central element of the deliberative process: see *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at [110] per Rares J. They submitted that in this case Customs did this by giving detailed consideration to the prevailing market conditions and, in particular, whether domestic prices could be used to calculate adequate remuneration for the purposes of s 269TACC(4)(d).

106 The respondents also submitted that Customs did not simply look at prevailing market conditions only in order to put them aside: cf. *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [52] per Gleeson CJ, Heydon and Crennan JJ. Rather, Customs used prevailing market conditions where it considered this was appropriate (ie. for inputs other than HRC and narrow strip) and gave proper consideration to the question whether Chinese domestic prices for HRC and narrow strip were otherwise suitable for use in establishing a price benchmark.

107 I accept the respondents' submissions.

108 Nevertheless, the question still remains whether it was open to Customs to put the prevailing market conditions aside at least in so far as they encompassed domestic prices for

HRC and narrow strip in China. It is on this question that the applicants placed reliance upon Art 14(d) of the SCM Agreement and the US/Canada Report.

109 The language of Art 14(d) might be taken to suggest that adequacy of remuneration must be determined on the basis of prevailing market conditions for the goods in question in the country in which they are supplied. However, Art 14(d) was not interpreted in this way by the WTO Appellate Body in the US/Canada Report. In that case the WTO Appellate Body said at [89]-[90]:

> [89] As we see it, the phrase "in relation to" implies a comparative exercise, but its meaning is not limited to "in comparison with". The phrase "in relation to" has a meaning similar to the phrases "as regards" and "with respect to". These phrases do not denote the rigid comparison suggested by the Panel, but may imply a broader sense of "relation, connection, reference". Thus, the use of the phrase "in relation to" in Article 14(d) suggests that, contrary to the Panel's understanding, the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision. This is not to say, however, that private prices in the market of provision may be disregarded. Rather, it must be demonstrated that, based on the facts of the case, the benchmark chosen relates or refers to, or is connected with, the conditions prevailing in the market of the country of provision.
>
> [90] Although Article 14(d) does not dictate that private prices are to be used as the exclusive benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. In this case, both participants and the third participants agree that the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.

(footnotes omitted)

The reference in this last sentence of para [90] to private price distortion attributable to the government's role in providing goods must be read in the context of the facts of the case and, in particular, the United States' contention that market conditions in Canada were distorted by the fact that provincial governments in Canada controlled the vast majority of timber and were the predominant suppliers.

110 The WTO Appellate Body went on in the US/Canada Report to emphasise (at para [102]) that the possibility under Art 14(d) for investigating authorities to consider a benchmark other than private prices in the country of supply was very limited, but that the question whether prices were distorted because of the government's predominant role as a supplier had to be answered on a case by case basis. I do not see why the same approach should not also apply in situations where price distortions are caused by other forms of State intervention in domestic markets. In the result, Art 14(d), as interpreted by the WTO Appellate Body, does not preclude the use by investigating authorities of what might be called a "non-country of provision" or "external" benchmark in an appropriate case.

111 In my view, s 269TACC(5) did not require that Customs use domestic prices for HRC and narrow strip for the purpose of determining whether those goods were provided to Chinese producers of HSS for "less than adequate remuneration".

Issue 8: Choice of external benchmark to determine adequate remuneration

112 It was common ground that there was a significant overlap between Issues 7 and 8. The specific complaints made by the applicants falling within the scope of Issue 8 may be summarised as follows.

113 Having rejected Chinese domestic prices as a benchmark to determine the adequacy of the remuneration received by SIEs for the provision of HRC and narrow strip, Customs used as its benchmark a weighted average basket of costs incurred by various co-operating exporters from Korea, Malaysia and Taiwan, at comparable terms of trade and conditions of purchase to those observed in China. The applicants submitted that Customs erred in adopting this approach in the following two respects:

- Customs refused to make alterations to the weighted average basket to take account of comparative advantages that the Chinese HRC and narrow strip markets have over other markets; and
- Customs refused to use as a benchmark the next lowest available HRC costs in the region.

114 Central to each of these submissions was the proposition, based upon Art 14(d) of the SCM Agreement, that adequacy of remuneration had to be determined in relation to prevailing market conditions for HRC and narrow strip in China. However, the language in which s 269TACC(5) is expressed is different to that found in Art 14(d). Section

269TACC(5) merely provides that adequacy of remuneration is to be determined having regard to prevailing market conditions. As I have already found, Customs had regard to this matter as a central element of its deliberative process.

115 Customs gave specific consideration to the question whether there was a need to adjust any external benchmark for competitive advantage. In Report 177 (at p 266) it concluded that such an adjustment was not practical, reasonable or warranted in this case. In support of this conclusion Customs referred to evidence which suggested that China had a competitive disadvantage in some areas relevant to the production of HRC and narrow strip, and a competitive advantage in some other relevant areas. Customs reasoned that this would necessitate the making of a "net" adjustment that took account of China's competitive advantages and disadvantages, which it said it could not accurately do. Accordingly, Customs made a judgment that the more reasonable approach was to use a benchmark that reflected an average price of HRC (adjusted for narrow strip) that did not include any adjustment for competitive advantage. I am not satisfied that Customs made any legal error in doing so.

116 In relation to the applicants' second argument, Customs noted the relevant submission, but rejected it in favour of what it considered the more reasonable approach. I am not satisfied that Customs made any legal error in declining to use the next lowest (after China's) HRC costs in the region as the benchmark.

DISPOSITION

117 The applicants have succeeded on Issue 6. They are entitled to the relief they seek with respect to the countervailing duty notice published on 3 July 2012. I will hear from the parties as to the precise form of such relief as well as costs. The orders I shall make will provide for the preparation of draft orders and a short written submission from each side in relation to the appropriate orders. The proceeding will stand over to another date for the purpose of making final orders.

I certify that the preceding one hundred and seventeen (117) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 21 August 2015