MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

LABOUR, SCIENCE AND ENTERPRISE

Galvanised Steel Coil from China - Reconsideration

Final Report

Dumping and Countervailing Duties Act 1988

June 2019

Non-confidential

New Zealand Government

ISBN: 978-1-98-857096-9

Table of Contents

Abbreviations

The following abbreviations and acronyms are used in this Report:

Abbreviation/Acronym	Meaning
Act (the)	Dumping and Countervailing Duties Act 1988
AD	Anti-Dumping
ADBC	Agriculture Development Bank of China
ADRP	Australian Anti-Dumping Review Panel
AFA	Adverse facts available
Anti-Dumping Agreement (the)	WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Australian ADC	Australian Anti-Dumping Commission
ACBPS	Australian Customs and Border Protection Service
BlueScope	BlueScope Steel Limited
BoC	Bank of China
CAS	Chinese Accounting Standards
CBRC	China Banking Regulatory Commission
CCB	China Construction Bank
CCOIC	China Chamber of International Commerce
CDB	China Development Bank
Chief Executive (the)	Chief Executive of the Ministry of Business, Innovation and Employment
China	People's Republic of China
CITT	Canadian International Trade Tribunal
CMC	Commercial Metals (an exporter)
CPC	Communist Party of China
CRC	Cold-rolled coil
Customs	New Zealand Customs Service
CVD	Countervailing duty
EBIT	Earnings Before Interest and Tax

EC	European Commission
EFC Report	Essential Facts and Conclusions Report
EU	European Union
EXIM Bank	Export-Import Bank of China
FIE	Foreign-invested enterprise
FIS	Free in Store
FOB	Free on board
FY	Financial year
GOC	Government of China
HRC	Hot-rolled coil
HS	International Convention on the Harmonized Commodity Description and Coding System, also Harmonised System
HSS	Hollow steel sections
ICBC	Industrial and Commercial Bank of China
IFRS	International Financial Reporting Standards
LIBOR	London Interbank Offering rate
LTAR	Less than adequate remuneration
MBIE	Ministry of Business, Innovation and Employment, the
MCL	Metal coating line
MOLAR	Ministry of Land Resources Catalogue of Allocation of Land
NBS	National Bureau of Statistics (China)
NDRC	National Development and Reform Commission
NZ	New Zealand
NZD	New Zealand dollar
NZ Steel	New Zealand Steel Limited
PBOC	People's Bank of China
POI	Period of investigation
RFI	Request for information

RMB	Renminbi
SASAC	State-owned Assets Supervision and Administration Commission
SIE	State-invested enterprise
SOCB	State-owned commercial bank
SOE	State-owned enterprise
SCM Agreement (the)	The WTO Agreement on Subsidies and Countervailing Measures
TMRO	Trade Measures Review Officer (Australia)
US	United States
USDOC	United States Department of Commerce
USD	United States dollar
VAT	Value-added tax
VFD	Value for Duty
WTO	World Trade Organisation
WTO Agreement	The Agreement establishing the World Trade Organisation adopted at Marrakesh on 15 April 1994

Confidentiality of Information

In a number of instances, information in this report, including figures in the tables, is considered confidential because the release of this information would be of significant competitive advantage to a competitor or its release would otherwise have a significant adverse impact on a party.

In these instances the information been redacted or where possible has been summarised in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. For example, in tables the actual figures have been replaced by figures showing percentage changes from the previous period. Shading has been used to show where this occurs.

For the charts, confidentiality is maintained by deleting the relevant axis values.

Where it has not been possible to show summaries in this manner, the information has not been susceptible of summary because to do so would unnecessarily expose the provider of the information to commercial risk.

EXECUTIVE SUMMARY

The High Court has directed MBIE to reconsider NZ Steel's application for countervailing duties to be imposed on galvanised steel coil from China.

In 2017 the Ministry of Business, Innovation and Employment (MBIE) undertook an investigation into allegations that imports of galvanised steel coil from the People's Republic of China (China) were being subsidised. This followed an application from New Zealand Steel Limited (NZ Steel).

In July 2017, following the conclusion of MBIE's investigation, the then Minister made a final determination that the subject goods were subsidised only to *de minimis* levels, and by reason thereof subsidisation was not causing material injury to the industry.

Countervailing duties were not, therefore, imposed.

Notice of the final determination was provided to the parties and gazetted in accordance with section 13(2) of the Dumping and Countervailing Duties Act 1988 (the Act).

In September 2017, NZ Steel sought judicial review of the Minister's decision, and a hearing took place in May 2018. The High Court held that there were material errors in the advice to the Minister; quashed the Minister's decision; and directed reconsideration of the application already made in accordance with the Act as it stood at the time.

The Minister and MBIE are appealing against the High Court decision, and the appeal is due to be heard in November 2019. This reconsideration is being carried out pending the outcome of the appeal.

The High Court identified material errors in MBIE's conclusions and advice to the Minister in regard to the test for a public body, and the use and relevance of information from overseas investigations.

The material errors identified by the High Court were:

- MBIE's advice did not set out the proper test for determining whether an entity is a "public body" with respect to the subsidy programmes relating to policy loans; the provision of land-use rights at less than adequate remuneration (LTAR); and the provision of inputs at LTAR. The High Court made no findings of error concerning the other subsidy programmes investigated.
- MBIE had not properly informed the Minister of the implications of limited cooperation provided by the Government of China (GOC) and Chinese producers, and the Minister was not properly informed of the reasons why MBIE declined to give

weight to information from overseas investigations.

- MBIE's advice to the Minister on the relevance of overseas investigations to the assessment of whether the Chinese producers of the subject goods received subsidisation through policy loans was inadequate in that it erroneously advised the Minister that they had used an adverse facts available approach.

MBIE consulted with NZ Steel and the GOC on the approach to the reconsideration. Both accepted the approach proposed by MBIE.

In quashing the Minister's decision and directing MBIE to reconsider NZ Steel's application, the High Court noted that a reconsideration is not a fresh application. The High Court further ruled that it was a "matter for MBIE and the Minister over what period of time the reconsideration should take place and what further work would be required in order to reconsider what decision is to be made, although 180 days would be at the outer limit." The High Court noted that the original Final Report was "advice to the decision-maker, not the decision itself," and that the reinvestigation did not need to "cast aside all of the work that it contains."

Following the High Court's ruling, MBIE developed a proposed approach to undertaking the reconsideration, and consulted on this proposal with NZ Steel and the GOC. Both parties agreed with the proposed approach.

The agreed matters to be reconsidered are the following:

A. The definition of the term "public body"

B. The following subsidy programmes:

   - Policy loans: including consideration of whether there is a financial contribution through the provision of loans at preferential interest rates, and if so whether State-owned commercial banks (SOCBs) providing such loans are public bodies.
   - Land-use rights at LTAR: including consideration of whether there is a financial contribution through the provision of land use rights at LTAR.
   - Provision of inputs at LTAR: including consideration of whether there is financial contribution through the provision of inputs at LTAR, and if so, whether State-invested enterprises (SIEs) providing inputs are public bodies.

C. To the extent that it is relevant to the subsidy programmes listed above, the definition of like goods/subject goods covered by the reconsideration.

MBIE further proposed, and NZ Steel and the GOC agreed, that reconsideration of these matters would be set out in two reports:

- An Essential Facts and Conclusions (EFC) Report
- A Final Report (this document)

The reconsideration was initiated on 19 December 2019, with notice of the initiation gazetted on 20 December 2019. The 180-day period will end on 9 July 2019.

An EFC Report outlining the essential facts and conclusions that would likely form the basis for any final determination to be made by the Minister on the reconsideration was sent to interested parties on 17 May 2019.

This Final Report takes account of comments received on the EFC Report.

In line with the process agreed between MBIE, NZ Steel and the GOC, an EFC Report was provided to interested parties on 17 May 2019. In accordance with section 10A of the Act, the EFC Report provided written advice of the essential facts and conclusions likely to form the basis for any final determination to be made under section 13 of the Act.

Interested parties provided comments on the EFC Report which have been taken into account in the preparation of this Final Report. MBIE's detailed response to the submissions made is contained in Annex 4 to this Final Report

This reconsideration makes use of information from the original investigation, further information provided by interested parties, information from MBIE's own research, and information from other jurisdictions.

For this reconsideration MBIE has used information from the original investigation, including the detailed questionnaire response received from one manufacturer, and the GOC's questionnaire response.

MBIE has also sought further information from interested parties. MBIE sent Requests for Information (RFIs) to the GOC and to the five Chinese manufacturers identified in the original investigation that did not respond to the questionnaire sent to them in that investigation. The GOC provided a response which added to the questionnaire response in the original investigation. Two of the five manufacturers advised that they would not be responding to the RFI because to do so would be a costly burden for the companies in light of their level of sales to New Zealand, but did state that they did not receive subsidies in terms of bank loans or input materials. The other three manufacturers did not respond at all.

MBIE has also used further information obtained from its own research, and information from investigations undertaken by other jurisdictions.

A key issue addressed in

In conducting the reconsideration, MBIE has carefully reconsidered

this reconsideration relates to the test used for the determination as to whether or not entities providing financial contributions are public bodies.

the definition of the term "public body." The test identified by the WTO Appellate Body and referred to by the High Court is whether entities "possess, exercise or are vested with governmental authority." The Appellate Body has identified a range of matters that investigating authorities should consider in making a public body determination.

Annex 2 sets out MBIE's approach to the public body determination, based on the guidance provided by the Appellate Body.

MBIE has applied the definition of "public body" to the programmes relating to policy loans and the provision of inputs at LTAR.

MBIE has concluded that SOCBs and SIEs providing input materials are not public bodies, but policy banks are public bodies.

These conclusions are unchanged from the original investigation, but have taken account of the High Court decision relating to the test for "public body" and have addressed the key indicia derived from WTO Appellate Body findings.

MBIE has reviewed the particular application of this test as it relates to the programmes covered by this reconsideration, and this is set out in sections 5 and 7 of this Final Report. In its examination, MBIE has addressed the key indicia derived from WTO Appellate Body findings:

- Whether there is a statute or other legal instrument that expressly vests governmental authority in the entity concerned
- Whether there is evidence that an entity is, in fact, exercising governmental functions
- Whether there is evidence that the government exercises meaningful control over an entity.

The examination of banks covered both commercial banks (SOCBs), and "policy banks" (the China Development Bank, the Export-Import Bank of China, and the Agricultural Development Bank of China).

Specifically, in relation to SOCBs, MBIE examined:

- The role and functions of SOCBs in China
- The legislation governing the operation of commercial banks, including matters relating to ownership and control
- The oversight of the regulatory authorities, including the benchmark interest rates published by the central bank
- Regulations and practice relating to the management of risk and underperforming loans
- Information available on borrowing by galvanised steel coil producers
- The findings of other jurisdictions.

On the basis of this examination, MBIE has concluded that:

- There is no legal instrument that expressly vests SOCBs with governmental authority.
- Developments and reforms in the Chinese banking sector demonstrate requirements to operate commercially and with effective management of risk, while controls over interest rates have been removed, indicating that SOCBs are not, in fact,

exercising governmental functions.

- There is no meaningful control of SOCBs by the GOC, which does not intervene over interest rates and does not exercise control over daily operations of SOCBs.

MBIE also examined whether "policy banks" are public bodies in terms of the relevant test. On the basis that Chinese regulations set out the role of policy banks as policy financial institutions that serve national strategies, undertake governmental functions and are subject to meaningful control by the GOC, MBIE has concluded that policy banks are public bodies. One of the investigated manufacturers reported receiving a loan from a "central bank" and this has been treated as a loan from a policy bank.

In relation to SIEs, MBIE examined:

- The role and function of SIEs in China
- Legislation and regulations relating to ownership and control of SIEs
- Steel industry plans and directives
- Information available on input purchases of galvanised steel coil producers, including integrated steel companies
- The findings of other jurisdictions.

On the basis of this examination, MBIE has concluded that:

- There is no legal instrument that expressly vests SIEs with governmental authority.
- SIEs producing inputs operate in a competitive market, and while SIEs operate within the legal requirements for companies and State-owned bodies, this does not equate to the exercise, in fact, of governmental functions.
- The GOC owns SIEs producing input materials but the enterprises operate with autonomy in regard to management of their production and operations, and the GOC does not exercise meaningful control over the entities concerned.

MBIE's conclusion in the reconsideration is that on the basis of the information available to MBIE, and for the programmes concerned, SOCBs and SIEs providing inputs are not public bodies in terms of the test identified by the WTO Appellate Body (and as referred to by the High Court). These bodies do not possess, exercise or are vested with governmental authority. The GOC has not, in fact, exercised meaningful control over their conduct.

These conclusions are unchanged from the original investigation, but are based on the test identified by the High Court. In reaching these

conclusions in the reconsideration MBIE has not relied on the findings of the Australian Anti-Dumping Review Panel, which the High Court found had applied the wrong test.

Another key issue addressed in this reconsideration is the extent to which MBIE should have relied on information available from investigations undertaken by other jurisdictions, and the extent to which there is an "international consensus" on the public body determinations and the existence of subsidies.

In light of the High Court's ruling that the Minister was not properly informed of the reasons why MBIE declined to give weight to information from other jurisdictions, MBIE has carefully reviewed the information available from investigations undertaken by other jurisdictions.

MBIE has reviewed the particular relevance of information from other jurisdictions as it relates to the programmes covered by this reconsideration, as set out in sections 5, 6 and 7 of this Final Report.

MBIE notes that a number of jurisdictions have reached conclusions that SOCBs and SOEs are public bodies, suggesting a degree of consensus that deserves consideration. MBIE does have regard to the totality of the information available in reaching its conclusions, and in particular the findings of other jurisdictions, but does not consider that it should accept those findings without examining the basis on which they were made. However, MBIE considers that it does need to examine each of the overseas investigations separately, since they do involve different manufacturers, with different periods of investigation, and the bases for the conclusions reached by the overseas authorities in each case need to be examined.

MBIE has examined the primary and secondary information and has had regard to all available information that MBIE considered to be reliable.

In considering the information before it, MBIE has focused on factual matters, such as the text of the various laws, directives and plans, in the context of the information available with regard to the particular programmes and manufacturers that are the subject of the reconsideration. In reviewing this information, MBIE has examined primary and secondary information and has had regard to all available information that MBIE considered to be reliable in reaching its conclusions regarding subsidisation. In particular, it has applied the information available to the question of whether Chinese entities possess, exercise or are vested with governmental authority, and in its consideration of this test has taken into account the guidance provided by WTO dispute findings.

Annex 3 sets out MBIE's general approach to the treatment of information.

MBIE has concluded that the findings by other jurisdictions do not provide a reliable basis on which MBIE can make determinations relating to the existence and level of subsidisation for the programmes reviewed.

MBIE's conclusions are that the findings by other jurisdictions do not provide a reliable basis on which MBIE can make determinations relating to the existence and level of subsidisation for the programmes reviewed.

In particular, MBIE's conclusions have taken account of the following factors that may affect reliability, with the detailed analysis providing the basis for this summary being set out in the relevant sections of this Final Report:

- Some investigations are dated and do not take account of more recent developments in Chinese law and planning
- Some findings are not based on positive evidence, or are based on limited consideration of the information available
- In some investigations conclusions are drawn from partial analysis of legislation or regulations
- Some findings rely heavily on the circumstances of government ownership without considering whether an entity is in fact exercising governmental authority and functions
- Most of the overseas investigations are related to different products, different Chinese manufacturers and/or different periods of time, and include widely differing findings on levels of subsidy
- The views of some other jurisdictions are based on legislated definitions of China as a non-market economy, and assumptions that the Government controls all companies.

NZ Steel challenged the subject goods definition used in the original investigation, but MBIE considers that the definition should be maintained.

During the judicial review proceedings, NZ Steel made submissions with regard to the way in which MBIE had defined the subject goods in the original Final Report. Annex 1 deals with these submissions. MBIE's conclusion in this reconsideration is that its definition of subject goods, which excludes galvanised steel coil of widths greater than those produced by NZ Steel, should be maintained.

MBIE notes that the definition of like goods/subject goods has little relevance to the issues arising in relation to the subsidy programmes considered in this reconsideration.

MBIE concludes that subsidisation affecting exports to New Zealand from China of galvanised steel coil during the period of investigation is not above *de minimis* levels.

Given this conclusion there is no basis for considering whether subsidisation is causing

Based on its assessment of the subsidy programmes covered by this reconsideration, and taking into account the matters raised by the High Court, as well as comments received on the EFC Report, MBIE has determined that the amount of subsidy for galvanised steel coil exported to New Zealand from China during the period covered by this reconsideration was nil for the cooperating exporter, and a weighted average of 0.08 per cent for all other exporters.

MBIE has therefore concluded that the levels of subsidy provided to Chinese manufacturers of galvanised steel coil exported to New Zealand are not above the *de minimis* levels (two per cent) provided for in Article 27.10 of the SCM Agreement.

material injury to the domestic industry, and the likely final determination will lead to a decision to terminate the reconsideration.	In light of this conclusion, there is no basis to consider whether subsidisation is causing material injury to the domestic industry, and the essential facts and conclusions from the reconsideration indicate that the recommended final determination will lead to a decision to terminate the reconsideration. In this case no countervailing duties would be imposed.

1. Introduction

1.1 Purpose of this Report

1. This report sets out the essential facts and conclusions that form the basis for MBIE's determinations relating to the amount of subsidy and injury to an industry, and for the final determination to be made by the Minister as to whether or not, in relation to the importation of galvanised steel coil from China, the goods were being subsidised and by reason thereof that material injury to an industry had been caused.

1.2 Basis for Reconsideration

1.2.1 Original Investigation

2. MBIE initiated an investigation under the Act into galvanised steel coil from China on 19 December 2016, following the receipt of an application for a subsidy investigation from NZ Steel.

3. MBIE undertook a like goods analysis, and on the basis of that analysis concluded that the subject goods description should include an upper width limit of 1260mm, to reflect NZ Steel's manufacturing capability. Consequently, the goods which were the subject of the investigation (the subject goods) were:

> *Galvanised steel coil with a thickness equal to or greater than 0.3mm and less than or equal to 1.9mm, and a width greater than 600mm but not greater than 1260mm, with a hot dipped galvanised (zinc) coating.*

4. NZ Steel is the sole producer of galvanised steel coil in New Zealand, and constituted the domestic industry for the purposes of the investigation.

5. Following the initiation of the investigation MBIE requested information from identified importers, intermediary exporters, Chinese manufacturers, and the GOC. One importer declined to provide information. Responses were provided by several of the intermediary exporters, but only one Chinese manufacturer responded to the questionnaire. The GOC provided only general responses. MBIE sent supplementary questionnaires to the GOC, which responded, and to two manufacturers, which did not respond.

6. NZ Steel requested that provisional countervailing duties be imposed on the allegedly subsidised imports during the remaining period of the investigation. On 10 May 2017 the then Minister of Commerce and Consumer Affairs decided that she was not satisfied that the imposition of provisional measures was necessary to prevent material injury being caused by subsidised imports during the remaining period of the investigation.

7. In the Final Report, MBIE considered whether there had been a financial contribution by a government or any public body which provided a benefit to the recipient, and whether any such subsidy was specific. MBIE assessed the extent to which subsidised imports of the subject goods from China may have been causing material injury to NZ Steel, based on the provisions of section 8 of the Act, and concluded that:

- There had not been a significant increase in the volume of imports of the subject goods, over the injury investigation period, in either absolute terms or relative to production or consumption in the domestic market.
- There was evidence of price undercutting by imports from China, and there was also evidence that the domestic industry had experienced price depression and price suppression.
- The domestic industry had experienced an adverse economic impact on profits and related injury factors as a result of the impact of price effects.

8. Based on the subsidy levels established, MBIE concluded that material injury to an industry was not being caused by goods that were subsidised. On 5 July 2017, the Minister made a final determination that the subject goods were subsidised only to *de minimis* levels and were not by reason thereof causing material injury to the industry. Notice of the final determination was provided to the parties and gazetted in accordance with section 13(2) of the Act.

1.2.2 Judicial Review Outcome

9. NZ Steel sought judicial review of the Minister's decision. The High Court held that there were material errors in the advice to the Minister; quashed the Minister's decision; and directed reconsideration of the application already made in accordance with the Act as it stood at the time. The High Court's decision is being appealed by the Minister and MBIE, with the hearing expected to take place in November 2019.

10. The High Court noted that a reconsideration is not a fresh application, and was a matter for MBIE and the Minister over what period of time the reconsideration was to take place and what further work would be required in order to reconsider what decision is to be made, although 180 days would be at the outer limit. The High Court noted that the original Final Report was advice to the decision-maker, not the decision itself, and the reinvestigation did not need to cast aside all of the work that it contains.

11. The reconsideration has been conducted in light of the reasons in the judgment for quashing the Minister's decision.

1.2.3 Legal Framework for the Reconsideration

12. As noted above, the reconsideration is of the application made by NZ Steel for the imposition of countervailing duties on galvanised steel coil from China, and is being carried out in accordance with the Act as it stood at the time of the original investigation[1], and takes into account New Zealand's obligations under the SCM Agreement, relating to consultation and initiation of investigations, and the provisions relating to information.

[1] This means that the provisions of the revised Act relating to the public interest test will not apply to the reconsideration.

13. In order to reconsider the original application on the basis outlined in the judgment, and to meet New Zealand's obligations under the SCM Agreement, and to apply the Act, MBIE accepted the original application, in light of the facts and conclusions from the original Final Report and the rulings in the judgment, as the basis for initiating an investigation under section 10 of the Act. This means that the consultation and notice provisions of the Act and the SCM Agreement apply, along with the relevant provisions of both relating to the definition of like goods/subject goods, the determination of subsidy and material injury, and the provisions governing information.

14. Section 10(9) of the Act provides that before initiating an investigation the Secretary[2] shall notify the Government of the country of export of the goods that are the subject of the proposed investigation, and in the case of an application into the subsidisation of any goods, give that Government a reasonable opportunity for consultations with the aim of clarifying the situation and arriving at a mutually agreed solution.

15. MBIE provided NZ Steel and the GOC with its proposals for the conduct of this reconsideration and invited comments. Both NZ Steel and the GOC provided comments which were taken into account in the initiation of the reconsideration.

1.3 Proceedings

16. This reconsideration was initiated on 19 December 2018, and is undertaken in accordance with the provisions of the Act as it stood at the time of the original investigation. The 180-day period for the reconsideration will end on 9 July 2019.

17. An EFC Report setting out the essential facts and conclusions likely to form the basis for any final determination was provided to interested parties on 17 May 2019. Interested parties had until 31 May 2019 to provide comments. Comments were received from the China Chamber of International Commerce (CCOIC) and NZ Steel.

18. The comments received from interested parties and MBIE's consideration of them are set out in Annex 4, and where relevant and appropriate have been taken into account in preparation of this Final Report.

1.3.1 Matters to be reconsidered

19. The High Court identified the reasons for quashing the Minister's decision on the grounds that there were material errors in the advice to the Minister in the Final Report and Briefing. These errors related to MBIE's advice to the Minister on the following subsidy programmes investigated:

- Policy loans

[2] This earlier version of the Act refers to the "Secretary", who is defined as the chief executive of the Ministry, which is further defined as the department of State that, with the authority of the Prime Minister, is responsible for the administration of the Act. MBIE administers the Act, and the "Secretary" is the chief executive of MBIE.

- The provision of inputs at less than adequate remuneration (LTAR)
- The provision of land-use rights at LTAR.

20. The following subsidy programmes which were covered in the original investigation will not be included in the reconsideration because the High Court made no findings of error with respect to them:

- The provision of electricity at LTAR
- Export buyer's credits
- Grants
- Other subsidies.

21. In light of the High Court's directions, the matters to be reconsidered include the following:

A. The definition of "subsidy" and the term "public body"

B. The following subsidy programmes:

- Policy loans: including consideration of whether there is a financial contribution through the provision of loans at preferential interest rates, and if so whether State-owned commercial banks (SOCBs) providing such loans are public bodies.
- Provision of inputs at LTAR: including consideration of whether there is financial contribution through the provision of inputs at less than adequate remuneration, and if so, whether SIEs providing inputs are public bodies.
- Land-use rights at LTAR: including consideration of whether there is a financial contribution through the provision of land-use rights at less than adequate remuneration.

C. To the extent that it is relevant to the subsidy programmes listed above, the definition of like goods/subject goods.

1.3.2 Information to be used

22. In the original investigation, MBIE used the following information which was reflected in the original Final Report:

- Information contained in NZ Steel's application and subsequent submissions
- Information obtained during MBIE's verification visit to NZ Steel
- Responses by the GOC to the Government Questionnaire and Supplementary Questionnaire
- Responses to importer/exporter/manufacturer questionnaires
- Information arising from MBIE's independent research into matters arising in the investigation.

23. As this is not a new investigation, MBIE has used all of the information that it considered in the original investigation and which formed the basis for its original conclusions, subject to the matters raised in the judgment concerning the source and use of information.

24. In addition, MBIE has used the following information:

- New primary information on subsidisation provided by interested parties or sourced by MBIE that relates to the subject goods and the period of investigation, including information from the GOC's RFI response
- The comment of Dr Wolfgang Scholz on the like goods analysis, provided to the High Court by NZ Steel (attached as part of Annex 1)
- Other relevant secondary information on subsidisation provided by interested parties or sourced by MBIE, including the opinions of Professor Lardy and Mr Gospage provided by NZ Steel.

1.4 Treatment of Information

1.4.1 Availability of Information

25. Any interested party providing confidential information has been required to show good cause to MBIE as to why the information should be treated as confidential, and is required to furnish a non-confidential summary of the information which is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Where, in exceptional circumstances, the information is not susceptible of summary, a statement of the reasons why summarisation is not possible must be provided.

26. MBIE has made available all non-confidential information via the public file for this investigation. Any interested party has been able to request both a list of the documents on this file and copies of the documents on it.

27. In the original investigation MBIE requested information from importers, intermediary exporters, Chinese manufacturers, and the GOC. One importer declined to provide information. Several of the intermediary exporters provided information, but only one Chinese manufacturer responded to the questionnaire. The GOC provided general comments on programmes identified in the questionnaire, but considered that a GOC questionnaire response would serve no purpose because the GOC was not aware that any Chinese producer intended to submit a questionnaire response.

28. In this reconsideration, MBIE sent RFIs to the GOC and to the five Chinese manufacturers identified in the original investigation that did not respond to the questionnaire sent to them in that investigation. The GOC provided a response which added to the questionnaire response in the original investigation. Two of the manufacturers advised that they would not be responding to the RFI because to do so would be a costly burden for the companies in light of their level of sales to New Zealand. The other manufacturers did not respond at all.

1.4.2 Assessment of Information

29. The foundation of MBIE's approach to the assessment of information is the relevant provisions of the Act and the SCM Agreement, assisted by the interpretation of the SCM Agreement provided in WTO dispute findings.

30. Section 7 of the Act provides as follows:

> *(1) In this Act, the expression "amount of the subsidy" in relation to any subsidised goods, means the amount determined by the Secretary as being the benefit conferred on the recipient of the subsidy.*
> *…*
> *(5) Where the Secretary is satisfied that sufficient information has not been furnished or is not available to enable the amount of the subsidy to be ascertained for the purposes of this Act, the amount of the subsidy shall be such amount as is determined by the Secretary having regard to all available information that the Secretary considers to be reliable.*

31. Article 12 of the SCM Agreement provides as follows:

> *12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.*
> *…*
> *12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.*

32. Information relating to those parties who have not provided information is based on the facts available that MBIE considers to be reliable according to the provisions of the Act and the SCM Agreement.

33. In an investigation MBIE seeks and obtains information directly relevant to that investigation, and satisfies itself as to the accuracy of the information provided. Such primary information includes questionnaire responses from interested parties; laws, regulations and other official documents; relevant WTO documents, such as notifications; Customs and statistical data; and other relevant data such as exchange rates, interest rates and prices. MBIE can use verification visits and the review of evidence available to substantiate the information provided by interested parties and to assess its reliability.

34. Where MBIE is not satisfied as to the accuracy of the information provided, or where information is not available, other primary information can be used, or secondary information can be used as "facts available". The use of "facts available", including secondary information, is limited to instances where information is not available because an interested party refuses access to, or otherwise does not provide the necessary information within a reasonable period or significantly impedes the investigation. In such circumstances, the amount of the subsidy is determined having regard to all available information that MBIE considers to be reliable. MBIE is required to take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested.

35. In considering "facts available" MBIE can take into account secondary information, such as the application (in relation to subsidisation); information from previous MBIE investigations; information from investigations undertaken by counterpart authorities in other jurisdictions; and information from reports and publications covering matters related to the subject matter of the investigation. In using secondary information, MBIE undertakes a process of reasoning and evaluating which "facts available" constitute reasonable replacements for missing information that can be considered reliable. In this context, MBIE notes that secondary information that is not based on positive evidence but relies on inferences and assumptions may not be considered to be reliable.

36. Where information is not available because a party has not provided information requested, and where that information is required in order to make a determination of the existence and extent of a subsidy, MBIE can have recourse to secondary sources of information to replace the missing information.

1.5 Report Details

37. In this report, unless otherwise stated, financial years (FY) are years ending 30 June and dollar values are New Zealand dollars (NZD). In tables, column totals may differ from the sum of individual figures because of rounding. The term VFD refers to value for duty for New Zealand Customs Service (Customs) purposes.

38. The period of investigation for subsidisation is the year ended 30 June 2016, while the investigation of injury involves evaluation of data for the period since 1 July 2011.

39. All volumes are expressed on a tonne basis unless otherwise stated. Exports to New Zealand were generally invoiced in United States dollars (USD). The exchange rates used are those relating to specific transactions, where available, or the Customs exchange rates for the relevant time or shipment, or the rate that MBIE considers most appropriate in the circumstances.

2. Subject Goods and New Zealand Industry

2.1 Subject Goods

40. The imported goods that are the subject of the reconsideration are described as:

> *Galvanised steel coil with a thickness equal to or greater than 0.3mm and less than or equal to 1.9mm and a width greater than 600mm but not greater than 1260mm, with a hot dipped galvanised (zinc) coating.*

41. In its original application, NZ Steel did not include the limitation on width. This limitation was added by MBIE following a review of the subject goods/like goods (see sections 2.2.1 and 2.2.2 below, and Annex 1). NZ Steel has challenged MBIE's conclusions. This matter has been addressed in the reconsideration, as outlined in Annex 1.

2.1.1 Tariff description

42. Galvanised steel coil is made of carbon steel, with a hot dip galvanised finish commonly used in building applications, and supplied to distributor merchants and manufacturing customers.

43. The subject goods fell under the following Customs tariff item and statistical keys during the POI:[3]

- 7210.49.31.01
- 7210.49.31.09

44. NZ Steel stated that in late 2015 zinc, aluminium, and magnesium alloy-coated steel was included in the tariff item, whereas previously this product was imported under Harmonised System (HS) Code 7210.61.30.09. According to the applicant, this explains why there was a significant increase in imports, from all countries but especially from Japan, in 2015. The applicant noted that this product was outside the scope of the application.

45. In February 2017, revised statistical keys were introduced for the tariff item, primarily to differentiate between different coating alloys and to further differentiate product thicknesses.

2.1.2 Imports of Subject Goods

46. Table 2.1 below shows of galvanised steel coil based on Customs data for the tariff item and statistical keys noted above, adjusted by the removal of data for imports from

[3] New Zealand's Standard Tariff sets out the classification of all international trade goods and import duty rates to provide sufficient detail for duty or statistical purposes, and meets New Zealand's obligations under the International Convention on the Harmonized Commodity Description and Coding System, commonly known as the Harmonized System.

BlueScope Steel Limited (BlueScope),[4] and imports of steel coil coated with alloys of zinc and aluminium, since the application identified that these goods were not part of the application. The Customs data includes entries previously misclassified under other tariff items.

Table 2.1: Import volumes of galvanised steel coil to New Zealand (tonnes) Customs data, adjusted*[5]

Data suppression by Statistics NZ means that trade data is confidential, percentage figures indicate change from previous year.

	FY2012	FY2013	FY2014	FY2015	FY2016
Australia	0	0	[redacted]	-	-
Belgium	0	0	[redacted]	-	[redacted]
China	2565	3956	[redacted]	54%	118%
India	339	505	[redacted]	-	-
Japan	876	107	[redacted]	224%	125%
Korea	537	136	[redacted]	161%	156%
Taiwan	511	602	[redacted]	47%	241%
USA	41	52	[redacted]	-	-
Total	4869	5359	7376	3995	7080

* Adjusted as described above.

47. Information on imports from China prior to FY2016 or from other sources for any period was not available in sufficient detail to identify the widths of shipments of galvanised steel coil. However, on the basis of invoice information available to MBIE, it can be concluded that the level of imports from China in FY2016 which met the revised description of the subject goods, totalled [redacted] tonnes, which is 48 per cent of the total of [redacted] tonnes for FY2016 in Table 2.1 above.

2.2 Like Goods and New Zealand Industry

48. Section 3A of the Act defines the term **industry** as:

a. the New Zealand producers of like goods, or

b. such New Zealand producers of like goods whose collective output constitutes a major proportion of the New Zealand production of like goods.

49. Section 3(1) of the Act defines **like goods**, in relation to any goods, as:

a. other goods that are like those goods in all respects, or

b. in the absence of goods referred to in paragraph (a), goods which have characteristics closely resembling those goods.

[4] BlueScope is NZ Steel's Australian parent company.

[5] Information is confidential because Statistics NZ has data suppression in place for these items. The non-confidential summary is indexation of the figures for FY2015 and FY2016.

2.2.1 Like Goods

50. To establish the existence and extent of the New Zealand industry for the purposes of an investigation into injury, and having identified the subject goods, it is necessary to determine whether there are New Zealand producers of goods which are like those goods in all respects, or have characteristics which closely resemble the subject goods.

51. The scope of the subject goods is defined in section 2.1 above.

52. NZ Steel confirmed that it is the only producer of galvanised steel coil in New Zealand of the size and thickness range which are like goods subject to the application.

53. NZ Steel advised that it manufactures galvanised steel with dimensions of thickness from 0.32 to 1.85mm, widths from 70mm to 1260mm, and grades G250, G300, G450, G500 and G550, with zinc coating masses (gm/m^2) of 100, 275, 350, 450 and 600. The grades are as specified in the relevant standard (Australian Standard AS1397).[6]

54. NZ Steel considered that the galvanised steel coil it produces has the same form, function and usage as the allegedly subsidised goods and is therefore "like goods" to the imported goods, as defined under Section 3(1) of the Act. NZ Steel's position was based on the following grounds:

- **Physical Characteristics**: Products made locally by NZ Steel have the same physical characteristics as the allegedly subsidised goods from China. In particular, NZ Steel's locally produced galvanised steel coil and the allegedly subsidised galvanised steel coil may be manufactured to AS1397.
- **Production Methods**: Production methods for the locally produced steel coil and the allegedly subsidised goods from China are substantially similar.
- **Function and Usage**: Both the locally produced and allegedly subsidised goods have comparable or identical end uses. Common (but not exclusive) uses of the products include general manufacturing, cladding, structural elements in building and construction, frames, heating and ventilation.
- **Pricing**: The allegedly subsidised goods have a similar pricing structure (with gauge, width and coating extras) to NZ Steel's manufactured products. An illustration of this is that, in order to maintain market share (sales) in New Zealand, NZ Steel is forced to meet prevailing import offers in respect to particular goods supplied to particular customers.

2.2.2 MBIE Consideration

55. To determine whether the goods produced in New Zealand are like goods to the subject goods, MBIE normally considers physical characteristics, function and usage, pricing

[6] More details of NZ Steel's products can be found at http://www.nzsteel.co.nz/products/galvsteel/.

structures, marketing and any other relevant considerations, with no one of these factors being necessarily determinative.

56. In the original investigation, further consideration of like goods was required in light of the limitations on the range (i.e. the maximum width and spangle[7]) of goods produced by NZ Steel, which is a subset of the subject goods. Information from responses from importer's questionnaires, submissions from the (CCOIC), and matters raised during the domestic industry verification visit indicated that NZ Steel produces widths up to 1260mm with regular spangle, while some imports are of wider coils and zero spangle.

57. Article 15.6 of the SCM Agreement provides that:

> *The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.*

58. Further consideration of like goods was undertaken by MBIE, as set out in Annex 1 to this Report. The conclusions reached were that:

- The goods description need not be changed to account for differences in spangled finishes.
- The goods description should be limited to goods with a width up to 1260mm.

59. MBIE amended the subject goods description to include the width limitation as set out in section 2.1 above.

60. NZ Steel, in its submission of 31 January 2019, considered that MBIE made an error by using a narrower definition of like goods in the Initiation Note and that "the Initiation Notice should have referred to the original definition of subject goods." NZ Steel noted that the use of the narrower definition "may have caused some confusion for Chinese exporters asked to respond to MBIE's recent information requests."

61. As noted earlier in this Report, the High Court noted that the original Final Report was advice to the decision-maker, not the decision itself, and the reinvestigation did not need to cast aside all of the work that it contains. MBIE, therefore, initiated the reconsideration on the basis of its view of the scope of subject goods that had been arrived at during the original investigation.

[7] "A 'spangle' is the visible aesthetic feature of crystallites on the surface of a galvanised steel sheet. The spangle appears as either a snowflake or a six-pointed star pattern. This is produced on the steel sheet when certain alloying elements are either added to the liquid zinc or available as impurities." Sourced from https://www.corrosionpedia.common on 26 April 2017.

62. Further submissions from NZ Steel, including evidence produced before the High Court, have been addressed in the reconsideration, as outlined in Annex 1.

63. MBIE notes that the definition of like goods/subject goods has little relevance to the issues arising in relation to the subsidy programmes considered by this reconsideration.

2.2.3 New Zealand Industry

64. NZ Steel has stated that it believes it is the only producer of galvanised steel coil in New Zealand. MBIE is not aware of any other producer of galvanised steel coil in New Zealand.

65. Section 10(3) of the Act outlines the minimum level of support required from the domestic industry for the application for an investigation. This requirement was met as NZ Steel is the only producer of galvanised steel coil in New Zealand.

3. Interested Parties

3.1 Legal Requirements

66. Section 9 of the Act identifies the parties who are to be given notice for the purposes of the Act, including:

- The Government of the country of export
- Exporters and importers known by the Secretary to have an interest in the goods
- The applicant in relation to the goods

67. Article 12.9 of the SCM Agreement provides:

> *For the purposes of this Agreement, "interested parties" shall include:*
> *(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and*
> *(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.*
> *This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.*

3.2 New Zealand Producer

68. NZ Steel is an interested party, as it is the sole New Zealand producer of galvanised steel coil and the applicant in this proceeding.

69. Information provided by NZ Steel included:

- the application which provided the basis for the original investigation
- information verified by MBIE during a visit to the company's premises on 2-3 March 2017
- various submissions made to the original investigation
- information provided to the High Court for the judicial review proceedings
- submissions made to the reconsideration.

3.3 Government of China

70. The Government of China is considered an "interested Member" under the SCM Agreement.

71. In accordance with the requirements of section 10(9) of the Act, the GOC was provided with the consultation document on the reconsideration prepared by MBIE, and invited to provide comments on it.

72. An RFI was provided to the Government of China and a full response was received on 25 January 2019.

3.4 Manufacturers

73. Chinese manufacturers supplying galvanised steel coil to New Zealand via a range of intermediary exporters were identified in the original investigation from Customs data and questionnaire responses provided by intermediary exporters and importers.

74. Seven manufacturers were identified in the original investigation, but one, Yieh Phui (China) Technomaterial Co Ltd (YPC) was dropped, following a more detailed analysis of Customs data that confirmed that YPC did not produce any of the subject goods exported to New Zealand in the POI. Table 3.1 below shows the remaining Chinese manufacturers that have been identified. The companies are listed alphabetically.

Table 3.1: Chinese manufacturers of galvanised steel coil

Manufacturing Company	FY2016 import volume MT
Angang Steel (Angang) Anshan Liaoning Province	[redacted]
Baoshan Iron and Steel Co Ltd (Baosteel) Baoshan District Shanghai Municipality	[redacted]
Changshu Everbright Material Tech Limited (Changshu) Changshu Jaingsu Province	[redacted]
Huangshi Sunny Strip Aluminium and Zinc Coated Limited (Huangshi) Huangshi City Hubei Province	[redacted]
Jiangyin Zong Cheng Steel Co Limited (Zong Cheng) Jiangyin Jiangsu Province	[redacted]
Shougang Jingtang United Iron and Steel Co (Shougang) Tangshan Hebei Province	[redacted]

75. In the original investigation information was sought from all manufacturers but only Zong Cheng responded to the Ministry's request for information.

76. All of the manufacturers, other than Zong Cheng, were sent an RFI and invited to respond to it.

Angang

77. Angang is a limited liability joint venture company, listed in both the Hong Kong Stock Exchange and the Shenzhen Stock Exchange. The major shareholder is Anshan Iron and Steel Group Complex which is 100% owned by Angang Holdings, itself 100% owned by the State-owned Assets Supervision and Administration Commission (SASAC), a government agency.

78. Angang operates as an integrated steel mill, and is headquartered in Anshan, Liaoning Province, and has production bases in Anshan, Bayuquan and Chaoyang of the northeast region and Panzhihua, Chengdu, Jiangyou, Xichang and Chongqing in Southwest region.

79. Based on invoices provided by importers and exporters, Angang was a major supplier of galvanised steel coil to New Zealand in FY 2016, providing ▒▒▒ tonnes of the subject goods.

80. Angang was subject to investigations into the subsidisation of similar products by the Australian and US authorities in 2011-13 and 2014-2016 respectively.

81. Angang was sent an RFI but did not provide a response. Following MBIE's request to the law firm representing the GOC for assistance in obtaining a response from Angang, the company advised MBIE that it had received the RFI, but that it had not received any subsidisation as claimed by the petitioner. Angang advised that it was a large enterprise for the manufacture and sale of iron and steel products, and was listed on the Hong Kong and Shenzhen stock exchanges. The company operated as an integrated producer of galvanised steel coil. Exports to New Zealand accounted for only a tiny percentage of overseas sales, and taking into account the task at hand and the size of the New Zealand market, Angang considered that the questionnaire was an excessive burden for the company and had decided not to provide any further replies. Angang stated that the company was a market-based operation, and the alleged subsidies, either in terms of bank loans or in terms of input material purchases were unsubstantiated. Angang also noted that the ADC anti-subsidy action, filed in November 2012 and completed in August 2018, had ended with zero subsidy duty on Angang, which proved its declaration that it did not have any subsidy.

Baosteel

82. Baosteel is located in Shanghai, China. The company is a subsidiary controlled by Baowu Steel Group (previously Baosteel), and was listed for trading at Shanghai Stock Exchange in 2000. Baowu Steel Group is a state-owned enterprise under the supervision of SASAC. Baosteel is an integrated steel producer.

83. Baosteel provided ▒▒▒ tonnes of exports of the subject goods to New Zealand in FY2016.

84. Baosteel was sent an RFI but did not provide a response. Following MBIE's request to the law firm representing the GOC for assistance in obtaining a response from Baosteel, the company advised MBIE that it had received the RFI, but considered that it was not in a position to provide a response. Baosteel advised that it operated in a market-oriented mode and its business activities were carried out under market-driven conditions, and the allegations of subsidies particularly in the form of loans and input material purchases were ungrounded in its case. The company operated an integrated process for galvanised steel coil from the input as iron ore to the finished products for sales. New Zealand was not its primary market for export sales, and made a limited contribution to total revenue, which meant the questionnaire was a costly burden for the company.

Changshu

85. Changshu makes thin-gauge galvanised steel coils, used mainly in the automotive and consumer electronics industries. Galvanised steel production capacity is estimated at 750,000 tonnes annually.

86. Changshu is located in Changshu, Jiangsu Province, and during the POI operated as a subsidiary of China Minmetals Corporation, a Chinese metals and mineral trading company headquartered in Beijing, and a state-owned corporation under direct supervision of the State-owned Assets Supervision and Administration Commission. In September 2017, Changshu was taken over by Handan Steel Group Co Ltd, part of Hansteel, a state-owned integrated iron and steel enterprise. China Minmetals Corporation is China's largest nationwide supplier of raw materials for the metallurgical industry and also the largest steel trading company. In any event, Changshu is a State-owned entity and was such an entity during the POI.

87. Information provided by the GOC in response to the RFI suggested that because it is now a subsidiary of Handan Steel Group Co Ltd Changshu should be regarded as part of an integrated steel producer. However, on the basis of further information provided by the GOC, Changshu was not part of Handan Steel Group Co Ltd during the POI, and in the absence of specific information relating to suppliers of HRC to Changshu it is not clear that ownership by China Minmetals Corporation meant that Changshu could be regarded as part of an integrated steel producer during the POI. MBIE has treated Changshu as a non-integrated producer.

88. Changshu provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

89. Changshu was subject to investigations into the subsidisation of similar products by the US authorities in 2014-2016.

90. Changshu was provided with an RFI but did not provide a response.

Huangshi

91. Huangshi produces galvanised sheet steels, aluminium alloy plates, cold rolled sheet steels, and other related products, and is located in Huangshi, Hubei Province. The company website identifies Jin Brand Co Ltd as the holding company, which is primarily a beverage company.

92. Huangshi provided [redacted] tonnes of exports of the subject goods to New Zealand in FY2016.

93. Huangshi was provided with an RFI but did not provide a response.

Zong Cheng

94. Zong Cheng is a large-scale foreign-owned enterprise, which manufactures and distributes steel products, including colour coated steel coils, hot dip galvanised steel coils, galvanised steel coils, cold rolled steel coils, pickling coils, and other related products. Zong Cheng is located at Xiagang Industrial Park, Jiangyin, Jiangsu Province.

95. Zong Cheng provided [redacted] tonnes of the exports of the subject goods to New Zealand in FY2016.

96. Zong Cheng responded to the questionnaire in the original investigation. In view of Zong Cheng's full response, further information through an RFI response has not been required, but Zong Cheng was invited to provide any further information and comments on the matters being investigated.

Shougang

97. Shougang produces iron and steel including steel sheets, pipes and slabs, was founded in 2005 and is based in Tangshan City, Hebei Province. As of 2005, Shougang is a subsidiary of Shougang Group Corp, which is owned by the Government of Beijing (79.40 per cent), with the parent being the State-owned Assets Supervision and Administration Commission of the Government of Beijing.

98. Shougang is an integrated steel producer.

99. Shougang provided [redacted] tonnes of exports of the subject goods to New Zealand in FY2016.

100. Shougang was provided with an RFI but did not provide a response.

3.5 Trading Intermediaries

101. Trading intermediaries (exporters) were identified from Customs data and from questionnaires sent to known importers and manufacturers.

102. Table 3.2 below shows six exporters, primarily trading companies acting as intermediaries between Chinese producers and New Zealand importers, who were originally identified as exporting the subject goods in FY2016 (two additional companies, originally identified as intermediaries in the original investigation, were excluded when it was confirmed that the goods they trade had been incorrectly classified). The companies are listed alphabetically.

Table 3.2: Trading intermediaries for galvanised steel coil

Exporting company	Company Location	FY2016 import volume MT
Commercial Metals (CMC)	Sydney, Australia	[redacted]
Cumic Steel Ltd (Cumic)	Hong Kong, China	[redacted]
Marubeni-Itochu Steel Oceania Pty Ltd (Marubeni)	Melbourne, Australia	[redacted]
Stemcor (SEA) Pte Ltd (Stemcor)	Singapore	[redacted]
Vast Link International Co Ltd (Vast Link)	Shanghai (headquarters), China	[redacted]
Yieh Corp	Shanghai, China	[redacted]

103. In the original investigation, information was sought from all six companies but only CMC, Marubeni, and Stemcor responded to the Ministry's request for information. While no further information is required from these companies, they were invited to provide any further information and comments on the matters subject to investigation. No comments were received.

CMC

104. CMC responded to the original questionnaire. CMC's headquarters are in Sydney.

105. CMC is a 100% fully-owned subsidiary of Commercial Metals Company, which is a US-based company, listed on the New York Stock Exchange. CMC is a trading company, primarily in the business of importing steel products into Australia and New Zealand.

106. CMC provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

Cumic

107. Cumic Steel did not respond to the original questionnaire. Cumic Steel is based in Hong Kong.

108. Cumic Steel provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

Marubeni

109. Marubeni provided a response to the original questionnaire. Marubeni is based in Melbourne and operates as an intermediary between customers and steel manufacturers.

110. Marubeni provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

Stemcor

111. Stemcor responded to the original questionnaire. Stemcor has a branch office in Auckland which is responsible for making offers for supply of steel to New Zealand customers. Stemcor's headquarters are in Singapore, and it has an Australian branch based in Sydney.

112. Stemcor provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

Vast Link

113. Vast Link did not respond to the original questionnaire.

114. Vast Link's headquarters are in Zhabei District, Shanghai, and its production base is in Foshan City, Guangdong Province. Vast Link does not produce galvanised steel coil itself, but information from the importer confirmed the source of the subject goods exported to New Zealand.

115. Vast Link provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

Yieh Corp

116. Yieh Corp did not respond to the original questionnaire. Yieh Corp's headquarters are in Kaohsiung, in the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("Chinese Taipei", or "Taiwan" when referred to by other jurisdictions).

117. Yieh Corp provided [redacted] tonnes of the subject goods exported to New Zealand in FY2016.

3.6 Importers

118. New Zealand-based importers were identified from Customs data. Table 3.3 below shows the importers that MBIE has identified.

Table 3.3: Importers of galvanised steel coil

Importing company	FY2016 import volume MT
Fletcher Steel Limited, trading as Easy Steel (Easy Steel)	[redacted]
Kiwi Steel Limited (Kiwi Steel)	[redacted]
R C Macdonald Limited (RCML)	[redacted]
Roll Formers New Zealand Limited (Roll Formers)	[redacted]
Steel and Tube Holdings Limited (STH)	[redacted]
Steel Co Limited (Steel Co)	[redacted]
Vulcan Steel Limited (Vulcan)	[redacted]

119. Six of the importers above completed the original questionnaires. Steel Co declined to provide information, citing commercial sensitivity. While no further information is required from these companies, they were invited to provide any further information and comments on the matters subject to investigation.

Easy Steel

120. Easy Steel imports Chinese-origin steel from [redacted]. It also imports non-Chinese origin steel from [redacted], and [redacted].

121. Easy Steel sells the majority of its products to steel processors, including general engineering companies, structural steel fabricators, and manufacturing companies. These companies process the steel as part of a manufactured product which is then sold to the end user.

122. Easy Steel claimed that the imposition of a countervailing duty on Chinese steel imports would result in it raising its prices as part of its aim to provide import parity.

123. Easy Steel imported [redacted] tonnes of the subject goods from [redacted] in FY2016.

Kiwi Steel

124. Kiwi Steel stocks flat-rolled steel products, including the subject goods, and wholesales to New Zealand manufacturers. Most of the customers are manufacturers of building products. Kiwi Steel's major customers for Chinese galvanised steel products are [redacted] and [redacted].

125. In FY2016 Kiwi Steel imported [redacted] tonnes of the subject goods from [redacted] and [redacted].

126. Kiwi Steel claimed that the imposition of a countervailing duty on galvanised steel coil would not affect the overall balance of galvanised steel sales in New Zealand, because even if the price for the subject goods increases there are other source countries of cheap imports.

RCML

127. Imported galvanised coil makes up [redacted] of RCML's total sales, and is sold primarily to a New Zealand-based manufacturing company.

128. RCML imported [redacted] tonnes of the subject goods from [redacted] in FY2016.

129. RCML claimed that the imposition of a countervailing duty on the subject goods would not change the quantities of the company's imports. RCML believed there would be reduced competition causing an increase in the cost of building in New Zealand.

Roll Formers

130. Roll Formers manufactures product from the subject goods, which it sells as finished products into the New Zealand market. Roll Formers is both a customer and supplier of [redacted].

131. Roll Formers imported [redacted] tonnes of the subject goods from [redacted] in FY2016.

132. Roll Formers claimed it cannot [redacted] if using NZ-manufactured steel. It claims any additional tariff applied to the subject goods would make Roll Formers [redacted].

STH

133. STH claims to be the largest manufacturer, supplier and distributor of steel products in New Zealand, including a comprehensive range of structural steel, bar and plate products, and hollow steel sections.

134. In FY2016 STH imported [redacted] tonnes of the subject goods from [redacted].

Steel Co

135. Steel Co did not provide a response to the original questionnaire, citing concerns that the information required would [redacted].

136. Steel Co imported [redacted] tonnes of the subject goods from [redacted] in FY2016.

Vulcan

137. Vulcan provided a response to the original questionnaire and details of [redacted] tonnes of the subject goods imported from [redacted] and [redacted], which included imports originally [redacted].

3.7 Other Interested Parties

138. The CCOIC asked to be an interested party to the original investigation, and made a submission on injury, causality and other relevant elements of the investigation, including procedural elements. The CCOIC also submitted comments on the original EFC Report.

139. The CCOI was invited to provide any further information and comments on the matters subject to investigation.

140. As in the original investigation, the CCOIC and the GOC were represented by Allbright Law.

141. On 19 March 2019, a delegation from the CCOIC with representatives from Allbright Law and the Chinese Embassy met with MBIE to make an oral presentation of their submissions. A non-confidential record of the meeting and the documentation provided by the CCOIC has been made available on the Public File. The matters raised by CCOIC are reflected in this Final Report.

4. Subsidisation

4.1 Subsidisation

142. The Act defines 'subsidy', 'subsidised goods' and 'specific subsidy' in section 3, which reflect the definitions and descriptions set out in the SCM Agreement:

> ***subsidy*** *includes any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of goods, as a result of any scheme, programme, practice, or thing done, provided, or implemented by a foreign Government; but does not include the amount of any duty or internal tax imposed on goods by the Government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted or have been or will be relieved by means of refund or drawback.*
>
> ***subsidised goods*** *means goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of which a specific subsidy has been or will be paid, granted, authorised, or otherwise provided, directly or indirectly, by a foreign Government.*
>
> ***specific subsidy*** *means a subsidy that is specific to an enterprise or industry, or a group of enterprises or industries, within the jurisdiction of a foreign Government.*

143. Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if:

- There is a **financial contribution** by a **government or any public body**, including a direct transfer of funds (e.g. grants, loans, equity infusions), government revenue that is foregone or not collected (e.g. tax credits), and the provision or purchase by government of goods or services; and
- The financial contribution confers a **benefit**.

144. Under Article 1.2 of the SCM Agreement, subsidies meeting the requirements of Article 1.1 are countervailable under Part V of the Agreement only if they are **specific** in accordance with the provisions of Article 2, i.e. the subsidy is limited to an enterprise or industry or group of industries or enterprises, including geographical limitation, or if the subsidies are contingent on export performance or the use of domestic over imported goods.

145. As defined in section 7(1) of the Act, the **amount of the subsidy**, in relation to any subsidised goods, means the amount determined by the Secretary as being the benefit conferred on the recipient of the subsidy. Section 7(2) of the Act sets out limitations on the nature and calculation of the benefit, based on the provisions of Article 14 of the Subsidies Agreement, while section 7(3) sets out amounts that are not to be included in the amount of the subsidy, including any application fee or other fees, or costs necessarily incurred in order to qualify for or receive the benefit of the subsidy. Section 7(4) sets out the basis for

determining adequate remuneration in terms of section 7(1)(d), reflecting the provisions of Article 14(d) of the SCM Agreement.

146. The definitions relating to "subsidy" in section 3 of the Act refer to a financial or commercial benefit provided by "a foreign Government". MBIE treats this as including "Government" in both the narrow and collective sense described by the WTO Appellate Body,[8] and as provided for in the parentheses in Article 1.1(a)(1) of the SCM Agreement. The SCM Agreement refers to "a financial contribution by a government or any public body." The test for a "public body" identified by the WTO Appellate Body and by the High Court is whether entities possess, exercise or are vested with governmental authority.[9]

147. Section 7(5) of the Act provides that where the Secretary is satisfied that sufficient information has not been furnished or is not available to enable the amount of the subsidy to be ascertained for the purposes of this Act, the amount of the subsidy shall be such amount as is determined by the Secretary having regard to all available information that the Secretary considers to be reliable.

4.2 Basis for Investigation of Subsidisation

148. The information available to MBIE for this reconsideration of the subsidisation of galvanised steel coil from China includes:

- Information from the original investigation, as set out in the Final Report of that investigation, and including:
  - Information contained in NZ Steel's original application and subsequent submissions
  - Information obtained during MBIE's verification visit to NZ Steel
  - Responses in the original investigation by the GOC to the Government Questionnaire and Supplementary Questionnaire
  - Responses in the original investigation to importer/exporter/manufacturer questionnaires
  - Information in the original investigation arising from MBIE's independent research into the matters raised
- The Judgment of the High Court
- Materials provided by NZ Steel to the High Court in the judicial review proceedings, including comments by Dr Wolfgang Scholz, specifically referred to by the High Court as being relevant to any reconsideration
- New primary information on subsidisation provided by interested parties that relates to the period of investigation
- Other relevant secondary information on subsidisation provided by interested parties or sourced by MBIE.

[8] *US – Anti-Dumping and Countervailing Duties (China),* WT/DS379/AB/R, paragraph 286.

[9] Ibid, paragraph 317.

4.2.1 NZ Steel Application

149. The application listed the subsidy programmes identified by the Australian and United States authorities. For the purposes of estimating an amount of subsidy applicable to the subject goods, on the basis of reasonably available information, the application identified ten subsidy programmes, and provided a breakdown and explanation of the programmes based on US Department of Commerce (USDOC) findings relating to a cooperating Chinese producer.

150. For the programmes that NZ Steel identified and for which more detailed information was provided as noted above, the level of alleged subsidy totalled 39.05 per cent. This reflected the total of the amounts of benefit provided by the subsidy programmes concerned to the cooperating producer (YPC), as established by the US authorities.

NZ Steel Submissions

151. NZ Steel lodged the submissions from expert witnesses it made to the High Court proceedings. These included submissions from Professor Lardy regarding state subsidisation in China, and a submission from Mr Stephen Gospage, addressing a number of aspects of MBIE's investigation, including the availability of information and the European Union's (EU) use of "facts available", MBIE's determinations that SOCB's and input suppliers were not public bodies; and MBIE's determinations that land-use rights and electricity were not provided at less than adequate remuneration.

152. NZ Steel made an additional submission on 31 January 2019, providing preliminary comments on the effect of the High Court decision on the reconsideration, and providing additional information that NZ Steel considered relevant to the reconsideration.

153. NZ Steel made a further submission on 13 February 2019, responding to certain factual matters raised by the GOC in its response to the RFI.

154. NZ Steel made a submission on 1 March 2019 in which it commented on the communication from Angang in which Angang referred to the zero subsidy duty applied by Australia on galvanised steel coil, and noted that information from the GOC confirmed that Changshu was not a subsidiary of Handan during the POI.

155. NZ Steel made a further submission on 20 March 2019 regarding market distortions and subsidies, based on a CBSA review report on dumping of *Corrosion-Resistant Steel Sheet*, and a speech by the EU Trade Commissioner.

156. On 12 April 2019, NZ Steel made a further submission, commenting on matters raised in the CCOIC submissions of 9 March 2019 and 19 March 2019 (presentation). The matters raised related to the programmes on the provision of preferential loans and input materials at LTAR, and also referred to CCOIC comments on matters relating to the findings of other jurisdictions. The matters raised are specifically addressed in the relevant sections of this Final Report, while matters relating to the use of information from other jurisdictions is covered in Annex 3.

157. MBIE has taken account of all of the matters raised by NZ Steel in the preparation of this Final Report.

4.2.2 GOC Questionnaire Response

Original Investigation

158. In its original questionnaire response the GOC provided general comments relating to the alleged subsidy programmes, which it claimed demonstrated that the alleged programmes did not meet the subsidy definition set out in Article 1.1 of the SCM Agreement. The GOC claimed that it was able to provide only general responses because any specific assistance received by Chinese producers of galvanised steel coil is not known by the GOC due to the lack of cooperation with the investigation by such producers.[10]

159. The GOC response attached copies of a range of laws, regulations, rules and guidelines to support the general comments.

160. In the original investigation, Supplementary Questionnaires were provided to the GOC, addressing issues which had emerged regarding particular programmes. Responses provided clarified the position regarding export buyer's credits, policy loans, import tariff exemptions, grants, and other subsidies.

Reconsideration

161. For this reconsideration, the GOC was cooperative in providing a full response to the RFI. The matters covered included the GOC's interest in the steel sector, the legal framework for companies in China, the role of Plans in the steel sector and the priority for over-capacity reduction, a general description of the galvanised steel coil industry, the significance of integrated production in relation to alleged input subsidies, the status of SOCBs and the rules applicable to them, and the laws and rules governing State-owned enterprises (SOEs) in China, including the role of SASAC. The following paragraphs summarise the main general points, with more detailed aspects of the GOC response being picked up in the sections below addressing the particular subsidy programmes dealt with in this reconsideration.

162. In its response, the GOC identified its macro-economic interests in the operation of the Chinese steel industry. It was noted that given the significant size and scale of the steel industry, there was nothing unusual or special about the GOC's consideration of the steel sector, in a general sense, as a very important part of China's economy. It was pointed out that China is the largest steel producer in the world, accounting for about half of global output in 2015 and 2016. The industry is subject to international commitments and national policies in relation to climate change. While the GOC has enacted macro-economic policy in the steel sector, it does not intervene in micro-economic activities of individual entities in the sector, and manufacturers and traders in the sector operate independently in highly competitive commercial markets for steel products, as guaranteed by law in China.

[10] Zong Cheng did provide a questionnaire response, but this was not reflected in the GOC response to the original investigation.

163. It was stressed that the steel industry in China does not benefit from any special treatment by law, and the GOC's law and policies are intended to liberalise the market. Details of relevant laws and policies and recent changes aimed at increasing the degree of market orientation were provided. The GOC pointed out that overcapacity reduction was the GOC's primary policy in the steel sector during the period of investigation. It was stressed that government policies, as set out in industry plans, are not laws, and are not enforceable as such.

164. The GOC noted that the galvanised steel coil industry was highly market-oriented and fiercely competitive, but was not a well-defined industry in itself, being linked to other sectors. The GOC suggested that major producers of galvanised steel coil used an integrated process, beginning with steel-making. The GOC pointed out that galvanised steel coil is typically produced in an integrated process, so the alleged input at LTAR programme did not exist, and noted that Baosteel, Shougang, Angang and Changshu were integrated producers of galvanised steel coil and did not have to purchase the inputs of HRC and CRC. Findings of other jurisdictions in support of this position were cited. It was noted that galvanised steel coil is considered as a low value-added product amongst steel sectors, with a relatively low market entry threshold, which means that prices correlate to prices in the upstream supply chain, in this case mainly iron ore for integrated producers

165. On the demand side, the GOC stated that the domestic market for galvanised steel coil is fiercely competitive, exacerbated by the large number of producers, both large and small, and the large number of privately-owned manufacturers. The GOC reported that on the basis of confidential data from the National Bureau of Statistics (NBS), in 2015 there were [redacted] scaled[11] galvanised steel coil producers, of which only [redacted] were producers having certain State investment,[12] with the remaining producers being privately-owned or foreign-owned. In terms of production volume, non-SOE producers accounted for over [redacted] per cent of the total production.

166. The GOC response went on to address the status and role of SOCBs, stating that they were neither government authorities nor public bodies, and that China had achieved substantial market-oriented reforms in the banking sector by enforcing new rules and further deregulating interest rates. Details of relevant laws and regulations were provided. It was stressed that SOCBs, as listed companies, are required to operate commercially and

[11] The NBS collects data only from industry manufacturing enterprises with an annual main business revenue above RMB 20 million (currently around NZD 4.3 million), and this is what is meant by "scaled."

[12] The GOC provided details of the NBS definitions for State-owned equity controlled companies. This includes companies with a government shareholding of over 50 per cent; companies where the government shareholding is less than 50 per cent but is more than that of any other investor; companies where the government shareholding is less than 50 per cent but the government investor maintains a controlling management interest on a contractual basis; and companies where the government shareholding is equal to 50 per cent without specifying which party maintains a controlling management interest. A "Government investor" is interpreted by NBS to include only a government authority, ownership of which could be held by the government authorities directly and/or indirectly.

independently, and to establish sound corporate governance. The GOC did not comment on policy banks.

167. Similarly, the GOC provided comment on State-owned entities in the steel sector and the extent of government control. The GOC pointed out that both SOEs and non-SOEs are equally subject to the relevant laws, and details were provided. The role of SASAC as the representative of the shareholder was also explained with reference to relevant laws. The GOC considers that there is no evidence to indicate that SOEs possess, exercise or are vested with government authority to the effect that they are public bodies, either legally or factually.

168. The GOC provided information on the categories of sample manufacturers.

169. The GOC also provided responses to specific questions regarding the programmes identified in the RFI. To the extent relevant, these responses are addressed in sections 5, 6 and 7 of this Final Report. The GOC pointed out that it does not have access to information concerning the loan transactions of any individual bank or company, despite being the controlling shareholder, nor does it have access to information on purchase transactions of any individual company. MBIE accepts that this is the situation, and does not consider the GOC is refusing to provide information requested or is seeking to impede the investigation by not providing this information, since it does not have access to specific information.

170. The GOC also made comments on the investigations undertaken by other authorities and the extent to which MBIE should be bound to follow them. The GOC stated that MBIE cannot take the determinations of overseas jurisdictions as legal jurisprudence or authority, given that it has an independent obligation to comply with the SCM Agreement. It was noted that none of the determinations referred to in the original Final Report or the Judgment had ever been reviewed and confirmed by a WTO panel or by the Appellate Body, so MBIE was not bound by any of the determinations. MBIE was obligated to undertake an independent analysis in conformity with the SCM Agreement and on the basis of the records of the current investigation.

171. The GOC noted that the current case could be distinguished from the investigations by other authorities in several aspects, including the products concerned, the investigation period and the entities concerned. A summary table of these differences as they related to the EC investigations was provided.

172. The GOC pointed out that the determinations by other authorities were largely based on facts available or adverse facts available or the specific evidentiary circumstances.

173. It was suggested that MBIE should also be mindful of the change in circumstances over time as a result of the GOC's continued reforms, in particular in the steel and banking sectors. In this context, the GOC noted that the 13th Five-Year Steel Plan replaced "accelerating product upgrading" with the policy of reducing over-capacity. Also, the 13th Five-Year Steel Plan acknowledged the market's decisive role in allocating resources to the steel sector, and discouraged government intervention in the micro-economy.

174. In the banking sector, two decades of financial reforms meant that the there is an open market characterised by publicly-listed companies driven by market fundamentals. Large

commercial banks in China employ sophisticated credit risk assessment policies and models, and make independent assessments of a loan application based on a thorough market-based risk assessment. The GOC described the Capital Rules that came into effect in 2013, the liberalisation of lending rates, and the self-governance of commercial banks, illustrated by comments from the financial reports of the leading SOCBs.

175. The GOC noted that the determinations by other jurisdictions were made on the basis of the specific factual records before them, and provided a table showing the differences in the information considered in EC *Hot-Rolled Flat Products*, ADRP 63, USDOC *Corrosion Resistant Steel*, and CBSA *Concrete Reinforcing Bar*, compared with the current investigation.

CCOIC

176. The CCOIC made an oral presentation to the Ministry on 19 March 2019. The matters covered and the information provided was similar to that provided by the GOC in its RFI response.

4.2.3 Exporter's/Manufacturer's Questionnaire Responses

177. In the original investigation, Exporter's Questionnaires were sent to known exporters, but these companies were intermediaries which are unlikely to be involved in any of the alleged subsidy programmes under investigation. CMC, Marubeni, RGS and Stemcor provided responses to the Exporter's Questionnaire.

178. In the original investigation, MBIE sent Manufacturer's Questionnaires to all of the known manufacturers. The only Manufacturer's Questionnaire response was received from Zong Cheng.

Zong Cheng

179. Zong Cheng provided a detailed response to the original questionnaire. Zong Cheng, which was established in 2004 as a wholly foreign-owned enterprise, is located in Jiangyin City, Jiangsu Province, China.

180. In FY 2016 Zong Cheng exported [redacted] tonnes of the subject goods to [redacted]. Total exports to New Zealand included shipments of galvanised steel coil falling outside the description of the subject goods because the coil was thicker than 1.9mm. Zong Cheng does not actively seek orders in export markets, but receives orders from [redacted]. Upon receiving an order inquiry from [redacted], Zong Cheng [redacted] which takes account of the [redacted]. Upon acceptance by [redacted] and agreement of terms and conditions, [redacted], with hot rolled coil feed material being purchased for a particular order. Prices are [redacted]. A [redacted] sale.

181. Zong Cheng provided specific comments and information on the alleged subsidy programmes.

182. In the original investigation, MBIE did not conduct a verification visit to the premises of Zong Cheng. Verification visits are not required by Act or the SCM Agreement.[13] The extent to which the information provided by Zong Cheng could be considered reliable was assessed by MBIE in the context of all of the information available.

Other Manufacturers

183. No other manufacturers provided questionnaire responses in the original investigation.

184. After prompting, Angang and Baosteel advised that in light of the level of trade with New Zealand compared with total sales, responding to the questionnaire was an excessive burden and they had decided not to provide any further replies. Some general claims were made that neither company was receiving subsidies, and both were large integrated producers which operated under market-driven conditions.

185. While the failure to provide an RFI response may reflect the comparative insignificance of exports to New Zealand in the context of a manufacturer's total business, it does affect MBIE's ability to source information and to draw appropriate conclusions relating to the level of subsidisation that might be applicable. In such circumstances, MBIE must make a judgment on the reliability of the information before it, and use the best information that is available to it in order to reach a conclusion on the existence and level of any subsidisation. While another explanation for the failure to provide information could be to avoid providing evidence of subsidisation, the information available to MBIE does not support that explanation.

4.2.4 Other information

186. In the original investigation, MBIE undertook further research into matters relating to the alleged subsidisation of Chinese production and exports of galvanised steel coil to New Zealand, including relevant WTO documentation and dispute settlement reports, the review of the investigations by other authorities referred to in the application, and the various general commentaries identified by the applicant. The High Court also referred to investigations and related proceedings undertaken by other jurisdictions, including those referred to by NZ Steel during the High Court proceedings.

[13] See *Argentina – Ceramic Tiles*, WT/DS189/R, relating to the Anti-Dumping Agreement, which noted, at footnote 65, page 178, "There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the Anti-dumping Agreement merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfil its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based." This finding was endorsed by the panel in *Egypt — Steel Rebar*, WT/DS211/R, page 79. The SCM Agreement, in Article 12.6, contains similar provisions to the Anti-Dumping Agreement.

WTO Documentation and Dispute Settlement Reports

187. WTO documentation includes reports by Members on specific subsidy programmes which they operate, while reports of dispute settlement cases by panels and the Appellate Body provide a basis for analysing and assessing the treatment of programmes under domestic legislation and WTO rules.

188. The High Court noted that relevant WTO dispute findings included DS295, DS299, DS379, DS436, and DS437. On the basis of findings by the Appellate Body, the High Court identified the test for a public body is whether the entity "possesses, exercises or is vested with governmental authority." MBIE has also referred to several other dispute findings in this Report.

189. Where reference is made to WTO jurisprudence or reports of panels or the Appellate Body, it should be recalled that:

> *A WTO dispute relates to a specific matter and takes place between two or more specific Members of the (WTO). The report of a panel or the Appellate Body also relates to that specific matter in the dispute between these Members. Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. As in other areas of international law, there is no rule of* stare decisis *in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases. This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases.*[14]

190. This is an important consideration when authorities are seeking to develop fixed methodologies or tests in order to interpret provisions of the SCM Agreement, since there is a risk that the evolution of WTO jurisprudence could lead to such tests becoming inconsistent with relevant findings.

191. It should also be noted that Panels are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> *[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.*

192. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination

[14] WTO Dispute Settlement System Training Module: Chapter 7 at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm.

of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall determination.[15] The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[16]

193. The relevant WTO proceedings to matters raised in this Final Report are listed below (AB is Appellate Body, 21.5 is a reference to compliance proceedings):

Table 4.1: WTO Disputes

Dispute and body	Case	Short Title
DS189 Panel	*Argentina — Definitive Anti-Dumping Measures on Measures on Imports of Ceramic Tiles from Italy*	*Argentina – Ceramic Tiles*
DS211 Panel	*Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey*	*Egypt – Steel Rebar*
DS277 AB (21.5)	*United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*	*US – Softwood Lumber VI*
DS295 AB	*Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*	*Mexico – Anti-Dumping Measures on Rice*
DS296 AB & Panel	*United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*	*US — Countervailing Duty Investigation on DRAMs*
DS299 Panel	*European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*	*EC – Countervailing Measures on DRAM Chips*
DS336 AB and Panel	*Japan — Countervailing Duties on Dynamic Random Access Memories from Korea*	*Japan — DRAMs (Korea)*
DS341	*Mexico — Definitive Countervailing*	*Mexico – Olive Oil*

[15] *US – Countervailing Duty Investigation on DRAMS*, WT/DS296/AB/R paragraph 186.

[16] *US – Softwood Lumber VI*, WT/DS277/AB/RW paragraph 93.

Panel	*Measures on Olive Oil from the European Communities*	
DS379 AB	*United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*	*US – Anti-dumping and Countervailing Duties (China)*
DS436 AB & Panel	*United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*	*US – Carbon Steel (India)*
DS437 AB & Panel & Panel (21.5)	*United States – Countervailing Duty Measures on Certain Products from China*	*US – Countervailing Measures (China)*

Investigations by Other Jurisdictions

Australia

194. In the original investigation, MBIE undertook a review and analysis of reports of Australian subsidy investigations into goods from China, and in particular the various reports in the investigation into the alleged subsidisation of zinc coated steel and aluminium zinc coated steel from China, ADC *Galvanised Steel* 193[17] which took place in 2011-13. The scope of the goods covered was broader than the galvanised steel coil covered by this reconsideration. The information from Australian investigations includes questionnaire responses from Chinese manufacturers which are also parties to the current reconsideration. The POI was the year ended June 2012.

195. The Australian Investigation ADC *Galvanised Steel* 193 concluded that galvanised steel exported from China was subsidised with the following subsidy margins:

Table 4.2: Australian ADC Investigation

Exporter	Subsidy Level
ANSTEEL (Angang)	Negligible
TAGAL	Negligible
Wuhan Iron and Steel Co Ltd	12.5%
YPC	5.2%
Non-cooperating exporters	22.8%

196. Other Australian proceedings referred to in the Final Report and in the Judgment included the review of ADC *Galvanised Steel* 193 undertaken by the Anti-Dumping Review Panel (ADRP 2013), and a 2016 investigation into *Rebar and Rod in Coils* (ADC 322).

[17] http://www.adcommission.gov.au/cases/Documents/064-REP193.pdf accessed on 3 April 2017.

197. The Judgment also referred to a 2015 investigation into ADC *Silicon Metal* 237,[18] and to a 2018 ADRP review of *HSS* (ADRP 63) published after the completion of the original Final Report in MBIE's original *Galvanised Steel Coil* investigation.

Canada

198. Although Canadian investigations were not specifically addressed in the original investigation, this reconsideration has reviewed any relevant investigations undertaken by the Canadian Border Service Agency (CBSA).

Table 4.3: CBSA Investigations

Exporter	Subsidy Level
***Concrete Reinforcing Bar* (2014)**	
Shiheng Special Steel	0.4%
All Other exporters	14.7%
***Line Pipe* (2016)**	
Baoshan Iron & Steel/Baosteel America	0.63%
Hengyang Steel Tube/Hengyang Valin	0.64%
Huludao City Steel Pipe Industrial Co	0.38%
Jiangsu Changbao Steel Tube Co	4.51%
Jiangsu Valin Xigang Special Steel Co	7.97%
Tianjin Huiltong Steel Tube Co	1.48%
Wuxi Huayou Special Steel Co	15.50%
Yangzhou Lontrin Steel Tube Co	6.01%
All other exporters	17.32%

199. The Judgment referred to CBSA investigations into *Concrete Reinforcing Bar* (2014), with a POI of January 2013 to March 2014, and *Line Pipe* (2016), with a POI of January 2014 to June 2015.

European Union

200. The EU, through its investigating authority, the European Commission (EC), undertook an investigation in 2012-13, into imports of certain organic coated steel products from China.[19] The goods covered do not include galvanised steel coil. The investigation covered the programmes relating to government provision of goods and services for LTAR, preferential loans and interest rates, equity programmes, income and other direct taxes, indirect tax and import tariff programmes, grant programmes, the purchase by the

[18] The Court's reference to ADC *Silicon Metal* 237 was in relation to the ADC finding that suppliers of electricity in China were public bodies and the ADC's references to the Appellate Body's findings in DS436 and the Panel findings in DS437. MBIE notes that in the original investigation MBIE concluded that electricity was provided by a government or any public body because the State Grid Corporation, which supplies the electricity, is a State-owned entity, and prices were subject to the control of the NDRC; and that the provision of electricity at LTAR is not covered by this reconsideration.

[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:073:0016:0097:EN:PDF.

Government of goods for higher than adequate remuneration, other regional programmes, and ad hoc subsidies referred to in the application. The POI was the twelve month period ending in September 2011.

201. Issues addressed included non-cooperation and best information available, "public body", specificity, and benchmarks.

202. The EC also completed an investigation into *Hot-Rolled Flat Products* in 2017, which was brought to MBIE's attention by NZ Steel following the publication of the original EFC Report, and which was referred to in the High Court judgment. The investigation covered preferential loans and guarantees, various tax and VAT-related programmes, grants, the provision of raw materials at LTAR, the provision of electricity at LTAR, and the provision of land-use rights at LTAR. The investigation included the Shougang Group, which includes Shougang Jingtang United Iron and Steel Co covered by MBIE's investigation. The POI was the calendar year 2015.

203. The outcome of the EU investigations established the following levels of subsidy:

Table 4.4: EC Investigations

Exporter	Subsidy Level
***Organic Coated Steel* (2013)**	
Zhangjiagang Panhua Steel Strip Co., Ltd.; Chongqing Wanda Steel Strip Co., Ltd.; Zhangjiagang Free Trade Zone Jiaxinda International Trade Co., Ltd.	29.7%
Zhejiang Huadong Light Steel Building Material Co. Ltd.; Hangzhou P.R.P.T. Metal Material Co., Ltd.	23.8%
Union Steel China	26.8%
Other cooperating companies	26.8%
Other companies	44.7%
***Hot-Rolled Flat Products* (2017)**	
Benxi Group	28.5%
Hesteel Group	7.8%
Jiangsu Shagang Group	4.6%
Shougang Group	38.6%
Other cooperating companies	16.9%
All other companies	38.6%

EC Staff Report

204. The Court also referred to the EC Staff Report (2017), issued in accordance with amendments to the EC Regulations governing the investigation of anti-dumping duties.

205. The EC Staff Report (2017) was prepared for the purposes of addressing Article 2(6a) point (c) of the EU Regulation (EU) 2016/1036 on the protection against dumped imports, as amended by Regulation 2017/2321 (the Basic Regulation). The Basic Regulation refers to the publication of a report on the market circumstances where the EC has well-founded indications of the possible existence of significant distortions in a certain country or a certain sector in that country. The Basic Regulation provides that where there are

significant market distortions with the consequence that costs reflected in the records of the party concerned are artificially low, such costs may be adjusted or established on any reasonable basis, including information from other representative markets or from international prices or benchmarks. Thus, like the Canadian section 20 inquiry, this process addresses the establishment of normal values in dumping investigations, rather than being a direct response to any need to make a public body determination.

206. Significant distortions are defined in the Basic Regulation, and include distortions that occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention. In the assessment of the existence of significant distortions, regard is to be had to the impact of the extent to which the market is served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; State presence in firms, allowing the State to interfere with respect to prices or costs; public policies that discriminate in favour of domestic suppliers or otherwise influence free market forces; the lack or discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; distorted wage costs; and access to finance granted by institutions which implement public policy objectives or otherwise do not act independently of the State.

207. The EC Staff Report examined the core features of the Chinese economy, including the concept of a "socialist market economy", the role of the Chinese Communist Party (CPC) in relation to the economy, the extensive system of plans issued and followed up by various levels of government under the leadership of the CPC, the extensive State-owned sector including the various supervision and control mechanisms, the financial market, the procurement system and the system of investment screening. The EC Staff Report noted that the overall picture that was emerging concerning the framework in which economic activity takes place in China is one where the State continues to exert decisive influence on the allocation of resources and on their prices.

208. The EC Staff Report also reviewed the factors of production, including the provision of land, energy, capital, material inputs (including raw materials) and labour. The conclusion was that the allocation and pricing of the various factors of production was influenced by the State in a very significant manner.

209. Finally, the EC Staff Report examined a number of sectors, including the steel sector. The examination concluded that there were significant distortions resulting from the specific features of the Chinese economy and those found in relation to the various factors of production.

210. Relevant aspects of the EC Staff Report as they relate to banks, land-use rights and input providers are addressed in sections 5, 6 and 7 of this Final Report.

USA

211. In the original investigation, MBIE reviewed the available documentation in the USDOC investigation of certain corrosion-resistant steel products from China, which took place in 2014-16. The goods covered included coated and alloyed corrosion-resistant steel, which

was broader than the galvanised steel coil covered by this reconsideration. The POI was calendar year 2014. The USDOC outlined the basis for its consideration of issues relating to the existence and amount of subsidies in the Issues and Decision Memorandum for the Provisional and Final Determinations[20] in that case. YPC was the sole cooperating mandatory respondent in that proceeding, and the analysis of programmes related to that company, and to the programmes identified by NZ Steel in its application. In addition, the USDOC addressed a number of issues, including questions relating to "public body" ("authorities" in the US context), specificity, and use of benchmarks. The investigation also included Angang, Baosteel and Changshu as non-cooperating exporters.

212. The outcome of the US investigation was to establish subsidy rates as follows:

Table 4.5: USDOC Investigation

Exporter	Subsidy Level
Yieh Phui (China) Technomaterial Co Ltd (YPC)	39.05%
Angang Group Hong Kong Company Ltd	241.07%
Baoshan Iron & Steel Co Ltd	241.07%
Duferco S.A , Hebei Iron & Steel Group, and Tangshan Iron & Steel Group	241.07%
Changshu Everbright Material Technology	241.07%
Handan Iron & Steel Group	241.07%
All Others	39.05%

213. Information from other US investigations was reviewed where appropriate.

214. The High Court also referred to a 2017 USDOC investigation into *Cut-to-Length Steel Plate* (POI of calendar 2015), and to a 2017 US Trade Representative Report (USTR Report) into China's compliance with WTO obligations.

Previous New Zealand Investigations

215. MBIE has undertaken previous investigations into steel products from China which were not available to the original investigation, having taken place subsequent to it, but to the extent that they covered similar issues and programmes and involved some of the same parties, MBIE considers that they can have some relevance to this reconsideration. The investigations concerned were *Steel Reinforcing Bar and Coil* (2018) and *Hollow Steel Sections* (2019).

Other Information

216. Other information obtained by MBIE in the original investigation included copies of government laws, regulations and other instruments; academic articles on issues raised; relevant news reports and commentaries; financial reporting by companies and organisations investigated; and prices, interest rates and other reference material.

[20] http://enforcement.trade.gov/frn/summary/prc/2016-12962-1.pdf accessed on 3 April 2017.

Identified Programmes

217. The subsidy programmes to be addressed in this reconsideration are as follows:

Table 4.6: Alleged Subsidy Programmes

Programme description	Programme type	Level of Alleged Subsidy*
Policy loans to the corrosion-resistant steel industry	Grants or loans	0.86%
The provision of land-use rights for LTAR	Goods or services	0.36%
The provision of hot-rolled steel at LTAR	Goods or services	23.74%
The provision of cold-rolled steel at LTAR	Goods or services	2.11%
The provision of zinc at LTAR	Goods or services	0.22%

* Based on USDOC findings

4.3 General Interpretation

218. There are a number of matters of general interpretation raised in this reconsideration which affect the determinations reached on particular programmes. These matters include:

- The meaning of "public body" (see Annex 2)
- The information to be used in determining the amount of subsidy (see Annex 3).

219. The reconsideration has addressed these matters as required by the High Court.

4.4 Attribution of Subsidies

220. An investigation into the subsidisation of goods needs to ensure that subsidies are appropriately attributed. This requires the identification of the ownership and control links that exist between companies which manufacture and export the subject goods to New Zealand and any other associated companies.

221. The issue arises in relation to the investigation into galvanised steel coil from China because it appears that the investigated manufacturers are parts of wider groups of companies. In addition to determining which subsidies need to be investigated and included in any calculation of countervailing duty, the response to the issue will help determine the denominator to be used in measuring subsidy levels for particular programmes.

222. MBIE has reviewed the practices of other jurisdictions and findings from WTO disputes on this issue. MBIE's approach is to seek to identify all related parties (to manufacturers of galvanised steel coil exported to New Zealand), and make decisions on whether or not subsidies to those related parties should be included when it is deemed reasonable to do so. Subsidies would be examined when (1) a firm that received a subsidy is a holding or parent company of the subject company and the subsidy provides a benefit to the production or sale of the subject goods; (2) a firm that produces an input that is primarily dedicated to the production of the downstream product receives a subsidy that provides a

benefit to the production or sale of the subject goods; or (3) a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership with the subject company, such that it could be deemed to provide a benefit to the production or sale of the subject goods. The inclusion of location-based subsidies would follow this approach.

4.5 Subsidy Analysis

223. The reconsideration has taken account of:

- Information considered in the original investigation
- The terms of the High Court's judgment
- Information provided to the High Court
- Any new primary information relating to the POI provided by interested parties or based on MBIE's researches
- Any secondary information relating to the POI provided by interested parties, including information relating to investigations undertaken by other jurisdictions.

224. The public body determination is central to the reconsideration, and as noted in section 4.2.4 above, the High Court has identified that the test for a public body is whether the entity "possesses, exercises or is vested with governmental authority." Annex 2 sets out the basis for MBIE's public body analysis.

225. With regard to information from other jurisdictions, MBIE notes that some other jurisdictions tend to conclude that the GOC has such a degree of control that it distorts production and markets, and in particular the steel industry, such that prices must be distorted, and that State-owned bodies as well as privately-owned banks and producers act as an arm of the government. MBIE's approach is based on taking each case on its evidential merits and the applicable legislative and treaty provisions. On this basis, MBIE's assessment of whether banks or input providers are public bodies, and its identification of relevant benchmarks for establishing if there is a benefit to a recipient, are all based on a careful examination of the information available that relates to the manufacturers and the goods covered by the current investigation.

226. The objective of the investigation of each alleged subsidy programme is to establish if it is a countervailable subsidy, i.e. there is a financial contribution by a government or any public body that confers a benefit on the recipient and is specific to certain enterprises. MBIE notes that the Appellate Body has stated:

> *With respect to the architecture of Article 1.1 of the SCM Agreement, we note that the provision sets out two main elements of a subsidy, namely, a financial contribution and a benefit. Regarding the first element, Article 1.1(a)(1) defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member. .... If the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls*

within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution.[21]

227. With regard to each of the elements set out in Article 1.1(a)(1) of the SCM Agreement an investigation examines, in relation to each of the manufacturers concerned:

- **whether there is a financial contribution of a kind set out in Article 1.1(a)(1) of the SCM Agreement**: where there is no evidence that an alleged programme exists, or if there is evidence that it has been terminated, or there is evidence that the manufacturer concerned does not come within the eligibility requirements for the alleged programme, then the conclusion is that the alleged programme does not need to be pursued in relation to that manufacturer.
- **whether the financial contribution is made by a government or any public body**: where it is concluded that the entity providing any financial contribution does not meet the requirements for determining that a provider is government or any public body as set out by the WTO Appellate Body, then the conclusion is that the matter does not need to be pursued with regard to that alleged programme. It should be noted that where, for example, grants or loans are paid direct by central or local government agencies, or the programme is based on government revenue being foregone or not collected, then it can be concluded that a financial contribution by a government is involved.
- **whether the financial contribution provides a benefit to the recipient**: if there is no benefit to the manufacturer concerned when, for example, the amount paid for a loan is not less than the amount that would be paid under a comparable commercial loan on the market, or when the goods or services are not provided for less than adequate remuneration determined in relation to prevailing market conditions in the country concerned, then the conclusion is that there is no subsidy, and the alleged programme does not need to be pursued. The existence or not of a benefit is not dispositive of whether there is a financial contribution or if a public body is involved, but does help determine the existence of a subsidy.
- **whether the subsidy is specific to an enterprise or industry, or a group of enterprises or industries (certain enterprises)**: if the subsidy is explicitly limited to certain enterprises by law then it is specific; if there are automatic and neutral objective criteria governing eligibility for and the amount of the subsidy then it is not specific; notwithstanding any appearance of non-specificity, a subsidy may be in fact specific when other factors are considered.[22] Also, if the subsidy is contingent in law or in fact upon export performance or on the use of domestic over imported goods,

[21] From *US – Anti-dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 284.

[22] Article 2.1(c) of the SCM Agreement also requires that in the circumstances where a subsidy may in fact be specific, 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.

then it is deemed to be specific. Note that a specificity analysis is required only where there is a financial contribution by a government or any public body that provides a benefit.

228. All of these elements must be in place before a conclusion can be reached that there is a countervailable subsidy. It follows that where, as here, there is clear evidence that one of the elements is not in place, then it is not necessary to pursue the other elements, for example, if an alleged programme has been terminated, the other elements are irrelevant. Equally, where there is no benefit, there is no subsidy, and the question as to whether there is a specific subsidy does not need to be addressed. The question of whether a financial contribution is made by a government or any public body does not need to be addressed where there is no financial contribution as indicated above, but where there is a financial contribution that is not clearly from a government agency, then it may be necessary to examine the matter to establish if there is a financial contribution from a public body. Where a financial contribution providing a benefit is provided by a government or any public body, and is specific in terms of Article 2 of the SCM Agreement, then there is a countervailable subsidy.

229. The analysis of the subsidy programmes subject to reconsideration set out in the following sections summarises the information available to MBIE.

5. Policy loans to the corrosion-resistant steel industry

230. A finding of countervailable subsidisation in relation to policy loans would require that evidence is available to confirm that under the programme:

- a policy loan was provided by a government or any public body
- a benefit to the recipient was provided through a direct transfer of funds in that the amount the firm receiving the loan paid on the government loan was less than the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market, and
- the programme was specific to certain enterprises.

231. The discussion in this Chapter is in three parts. The first part, in section 5.1, is a summary of the information and conclusions from the original investigation. The second part, in section 5.2, is a summary of the relevant parts of the High Court Judgment. The third part, in section 5.3, is a detailed reconsideration of the issue of policy loans.

5.1 Original Investigation

5.1.1 Application

232. The information provided in NZ Steel's application referred to government policies identifying the corrosion-resistant steel industry as being "encouraged" and therefore eligible for certain benefits from the central government as well as local and provincial authorities, including financing. This information was based on government instruments from 2005 and 2011. NZ Steel also referred to various reports on the Chinese steel industry and the role and level of subsidies granted through preferential loans and directed credit. NZ Steel was unable to identify Chinese mills supplying New Zealand so could not particularise its claims, including the identity of the banks that provided "policy loans" or the extent to which manufacturers of galvanised steel coil exported to New Zealand had participated in beneficial financing.

5.1.2 GOC Response

233. The GOC asserted that there is no government programme of "policy loans" to the galvanised steel coil industry. The GOC provided supporting documentation[23] to demonstrate the autonomous business governance of commercial banks in China. The GOC stated that the rules governing working capital loans provide that industrial policy is not a consideration for loans made to any companies, and that for short-term loans used as

[23] Including, "Interim Measure for the Administration of Working Capital Loans", "Capital Rules for Commercial Banks (Provisional)", "Notice of the PBOC on Further Market-oriented Reform of Interest Rate (2013)", "Notice of the PBOC on Reducing Benchmark Interest Rates of Deposit and Loan of Financial Institutions and Enlarging the Rate Floating Range (2015)", "Guidelines on Internal Control of Commercial Banks", and "The Company Law of China".

floating funds there is no requirement to comply with any industrial policy. In its response to the Supplementary Questionnaire, the GOC pointed out that the People's Bank of China (PBOC) has no authority or function to make loans to any individual company.

5.1.3 Manufacturer Response

234. The evidence from the cooperating manufacturer, Zong Cheng, was that it did not obtain loans from Chinese banks, but rather from Taiwanese banks which offered lower interest rates.

5.1.4 MBIE Research

235. MBIE undertook research into the history and operation of the banking sector in China, and reviewed information relating to individual banks.

236. The research established that in 1994 policy lending banks (policy banks) were established in order to take over lending for development from the large State-owned commercial banks (SOCBs). These policy banks were the Agricultural Development Bank of China (ADBC), the Export-Import Bank of China (EXIM Bank) and the China Development Bank (CDB). A review of the websites of these banks confirmed that the policy banks are under the direct administration of the State Council, and are funded mainly through borrowing from the central bank. The ADBC supports the development of the agricultural industry and the rural economy; the EXIM Bank facilitates exports and imports and off-shore activities; and the CDB is defined as a development finance institution. On the basis of the information available to it, MBIE concluded that policy banks were public bodies.

237. MBIE's research into SOCBs noted that they are now commercial banks, restructured into joint stock limited liability companies, and governed by relevant banking laws and regulations. The GOC remains a major shareholder in the large commercial banks through the Ministry of Finance and Central Huijin Investment Ltd (Huijin - an organisation through which the GOC can act as a shareholder in the major banks). Bank reporting indicated that Huijin exercises rights and fulfils its obligations as an investor on behalf of the State but neither engages in other business activities nor intervenes in the daily operations of the key state-owned financial institutions of which it is a controlling stakeholder.

238. MBIE noted that while the SOCBs did refer to their support of government policies, this was subject to the laws, rules and disciplines set by the GOC, including the compliance requirements of listed companies in China and Hong Kong, and the supervision of the relevant regulatory authorities. MBIE considered that while such banks may have some of the characteristics of a public body, such as ownership by the GOC, and while their activities were consistent with general government policies and rules governing banking, this was not sufficient evidence that they were public bodies. Taken all together, government policies and objectives in China did not provide positive confirmation that SOCBs were exercising governmental authority or functions, or were subject to meaningful control by the government. Accordingly, MBIE considered that it was not established that SOCBs are public bodies for the purposes of Article 1.1(a)(1) of the SCM Agreement, and there was no positive evidence linking any particular commercial bank with concessional

loans provided to any of the manufacturers of galvanised steel coil exported to New Zealand.

239. MBIE also considered whether Article 1.1(a)(1)(iv) of the SCM Agreement would be applicable, but considered that there was no positive evidence to support a contention that SOCBs not considered to be public bodies were entrusted or directed to provide loans to manufacturers of galvanised steel coil.

240. In addition to considering the question of whether banks were public bodies, MBIE reviewed the bases for establishing the level of benefit in the case of preferential loans, and whether any assistance to the galvanised steel coil industry was specific.

241. MBIE sought out information from financial reporting by non-cooperating manufacturers. The Baosteel Group Annual Report for 2015, in its consolidated balance sheet, included a reference to loans from the Central Bank totalling RMB 130.7 million and RMB 181.8 million in the 2016 Semi-annual Report (i.e. at June 2016). Short-term borrowing of RMB 27,111.0 million was also identified, made up mainly of unsecured and non-guaranteed loans. Details of interest rates applicable to the short-term borrowings were provided. In the 2016 Semi-annual Report, the level of borrowing from the Central Bank totalled RMB 181.8 million, and short-term loans totalled RMB 33,610.3 million.

5.1.5 Secondary Information

Other Jurisdictions

242. Findings by the Australian authorities, the European Commission and the USDOC indicated the likelihood of subsidies, but in the absence of information from the GOC those investigating authorities relied on facts available to determine the existence and extent of any subsidisation.

Australia

243. The Australian authorities, in Investigation ADC *Galvanised Steel* 193, looked at capital injections into a state-owned producer of galvanised steel, and concluded that there was a countervailable subsidy, based on best information available.

EU

244. In its submission of 6 April 2017, NZ Steel referred to findings published in the Official Journal of the European Union in Regulation (EU) No. 215/2013 of 11 March 2013, which set out findings in an investigation into *Certain Organic Coated Steel* products. The findings were that both the GOC and exporting producers had failed to provide information on the lending policies of Chinese banks. In view of this lack of cooperation and the totality of the facts available, it was deemed appropriate to consider that all firms in China were receiving concessional treatment on loans.

245. In commenting on the original EFC Report, NZ Steel advised that a recent EC investigation into hot-rolled steel from China had been released on 8 June 2017, and included a range of findings in respect of Shougang, a cooperating manufacturer in that investigation, including findings on policy loans.

246. In commenting on the NZ Steel advice, MBIE noted that in the brief time available, MBIE had considered the EC report on *Hot-Rolled Flat Products*, and noted that the EC's conclusions on policy lending were based on AFA. MBIE accepts that the EC report did not specifically refer to AFA,[24] and this reconsideration includes a full analysis of the EC findings.

USA

247. The USDOC 2016 investigation into corrosion-resistant steel from China considered that SOCBs are "government authorities" and that policy considerations continue to be a significant factor in lending decisions. In *Corrosion-Resistant Steel* the USDOC rejected the GOC claims that the enactment of new Capital Rules in 2013 had made substantial changes to China's commercial banking sector, including the elimination of industrial policies as a consideration for the provision of loans, by noting that there was a distinction between *de jure* reforms of China's banking sector, and *de facto* banking practices. The USDOC suggested that insufficient time had elapsed to see clearly the definitive *de facto* results of the incremental reforms and regulatory initiatives, and also noted that the new Capital Rules addressed only capital adequacy and loan management standards, and not the use of policy considerations or the role of government in the financial system. The USDOC saw no reason to contradict findings from earlier cases that China's banking sector did not operate on a commercial basis and was subject to significant distortions, primarily arising out of the continued dominant role of the government in the financial system and the government's use of banks to effectuate policy objectives. The USDOC considered that Article 25 of the Steel Plan specifically encourages financial institutions to comply with development policies for the iron and steel industry.

248. The US findings reflect the conclusions reached by the WTO Appellate Body in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379), when it noted that the USDOC analysis of SOCBs was broader than that undertaken in relation to SOEs providing inputs when it had relied only on ownership and control. In considering the position of SOCBs the USDOC had considered other factors, including relevant provisions of applicable laws, and statements by SOCBs, and other evidence. On this basis, the Appellate Body felt able to conclude that, while it might not have reached the same conclusion, the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that the SOCBs exercise governmental functions on behalf of the Chinese Government.

[24] But note that, as set out in Annex 3, EU legislation provides that where a party does not cooperate, or cooperates only partly, so that information is thereby withheld, the result of the investigation may be less favourable to the party than if it had cooperated. The USA legislation provides that the USDOC may use an adverse inference in selecting from facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information, hence AFA. The essence of these provisions is not dissimilar in permitting the use of information which is adverse to the interests of the investigated parties.

249. MBIE noted that the USDOC investigations which were the subject of DS379 took place in 2007-2008, and this does not mean that Chinese SOCBs are always to be treated as public bodies, but rather that the USDOC determination was properly based on an examination of a range of factors, not simply ownership, which led it to conclude that SOCBs were meaningfully controlled by the government in the exercise of their functions.

5.1.6 MBIE Analysis and Considerations

Financial Contribution Providing a Benefit

250. MBIE considered that there was no doubt that manufacturers of galvanised steel exported to New Zealand obtained bank loans to finance their operations, and there was some evidence to suggest that some manufacturers may have obtained loans from "policy banks" (but not the PBOC).

A government or any public body

251. MBIE reviewed the information available on the Chinese banking sector and the financial institutions operating within it.

252. The GOC stated that the SOCBs in China are not "public bodies", because they do not possess, exercise, or are vested with governmental authority, and asserted that government ownership *per se* does not establish that they are a "public body".

253. MBIE accepted that the PBOC does not provide loans to individual companies, but assessed the position of the PBOC and the "policy banks". On the basis of its analysis of their role and functions, MBIE concluded that the PBOC, the ADBC, the Ex-Im Bank, and the CDB are "public bodies."

254. With regard to the large SOCBs operating in China's financial system, MBIE considered that they may have some of the characteristics of a "public body", e.g. State ownership, and their activities are consistent with general government policies. However, this did not, of itself, provide evidence that an entity is a "public body", since private banks also deploy their policies in line with government planning. The government policies applying to the sectors concerned, in this context, are reflected in the Capital Rules for Commercial Banks, and the autonomous business governance of commercial banks in China. MBIE considered that, taken all together, government policies and objectives in China do not provide positive confirmation that SOCBs were exercising governmental authority or functions, or were subject to meaningful control by the government, rather than acting in accordance with government policy.

255. Accordingly, while MBIE was satisfied that the PBOC and "policy banks" are public bodies, it was not established that other commercial banks in China, including SOCBs were "public bodies" for the purposes of Article 1.1(a)(1) of the SCM Agreement.

Level of Benefit

256. On the basis that loans may have been provided by "policy banks" to manufacturers of subject goods exported to New Zealand, and that the providers of the loans are public bodies, the level of benefit to be calculated in accordance with section 7(2)(b) of the Act is

the extent to which the amount that the recipient of the loan pays under the loan is less than the amount the recipient would pay under a comparable commercial loan that the recipient could obtain on the market. In such a case the benefit to the recipient shall be deemed to be the difference between those amounts.

257. The information provided by Zong Cheng suggested that interest rates offered by Chinese banks may not be concessional when compared with rates available outside China.

258. In the EU investigation into *Organic Coated Steel* referred to above, the benefit to the exporting producers was calculated by taking the interest rate differential between the appropriate premium on bonds issued by firms based on a "non-investment grade"[25] bonds (BB at Bloomberg), and comparing it with the standard lending rate of the PBOC. This differential, expressed as a percentage was multiplied by the outstanding amount of the loan, and then allocated over the total turnover of the cooperating exporting producers. The subsidy rates established through this process were 0.25% and 0.89% for two co-operating companies, with a weighted average rate of 0.58% for cooperating companies not included in the sample. The rate for non-cooperating companies was set at the highest subsidy rate for an entity related to one of the sampled cooperating companies, at 0.97%.

259. The USDOC used a range of benchmarks depending on the nature of the loan, using interest rates in certain middle-income countries, adjusted for inflation, for short-term RMB-denominated loans; adjusted BB-rated bond rates for long-term RMB-denominated loans; and the London Interbank Offering rate (LIBOR) plus the average spread between LIBOR and the one-year corporate bond rate for companies with a BB rating. On the basis of this approach, the level of countervailable subsidy calculated for YPC was 0.76%.

260. MBIE noted from the Baosteel Group Annual Report, and from published reports and commentaries, that in 2013, Baosteel sold USD 500 million in 2018 bonds with a 3.75% coupon rate, suggesting a credit rating in the lower to upper medium grade for investment-grade bonds. MBIE also notes that the PBOC loan benchmark interest rate was reduced from 5.1% to 4.85% on 27 June 2015, to 4.6% on 25 August 2015, and to 4.35% on 23 October 2015.

261. The Baosteel loan of RMB 130.7 million from a Central Bank was apparently paid off at the end of the third quarter of 2016 (according to the 2016 Q3 public report of Baosteel, provided as Exhibit 1 in the GOC response to the Supplementary Questionnaire). In view of Baosteel's credit rating the benchmarks suggested by the EC and USDOC investigations would not be appropriate. For illustrative purposes to gauge the level of benefit that might be involved, MBIE assumed that no interest at all was paid, and compared that with the PBOC loan benchmark rate. The resulting level of benefit is 0.005%. This level is too low to

[25] A BB rating usually indicates a speculative investment where the obligor is less vulnerable in the near term than other lower-rated obligors, but faces major ongoing uncertainties and exposure to adverse business, financial, or economic conditions which could lead to the obligor's inadequate capacity to meet its financial commitments.

be meaningful and MBIE does not consider it to be a basis to include it in any overall level of subsidisation. MBIE notes that the EC considers any level of subsidisation below 0.01% to be negligible, and does not count it in any total levels of subsidisation.

Specificity

262. In its investigation into corrosion-resistant steel referred to above the USDOC noted that it found that policy lending is specific to an industry when the industry is listed in certain GOC policies and catalogues (such as the Steel Plan) that direct the use of loans to promote targeted industries, i.e. Article 25 of the Steel Plan specifically encouraged financial institutions to comply with development policies for the iron and steel industry. The Australian authorities have also cited Article 25 to support their finding that it reflects a direction by the GOC to the banks.

263. The EC also referred to the steel industry as being in the "encouraged" category in Decision No. 40, an Order from the State Council, which classifies industrial sectors into "Encouraged, Restrictive and Eliminated" projects. The EC noted that industries listed as "Encouraged" represent only a portion of the Chinese economy, and only certain activities within these sectors are given "encouraged" status. Under Decision No. 40, "encouraged investment projects" are to benefit from specific privileges and incentives, *inter alia*, from financial support.

264. For reasons set out in some detail in the original Final Report, MBIE did not consider that the steel industry, as such, is in the "encouraged" category, but does consider that galvanised steel coil is included in that category through the Guidance Catalogue's reference to corrosion-resistant steel.

Conclusions

265. MBIE considered that information provided by the GOC, the responses from the cooperating manufacturer, and information from published financial reports of steel companies were the best information available.

266. MBIE concluded that assistance provided to a manufacturer of galvanised steel coil would be specific because it comes under the "encouraged" category, and may therefore receive credit support. However, the available information indicated that any benefit to exporters of galvanised steel coil to New Zealand from policy loans by policy banks was extremely negligible.

267. On the basis of the analysis, the conclusion was that there was no financial contribution provided by way of "policy loans" to manufacturers of galvanised steel coil exported to New Zealand which provided any benefit.

268. MBIE therefore concluded that there was no countervailable subsidy in respect to government provision of "policy loans."

5.2 High Court Judgment

Public Body Test

269. The High Court considered that there was "an international consensus that Chinese steel products are subsidised by public bodies," and went on to consider whether NZ Steel had established that MBIE had made a reviewable error in providing its advice to the Minister. The High Court reviewed the findings of other jurisdictions and WTO dispute findings, and concluded that MBIE had misunderstood the effect of the Appellate Body's findings in DS436 on the conclusion reached in ADRP 2013, and this misunderstanding was an error of law as to the "public body" test.

270. The High Court noted that it was less clear that the error of law affected the Final Report's conclusions on whether SOCBs were public bodies (as opposed to the conclusions regarding SIEs providing inputs at LTAR). MBIE had not referred to ADRP 2013, nor was there any reference to whether SOCBs can control participants in the steel industry. There were, however, other issues with MBIE's findings on SOCBs and it was not necessary for the High Court to reach a concluded view on whether MBIE's error of law was material on this aspect of MBIE's conclusion.

Overseas Jurisdictions

271. The High Court noted that MBIE was satisfied that the PBOC and policy banks were public bodies, but the level of benefit provided to the Chinese producers was extremely negligible. It was noted that MBIE was not satisfied that SOCBs were public bodies, and therefore the subsequent questions of benefit and specificity were not considered.

272. The High Court reviewed the evidence used by MBIE to reach its decision on SOCBs, noting that in discussing overseas investigations MBIE had stated that in the absence of information from the GOC those investigating authorities had relied on the best information available to determine the existence and extent of any subsidisation. The High Court also reviewed the basis on which MBIE had concluded that policy banks were public bodies.

273. The High Court pointed out that MBIE's advice to the Minister that SOCBs were not public bodies did not place any weight on the findings of the overseas jurisdictions. The High Court noted that ADC *Galvanised Steel* 193 was not about SOCBs so could be put aside, while MBIE was entitled to place no weight on the USDOC findings considered in DS379 given that the findings were somewhat historic. The High Court considered that of more potential relevance were the EC findings in *Organic Coated Steel* and the USDOC findings in *Corrosion Resistant Steel*.

274. The High Court went on to review the findings in those proceedings. It was noted that the EC investigation had verified information from cooperating sources but considered that the GOC had not been cooperative, so had to rely on secondary information to reach its conclusion that SOCBs were public bodies. The High Court pointed out that the use of secondary information was not the same as making assumptions adverse to a party simply

because they had not cooperated. MBIE had not articulated a reason for placing no weight on the EC's finding and coming to the opposite determination.

275. The High Court also reviewed the USDOC proceeding. It noted that the USDOC made its determination that SOCBs were public bodies on the basis of secondary sources of information, but not on an adverse inference, and outlined the information relied on. This was relevant information for MBIE, which did not identify what had changed since the USDOC determination such that no weight should be place on the findings.

276. The High Court concluded that the EC and USDOC findings were relevant secondary sources of information, but MBIE gave them no weight. The Minister would have understood from MBIE's advice that this was because those investigations had used an AFA approach, which involved "assuming the worst", and the High Court stated that this was not an accurate statement of the basis on which those investigations had concluded that SOCBs were public bodies. The High Court also pointed out that the summary of findings from other jurisdictions set out in the Judgment showed that there were a number of other investigations which had found that Chinese-produced steel products received benefits from SOCBs at a meaningful level. Because MBIE had such limited direct information from which to make its assessment, those other investigations potentially provided relevant and reliable information. The particular investigations referred to in relation to policy loans included ADC *Steel Reinforcing Bar* 322, CBSA *Concrete Reinforcing Bar*, CBSA *Line Pipe*, and USDOC *Cut-to-Length Steel Plate*.

277. The High Court also noted that MBIE was entitled to place no weight on the USDOC findings considered in DS379 given the findings were somewhat historic.

278. In its summary table of the findings of the overseas jurisdictions, the High Court noted that none of the overseas authority reports distinguished between SOCBs and policy banks in the way that MBIE did. Therefore their benefit and specificity findings did not distinguish between them either.

279. The High Court went on to note the relevance of EC *Hot-Rolled Flat Products*, in particular since the producers selected by the EC included the Shougang Group which was covered in MBIE's investigation. The High Court noted the detailed investigation undertaken by the EC, including questionnaires and verification visits, and the analysis undertaken by the EC to establish proof of the exercise of control in a meaningful way. It was noted that the EC concluded that the GOC had exercised meaningful control over the conduct of the SOCBs examined and were therefore public bodies. The High Court pointed out that this conclusion was based not only on the formal indicia of control but also on an examination of whether meaningful control actually existed.

280. The High Court pointed out that MBIE's advice to the Minister that the EC conclusions were based on AFA was wrong. While the High Court recognised the very compressed time period facing MBIE, it did have a responsibility for carrying out the investigation and could have been keeping itself up-to-date on relevant overseas developments.

281. The High Court also noted the EC Staff Report would have provided new information for any fresh application, and referred to relevant parts of that Report which supported the findings in EC *Hot-Rolled Flat Products*.

5.3 Reconsideration

5.3.1 Primary Information

282. The primary information available to MBIE includes questionnaire responses from the original investigation and this reconsideration, and MBIE research conducted for the original investigation and for the reconsideration.

5.3.1.1 GOC Response

283. In its response to the Reconsideration RFI, the GOC:

- Quoted from relevant WTO jurisprudence in support of its claim that SOCBs in China are not "government authorities" or "public bodies", and stated that MBIE should objectively consider the facts provided and properly analyse the characteristics of the SOCBs on their own merits.
- Noted that China has achieved substantial market-oriented reforms in the banking sector by enforcing new rules and further deregulating interest rates, and described the relevant rules. The GOC pointed that that loans for working capital are not subject to any requirement to comply with any industrial policy. With regard to the applicable rules, the GOC noted that the 2013 Capital Rules established tight disciplines over the size of capital and related ratios that impinge heavily on loan management in general and risk management of loans in particular. Also, by the time of the POI the PBOC had completely deregulated its limitation on the floor of interest rates by commercial banks. The GOC also provided information showing that interest rates in China had moved in line with those in the US.
- Stressed that SOCBs in China make independent decisions on lending based on their own criteria. The GOC noted that commercial banks negotiate loans, taking account of the economic position of the borrower and relevant factors such as its competitive position, past performance, operating profits and costs, prospects for future development, and the nature and value of the collateral concerned. The GOC provided details of the processes operated by the big four SOCBs. The GOC did note that industry policies can be taken into consideration when evaluating a loan but are not the decisive factor. The GOC commented on the good financial situation of Baosteel and Angang.
- Stated that SOCBs as listed companies are required to operate commercially and independently and to establish sound corporate governance. The GOC noted that the majority of SOCBs in China are listed companies in Chinese or Hong Kong stock exchanges, and are required to operate commercially and independently and to establish sound corporate governance. Their operations are required to comply with stock exchange rules and are subject to the supervision of the securities regulatory authorities. The GOC provided copies of the 2016 Annual Reports for the big four

SOCBs, which included the comments regarding the role of Huijin in fulfilling its obligations as an investor on behalf of the State and that it neither engages in other business activities nor intervenes in the daily operation of the financial institutions in which it is the controlling shareholder.

284. The GOC considered that the information provided showed that the *de jure* reforms of the banking sector and *de facto* practices of the SOCBs in terms of reducing loans to overcapacity industries, including the iron and steel industry, demonstrated that SOCBs do not exercise, possess or are vested with governmental authority or function, and they are not subject to meaningful control by the GOC.

285. The GOC did not comment on policy banks because there was no evidence that producers subject to the investigation had received loans from policy banks during the POI.

CCOIC

286. At the meeting on 19 March 2019, the CCOIC made an oral presentation which reaffirmed the points made above.

5.3.1.2 Zong Cheng

287. In the original investigation MBIE was satisfied that there was reliable information that Zong Cheng did not receive loans from Chinese banks, whether State-owned or not, and not from policy banks, so there was no financial contribution by a government or any public body that provided a benefit.

288. Zong Cheng provided full and detailed information on bank loans it had received. Loans were received in US dollars from Taiwanese banks:

Table 5.1: Borrowing by Zong Cheng

Bank	Total Loans in POI (USD)	Interest Rates

289. During this period, the Taiwan Central Bank discount rates on 10-day loans to banks were 1.875% at the beginning of the POI and 1.375% at the end. The rates for accommodations with collateral were at a margin 0.375% higher than these rates.

290. In the original Final Report, it was noted that the evidence from the cooperating manufacturer, Zong Cheng, was that it did not obtain loans from Chinese banks, but rather from Taiwanese banks which offered lower interest rates. It was also noted that the

information provided by Zong Cheng suggested that interest rates offered by Chinese banks may not be concessional when compared with rates available outside China.

291. The conclusion is that since Zong Cheng did not obtain loans from Chinese banks, it has not received any benefits from a financial contribution from a government or any public body involving the provision of a loan at amounts lower than the amount paid on a comparable commercial loan.

292. This programme was not considered in ADC *Galvanised Steel* 193, which included Zong Cheng.

5.3.1.3 Other Manufacturers

293. None of the manufacturers provided detailed responses to the RFI so MBIE does not have details of loans received by them during the POI. Angang and Baosteel did claim that they did not receive subsidies in terms of bank loans. Information established by MBIE from its research is set out in section 5.3.1.4 below.

5.3.1.4 MBIE Research

294. The 2016 Annual Report of the China Banking Regulatory Commission (CBRC) reported that as of end-2016, China's banking sector consisted of one national development bank, two policy banks, five large commercial banks, 12 joint stock commercial banks, 134 city commercial banks, 1,114 rural commercial banks, 8 private banks, 40 rural cooperative banks, 1,125 rural credit cooperatives (RCCs), 1 postal savings bank, 4 asset management companies, 39 locally incorporated foreign banking institutions, Sino-German Bausparkasse, 68 trust companies, 236 finance companies of corporate groups, 56 financial leasing companies, 5 money brokerage firms, 25 auto financing companies, 18 consumer finance companies, 1,443 village or township banks, 13 lending companies and 48 rural mutual cooperatives. The number of incorporated banking institutions in China totalled 4,399 with 4.09 million employees as of end-2016.

295. The CBRC stated that in 2016 China's banking sector maintained sound and robust performance on the whole, with assets, liabilities and profits growing steadily. The risk resilience of banking institutions remained stable, with sufficient provisions and controllable risks. As of end-2016, the outstanding balance of non-performing loans (NPLs) in China's banking sector stood at RMB 2.2 trillion. The NPL ratio of all banking institutions registered at 1.91 percent. The Annual Report noted that comprehensive risk management systems were improved. Organization, strategies, processes and procedures have been improved, with a comprehensive risk management system largely established, covering business lines, departments, branches and risks. Risk prevention and control in key areas has been strengthened, with the objective of eliminating systemic risks.

Policy Banks

296. MBIE is satisfied from its analysis of the role of the three policy banks (see section 5.1.4) that their purpose is to operate as an arm of government to provide development finance in their areas of competence. They undertake a governmental function, and are subject to meaningful control by the GOC. MBIE notes that the EXIM Bank operates the Export

Buyer's Credit programme on behalf of the GOC. The CBRC has a separate Supervision Department for policy banks (plus the Postal Savings Bank of China).

297. In 2017, the CBRC issued regulations[26] to implement policy bank reform, strengthen areas of weakness in the regulatory system, and prevent and resolve the financial risks. The regulations highlighted the position of the policy banks as policy financial institutions to serve national strategies, and instructed them to provide sound financial services for key and weak areas of national economic development. Meanwhile, the document also emphasised market-oriented operation and subjected the banks to general rules governing the banking industry. This appears to confirm that prior to 2017, and during the POI, the policy banks were operating under a different regulatory regime from that applying to commercial banks. The policy banks have also been significantly involved in financing international investments, such as the Belt and Road Initiative.

298. MBIE also notes that in 2017 the CBRC issued "Guiding Opinions on Enhancing the Quality and Efficiency of the Banking Sector to Serve the Real Economy" which included the following section which specifically addressed policy banks:

> *The development-based and policy-based financial role shall be maximized. China Development Bank and policy banks shall firmly adhere to their respective functional positioning, highlight principal development-based and policy-based business, play their own advantages, follow the principles of serving state strategies, prudent and regulatory compliance operation, effective risk management and control and the guarantee of principal and low profits, and weaken assessment indicators of scale, growth and profitability types. Under the premise of controllable risks, the China Development Bank and the Agricultural Development Bank of China shall further enhance the investment and use efficiency of special construction funds. China Development Bank and policy banks are encouraged to explore the cooperation with local incorporated banks in the provision of financial services for micro and small enterprises.*

299. MBIE considers that this confirms the special role of policy banks to promote government policies through the provision of development finance. The fact that it was set out as a separate provision indicates that commercial banks do not play this special role.

300. MBIE's conclusion is that policy banks are public bodies in that they possess, exercise or are vested with governmental authority and carry out governmental functions under the meaningful control of the GOC.

---

[26] Individual regulations for each policy bank were issued on 15 November 2017. See http://www.cbrc.gov.cn/EngdocView.do?docID=65878921EFBE41709FB738E59FFD77D1 (ADBC); http://www.cbrc.gov.cn/EngdocView.do?docID=312518AB448D45FB814A41423BAEF6F0 (CDB); http://www.cbrc.gov.cn/EngdocView.do?docID=94532989DEE041A192D753A0AB05C092 (EXIM Bank).

Commercial Banks

301. The 2016 CBRC Annual Report noted that the corporate governance and risk-based performance appraisal and compensation systems of large commercial banks have been strengthened. The compliance management and team building have been strengthened, with relevant rules and procedures further improved. Deficiencies in overseas compliance management were identified and improvement plans were made accordingly. The risk control at group level has been strengthened, with the capabilities for consolidated management and risk data aggregation improved and recovery and resolution plans effectively carried out. An advanced approach to capital management was applied to operations. The CBRC's 2016 Annual Report indicated that for commercial banks the ratio of non-performing loans to total loans was 1.74 per cent, based on the outstanding balance of RMB 1.51 trillion, with total non-performing loans for all financial institutions of RMB 2.2 trillion and a total ratio of 1.9 per cent (see also section 5.3.2.5 below).[27]

302. The GOC questionnaire responses from the original investigation included copies of relevant laws and regulations governing the operation of the financial sector, including commercial banks. MBIE has reviewed the Law on Commercial Banks (1995), Interim Measures for the Administration of Working Capital Loans (2010), the Capital Rules for Commercial Banks (Provisional) (2012), the Notice of The People's Bank of China on Further Market-oriented Reform of Interest Rates (2013), the Notice of the People's Bank of China on Reducing Benchmark Interest Rates of Deposit and Loan of Financial Institutions and Enlarging the Rate Floating Range (2015), and the Guidelines on Internal Control of Commercial Banks (2014).

303. Article 34 of the Commercial Bank Law, originally passed in 1995, provided that commercial banks, i.e. banks that take in deposits from the general public, grant loans, handle settlements etc, shall conduct their business of lending in accordance with the needs of the national economic and social development and under the guidance of the industrial policies of the State. However, Article 4 of the Law provides that the business operations of commercial banks shall be governed by the principles of efficiency, safety and liquidity, and commercial banks shall make their own decisions regarding their business operations, take responsibility for their own risks, assume sole responsibility for their profits and losses and exercise self-restriction. Commercial banks shall, pursuant to law, conduct business operations without interference from any unit or individual. In addition, Article 35 provided that before granting a loan, commercial banks shall strictly examine the borrower's purpose for the loan, ability to repay the loan, method of repayment, etc. There was no requirement or direction in the law that loans should be provided at preferential rates. The GOC has advised that there have been significant market-oriented reforms in the banking sector in the last few years. MBIE notes that, for example, the 1995 Law provided in Article 38 that interest rates should be determined in accordance with the upper and lower limits

[27] The non-performing loan ratios for large commercial banks, as reported in their 2016 Annual Reports, were 1.46 per cent for the BoC, 2.37 per cent for the ABC, and 1.62 per cent for the ICBC.

for interest rates prescribed by the PBOC, but as described below, this prescription no longer applies.

304. The 2010 Measures on Working Capital Loans made it clear that elements of the loan, including interest rates, are to be agreed with the borrower, and there is no requirement, or evidence, that such interest rates are to be at preferential or concessional levels. The Capital Rules provide for disciplines over lending by commercial banks, including capital adequacy requirements and provisions governing the assessment of credit risk. The 2013 Notice on Reform of Interest Rates removed the upper and lower limits to interest rates prescribed by the PBOC and provided that the loan rate level was to be determined by financial institutions autonomously according to business principles. The 2015 Notice on Benchmark Interest Rates announced a reduction in the benchmark interest rate of RMB short term loans of financial institutions from 5.6 percent to 5.35 percent (and further reductions during that year reduced the rate to 4.35 per cent). Financial institutions were required to be mindful of supporting the real economy and realize the policy of the interest rate adjustment and reform, and to adjust rates to clients according to the adjustment in the benchmark rate, and in consideration of creditworthiness and time span, and to strengthen hard constraints of finance and risk management of interest rates and purposely maintain good order of market competition. The 2014 Guidelines on Internal Control of Commercial Banks set out the policies and processes by which commercial banks establish and undertake internal controls to ensure the implementation of relevant laws and regulations, the realisation of the bank's development strategies and business objectives, the effectiveness of risk management, and the quality of business records and other information.

305. The measures, rules and guidelines passed in more recent years have confirmed the requirement on banks to operate commercially and to take account of creditworthiness. All of the instruments reviewed confirm that commercial banks work in accordance with clear requirements to operate on a commercial basis, and do not provide any evidence that commercial banks possess, exercise or are vested with governmental authority. In particular, there is no evidence that under applicable laws and regulations commercial banks are enabled or required to exercise governmental functions, or that the GOC is exercising meaningful control over commercial banks such that they possess, exercise or are vested with governmental authority and exercise such authority in the performance of governmental functions.

Steel Industry Plans and Directives

306. MBIE has reviewed the various plans and directives applicable to the Chinese steel industry as they relate to the provision of financial support and to the public body determination. The relevant instruments include the "Policies for the Development of Iron and Steel Industry" (Order No 35)[28] issued by the National Development and Reform Commission

[28] http://www.asianlii.org/cn/legis/cen/laws/pfdoiasi501/ last accessed on 6 November 2017.

(NDRC) in 2005, the 12th and 13th Five-Year Plans, covering 2011-2015[29] and 2016-2020[30] respectively, and the "Temporary Provisions on Promoting Industrial Structure Adjustment" (Decision 40),[31] and the "Guidance Catalogue for Industrial Structure Adjustment, 2011 Version, (2013 Amendment)" (Guidance Catalogue)[32] established therein. Other relevant documents include the "Opinion of State Council for the Steel Industry to Resolve Excess Capacity" (2016), and the "2017 Implementation Plan to Reduce Capacity."

307. Order No 35 (2005) set out principles and objectives relating to the promotion of industrial concentration. Broad targets were set for the consolidation of major producers, and encouragement for large enterprises to list on stock exchanges, and a requirement that investments should be subject to NDRC examination, with additional requirements on foreign investors. In granting mid and long term loans for fixed asset investment in iron and steel projects a financial institution was required to comply with development policies for the iron and steel industry and strengthen their risk, as were enterprises seeking securities market financing. International cooperation in sourcing raw materials offshore was encouraged. The GOC has advised that while Order No 35 has not been officially repealed, it was enacted many years ago and the situation of the Chinese steel industry has changed substantially.

308. The focus of the 12th Five Year Plan (2011) for the Steel Industry was around environmental protection, higher industry concentration, upgrading technology, and addressing costs associated with location and iron ore pricing. The Plan demonstrated that the GOC was concerned to encourage the steel industry to move in particular directions, and as owner of a significant proportion of major players in the industry had the ability to influence such movements.

309. Decision 40 (2005) identified the targets, principles, direction and priorities of the adjustment of industrial structure, and also provided the categorizing principle of the Guidance Catalogue, i.e. industries are categorized into three types: the encouraged, restricted and those to be eliminated. Article 12 of Decision 40 states that the Guidance Catalogue "is the important basis for guiding investment directions, and for the government to administer investment projects, to formulate and enforce policies on public finance, taxation, credit, land, import and export etc." Articles 14-16 set out the principles to be applied in determining the inclusion of industries in the "encouraged", "restricted" and "elimination" categories. Article 17 of Decision 40 provides, for "encouraged" projects,

---

[29] http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html last accessed on 6 November 2017.

[30] http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf last accessed on 6 November 2017.

[31] http://www.asianlii.org/cn/legis/cen/laws/tpopisa783/ last accessed on 6 November 2017.

[32] Latest version, 2013 Amendment to the 2011 version, provided as Exhibit 2 to the GOC response to the Supplementary Questionnaire in *Galvanised Steel Coil*.

that all financial institutions shall provide credit supports in compliance with credit principles, and for the exemption from tariff and VAT payments of imports of equipment for self-use in such projects. In the case of other preferential policies on encouraged industry projects the relevant provisions of the state shall be applied. Article 18 of Decision 40 provides that new investment projects under the "restricted" category shall be prohibited, with no approvals given for them, no loans, and no relevant procedures handled by administrative departments, such as land administration and a range of other processes. Existing production capacities within the restricted category may take measures within a certain period to transform or upgrade themselves, and financial institutions shall, in compliance with credit principles, continue providing support. Investments are prohibited from contributing to projects under the "eliminated" category, with financial institutions to stop granting credit support, and for all localities and departments to take "powerful" measures to eliminate such projects, including raising the electricity price. Failure to eliminate the activity on time could lead to an order to stop production or close.

310. The Guidance Catalogue identified 40 sectors of the economy covering 761 "encouraged" activities. In the case of the iron and steel industry the Amendment referred to 17 activities. The "restricted" category, covering 17 sectors, identified 20 activities in the iron and steel industry, primarily aimed at discouraging older and smaller production capabilities. The "elimination" category covered outdated production techniques and equipment (17 sectors, 288 activities) and outdated products (12 sectors, 136 products). Industries not belonging to any of the specified categories, but conforming to the relevant laws, regulations and policies of the state, belong to the "permitted" category. The "encouraged" category in the Guidance Catalogue includes, under the Iron and Steel Industry heading, the activity "Development and application of technologies for higher performance, high-quality and upgrading steel products, including but not limited to...", and lists a number of areas and products, including corrosion- and wear-resistant steel. Given the context of the category this reference may not be intended to cover simple galvanised steel coil of the kind exported to New Zealand, but for the purposes of this reconsideration, and in the absence of evidence to the contrary, MBIE considers that this could place galvanised steel coil in the "encouraged" category.

311. The "Opinion of State Council for the Steel Industry to Resolve Excess Capacity" set out approaches to dealing with the problem of overcapacity in the steel industry. Targets and goals for decreasing production and the areas of focus were identified, including environmental protection, energy consumption, quality, safety, and technical improvements. The measures proposed to assist in structural adjustment and addressing overcapacity included the use of project awards and supplements as subsidies and compensation. Also referred to was the need to improve tax policies to promote adjustment and to achieve environmental and energy use goals. The need to use market-oriented measures to handle corporate debts and non-performing assets of banks was noted, as was the need to crack down on enterprise debt to protect the legitimate rights and interests of creditors. There were no provisions suggesting or requiring commercial banks to provide finance on a special or differential basis.

312. The 13th Five Year Plan (2016) recognised the decisive role of the market in resource allocation, and the role of the government in propelling supply-side structural reform of the steel industry. The focus was on addressing overcapacity, promoting innovation and green development, and enhancing development quality. The GOC has advised that the 13th Five-year Steel Plan is the latest prevailing policy of China on the iron and steel industry for the period 2016-2020, but has emphasised that the policy has no legally binding power by itself unless it is implemented through law, regulations or rules by different levels of governmental authorities.

313. MBIE is satisfied that the various laws, regulations and other instruments do not provide a basis for concluding that commercial banks are directed or required to provide finance at preferential rates to producers of galvanised steel coil, and it does not provide evidence that they possess, exercise or are vested with governmental authority.

Information on Manufacturers

314. MBIE has sourced information on loans received during the POI by two of the manufacturers in this investigation from financial reports published by Angang and Baosteel.

315. The 2015 Angang Annual Report noted that as at 31 December 2015, the Angang Group had long-term loans of RMB 962 million, with interest rates ranging from 4.289 per cent to 6.4 per cent, and terms ranging from 3 to 25 years, used mainly for replenishing working capital. The fixed interest rate was adjusted on an annualised basis in accordance with the adjustments to the benchmark interest rate for loans of the same period made by PBOC. The following year, as at 31 December 2016, long-term loans were at RMB 1,296 million, with interest rates ranging from 4.2892 per cent to 4.75 per cent.

316. In 2015, Angang's gross profit margin on steel rolling and processing was 6.24 per cent, made up of a negative gross profit margin on hot-rolled sheets of -0.26 per cent, and gross profit margins of 10.91 per cent on cold-rolled sheets and 7.62 per cent on medium and thick plates, all less than the previous year. Overall, the Group recorded a net loss of RMB 4,593 million compared with a net profit of RMB 928 million in the previous year. In 2016, the net loss had been turned into a profit of RMB 1,616 million. The gross profit margin on steel rolling and processing was 13.31 per cent, with hot-rolled sheets at 15.34 per cent, cold-rolled sheets at 16.44 per cent and medium and thick plates at 7.71 per cent, all showing significant increases over the previous year.

317. The Baosteel Annual Report for the year ending 31 December 2015 indicated that the company had short-term loans of RMB 27,111 million; "borrowing from the Central Bank" of RMB 131 million; and long-term borrowings of RMB 9,111 million. With regard to short-term borrowings, it was noted that the annual interest rate of RMB borrowings ranged from 3.30 per cent to 5.89 per cent, USD borrowings ranged from LIBOR[33]+0.6 per cent (1

[33] London Interbank Offer Rate (LIBOR)

month) to LIBOR+2.8 per cent (3 months), and that of EUR borrowings ranged from 0.95 per cent to 3.49 per cent. Long-term borrowings included amounts in USD, Japanese Yen and Korean Won, as well as in RMB. In 2016, short-term borrowings were at RMB 27,754 million, with the "loans from the central bank" having disappeared from the balance sheet, and long-term borrowings totalling RMB 296 million. The annual interest rate of RMB borrowings in 2016 ranged from 2.95 per cent to 5.89 per cent, USD borrowings ranged from LIBOR +0.87 per cent (1 month) to LIBOR+2.45 per cent (3 months), and that of EUR borrowings ranged from 0.25% to 1.5%.

318. In 2015, Baosteel's operating profit was RMB 3,357 million on operating income of RMB 86,533 million, giving an operating profit rate of 3.9 per cent. In 2016, the operating profit was RMB 11,595 million on an operating income of RMB 185,459 million, giving an operating profit rate of 6.3 per cent.

319. MBIE has established from Global-rates.com[34] that in 2016 USD LIBOR rates for 1 month averaged 0.496 per cent and for 3 months averaged 0.744 per cent. MBIE notes that in CBSA *Certain Steel Piling Pipe* (2012), the CBSA accepted the LIBOR rate as the benchmark for USD loans, and the loans were found not to be at preferential rates.

5.3.2 Secondary Information

320. The secondary information available to MBIE includes the findings of other jurisdictions and submissions made by NZ Steel.

5.3.2.1 Australia

321. The Australian investigation ADC *Galvanised Steel* 193 looked at capital injections but did not address preferential loans.

322. In its investigation of preferential loans, ADC *Steel Reinforcing Bar* 322 (2016), the ADC noted in its Statement of Essential Facts (SEF) Report, that the application relied on findings by the EC in *Organic Coated Steel*. The ADC noted that the EC had established that the Chinese financial market is characterised by government intervention because most of the major banks are State-owned, are controlled by the government and exercise government authority in a manner that their actions can be attributed to the State. In response to questionnaires, cooperating exporters identified loans obtained from State-owned banks.

323. In the SEF Report the ADC referred to its public body consideration detailed in an Appendix to the Report (which addressed SIEs providing inputs), and noted comments from the 2014 WTO trade policy review of China which referred to the 1996 General Rules on Loans and the provision that relevant departments may subsidise interest rates on loans to promote growth of certain industries and economic development in some areas. The Chinese authorities claimed that the General Rules no longer reflected the current situation in the

[34] See https://www.global-rates.com/interest-rates/libor/american-dollar/2016.aspx

financial sector in China. The ADC noted Article 34 of the Law on Commercial Banks, referred to above, and that it required commercial banks to conduct their business of lending in accordance with the needs of the national economy and social development and under the guidance of the industrial policies of the State. The Appendix was primarily about whether providers of inputs are public bodies, and in the Final Report for the investigation the responses to comments were on that issue.

324. The ADC concluded that since Chinese exporters relied on loans as a funding source in the production of steel reinforcing bar it considered that this was a financial contribution, and that a benefit existed to the extent that the government loans were granted on terms more favourable than the recipient could actually obtain on the market. The benchmark in this case was the interest rate of the PBOC, and the level of subsidy was calculated by taking the interest rate differential expressed as a percentage and multiplying it by the outstanding amount of the loan, with this amount being attributed to each unit of the goods using the total turnover of the company.

MBIE Comment

325. The detailed public body analysis set out in ADC *Steel Reinforcing Bar* 322 related to SIEs that provided inputs and not to commercial banks, and focused in particular on the role of SASAC and government influence on the steel industry, which are not relevant to an analysis of financial institutions and their relationship with the GOC. The ADC's consideration of whether SOCBs are public bodies does not appear to have involved an individual analysis of each bank alleged to have provided a financial contribution. MBIE's comments on reading Article 34 of the Law on Commercial Banks in isolation are outlined in section 5.3.1.4 above, while other instruments have replaced the 1996 General Rules on Loans, e.g. the Measures on Working Capital Loans. The information relied on by the ADC appears to be dated, and the ADC does not identify the governmental authority or functions that are involved, nor does it provide evidence that the banks possess, exercise or are vested with governmental authority. For the reasons outlined above, MBIE does not consider that ADC *Steel Reinforcing Bar* 322 provides reliable information relating to the determination of SOCBs as public bodies.

5.3.2.2 Canada

326. In its summary of overseas investigation findings, the High Court made specific references to CBSA *Concrete Reinforcing* Bar and CBSA *Line Pipe*, noting that overall subsidy rates set in *Concrete Reinforcing Bar* ranged from 0.4%-14.7%, and in *Line Pipe*, from 0.38%-17.32%. The High Court noted that the CBSA *Concrete Reinforcing Bar* findings were arrived at on the basis that there was insufficient information to remove programmes from the investigation for the purposes of its final determination, but also noted that unlike CBSA *Concrete Reinforcing Bar*, CBSA *Line Pipe* specifically determined the existence of preferential lending subsidy programmes from SOCBs.

CBSA *Concrete Reinforcing Bar*

327. In this investigation, the GOC did not provide a response to the subsidy RFI, while only one exporter provided a response. The cooperating exporter reported that it did not use

preferential loans. The application identified a number of loan programmes, so due to a lack of government response, subsidy amounts for all non-cooperating exporters were determined on the basis of ministerial specification.[35] Without a complete response to the subsidy RFI from the GOC and all known exporters, the CBSA did not have sufficient information to determine that any of the 176 programmes identified did not constitute actionable subsidies. The amount of subsidy was determined by ministerial specification on the basis of the amount of subsidy for the five programmes found for the cooperating exporter, plus the average amount of the subsidy so found applied to each of the remaining 176 potentially actionable programmes for which sufficient information was not available or had not been provided. This means that the subsidy level determined for the programme was not based on any assessment of the facts of any programme relating to loans.

328. It does not appear that the CBSA conducted any verification visit to the GOC or to Chinese exporters, there was no investigation of any programmes involving preferential or policy loans, and there was no specific determination that SOCBs possess, exercise or are vested with governmental authority.

CBSA *Line Pipe*

329. In its investigation the CBSA identified three key concepts for determining if the programme "Preferential loans and loan guarantees" was applicable:

- whether exporters or producers of the subject goods received preferential loans from SOEs
- whether the SOEs that supplied preferential loans are considered to be possessing, exercising or vested with governmental authority, and
- the market interest rates of loans provided by SOEs.

330. Information provided by cooperating exporters identified that four received loans from State-owned banks. The CBSA noted that due to the lack of cooperation from the GOC, detailed information for all of the State-owned banks was not available, but the CBSA found information on one State-owned bank, the EXIM Bank of China, and analysed that bank in order to establish whether it could be considered to constitute "government". The CBSA identified the following factors as indicating whether SOEs may be considered to constitute "government":

- where a statute or other legal instrument expressly vests government authority in the entity concerned
- evidence that an entity is, in fact, exercising government functions, and
- evidence that a government exercises meaningful control over the entity.

[35] As noted in Annex 3, "ministerial specification" applies where sufficient information has not been provided and where no manner of determining an amount of subsidy has been prescribed or sufficient information has not been provided or is not otherwise available to enable the determination of the amount of subsidy in the prescribed manner, so the amount of subsidy is determined in such manner as the Minister may specify.

331. The CBSA reviewed information from the website of the EXIM Bank which showed that the bank was owned by the GOC and was under the direct leadership of the State Council, and that its mission was to facilitate the export and import of Chinese goods and assist Chinese companies offshore. On this basis, the CBSA concluded that the EXIM Bank did constitute "government."

332. The CBSA then established the benchmark for comparing loan interest rates submitted by the exporters, and used the PBOC loan benchmark interest rate for RMB denominated loans for this purpose. Where the exporter's loan interest rate was below the PBOC rate, the CBSA considered the difference to constitute a financial contribution and a benefit to the extent of the difference. The CBSA noted that due to the lack of response by the GOC and lack of details provided by exporters, there was insufficient information on record to determine whether this programme was specific or not. On the basis of all available information it was concluded that the programme did not appear to be generally available to all enterprises in China.

MBIE Comment

333. The CBSA *Concrete Reinforcing Bar* investigation provides no positive evidence that any of the exporters involved received policy loans, and did not address the question of whether public bodies were involved. Accordingly, this investigation can provide no reliable information relating to the determination of SOCB's as public bodies or to the provision of preferential or policy loans to Chinese steel producers.

334. With regard to CBSA *Line Pipe*, MBIE has established that the EXIM Bank is a policy bank and is a public body. However, without further information it is not appropriate to apply this conclusion to SOCBs which do not share the purpose and activities of the EXIM Bank, and which are in a different category of financial institution from policy banks. For this reason, MBIE does not consider that the conclusions reached by the CBSA can be applied to banks other than the EXIM Bank (and other policy banks), and they do not provide reliable information relating to the determination of SOCB's as public bodies.

5.3.2.3 European Union

335. The EC reviewed the provision of loans at preferential rates of interest in EC *Organic Coated Steel* (2013) and EC *Hot-Rolled Flat Products* (2017). In its summary of overseas investigation findings, the High Court included EC *Organic Coated Steel*, with subsidy rates of 0.25%-0.97% and EC *Hot-Rolled Flat Products*, with subsidy rates of 1.99%-27.91%. The High Court also noted the EC Staff Report would have provided new information for any fresh application, and referred to relevant parts of that Report which supported the findings in EC *Hot-Rolled Flat Products*.

Organic Coated Steel

336. EC *Organic Coated Steel* relied heavily on facts available, citing the lack of a full response by the GOC to requests for information, and referred to information from 2004-05 relating to upper and lower limits on interest rates which have now been removed. The EC also identified the high market share of State-owned banks as being of significance, and its

conclusions regarding government control and the exercise of government authority over State-owned banks were based on facts available. The EC also concluded that all banks were subject to such control.

337. The information requested from the GOC by the EC included:

- information on the proportion of loans provided by banks in each of the ownership categories identified by the EC, to industry as a whole and to the industry producing organic coated steel
- information about the ownership of banks, noting that the GOC has access to the Articles of Association of the banks concerned
- information on the structure of GOC control of the banks concerned and the pursuit of government policies or interests with respect to the steel industry (i.e. board of directors and board of shareholders, minutes of shareholders/directors meetings, nationality of shareholders/directors, lending policies and assessment of risk with respect to loans provided to the cooperating exporting producers).

338. The GOC indicated to the EC that it did not retain records of the amounts and percentages of loans provided by State-owned banks, and did not retain the records of loans made to the steel industry. The EC also asked the GOC to arrange meetings with specific banks in order to verify information concerning preferential lending to the organic coated steel industry. However the GOC failed to organise such meetings and claimed that it was unable to intervene with State-owned banks to arrange such meetings or to coerce them to meet.

339. The EC noted that the GOC was made aware of the consequences of non-cooperation. In view of the lack of cooperation, it was necessary, in addition to taking account of GOC documents submitted by other parties, to use information from secondary sources, including the complaint and publicly available information retrieved from the internet.

340. The EC stated that the investigation had established that the Chinese financial market is characterised by government intervention because most of the major banks are State-owned, and that the State-owned banks in China hold the highest market share and are the predominant players in the Chinese financial market.

341. The EC concluded on the basis of the available data that State-owned banks are controlled by the government and exercise government authority in a manner that their actions can be attributed to the State. The relevant data used in order to arrive at this conclusion was derived from information submitted by the GOC, the annual reports of Chinese banks that were either submitted from GOC or publicly available, information retrieved from the 2006 Deutsche Bank Research on China's banking sector, the WTO Policy reviews on China (2010 and 2012), the China 2030 World Bank Report, information submitted from the co-operating exporting producers and information existing in the complaint. The EC considered that there was further evidence that these banks effectively exercise government authority since there was a clear intervention by the State (i.e. PBOC) in the way commercial banks take decisions on interest rates for loans granted to Chinese companies.

342. The EC also analysed whether the privately-owned commercial banks in China are entrusted or directed by the GOC to provide preferential (subsidised) loans to the organic coated steel producers. The EC noted that Article 34 of the Commercial Banking Law instructs the commercial banks to "carry out their loan business upon the needs of national economy and the social development and with the spirit of state industrial policies." It also noted that Articles 24 and 25 of Order No.35, which limited the provision of loans only to those companies which comply with the national development policies for the iron and steel industry, did not distinguish between State-owned and privately-owned commercial banks. The EC noted IMF and OECD reports from 2006-2010 which suggested that credit risk was not properly reflected in banks' lending. The EC concluded that the same evidence showed that SOCBs (as well as privately owned banks) are entrusted or directed by the government and this consequently means that a financial contribution exists.

Hot-Rolled Flat Products

343. EC *Hot-Rolled Flat Products* included a detailed analysis of the provision of loans and the status of banks, and reached the conclusion that State-owned banks were exercising governmental authority based on formal indicia of government control and evidence that it had been exercised in a meaningful way.

344. The report of the investigation noted that the EC had advised the GOC that it might have to resort to the use of best facts available when examining the existence and extent of the alleged subsidisation granted through preferential lending, and with regard to both banks and particular exporters noted that it did have to rely on best facts available.

345. The State-owned banks that provided information included the EXIM Bank and four SOCBs, but the EC made no distinction between them. The EC's conclusions regarding the formal indicia of control appear to have been based primarily on the degree of ownership and the extent to which the State controls appointments to Boards. With regard to meaningful control, the EC took account of Article 34 of the Commercial Bank Law, the PBOC's General Rules on Loans, the 12th and 13th Five Year Steel Plans, Decision 40 (which, according to the EU, covers the whole steel industry as "encouraged"), and other guidelines and opinions relating to the steel industry. In comments to the EC, the GOC pointed out that relevant aspects of the General Rules on Loans were no longer applicable, and Article 34 of the Commercial Bank Law should not be read in isolation. Decision 40 refers to support to be given to encouraged industries, but subject to credit principles. The EC nevertheless concluded that Chinese financial institutions were operating in a general legal environment that directs them to align themselves with the GOC's industrial policy objectives when taking financial decisions.

346. The EC reviewed information relating to individual loans and concluded that interest rates close to the PBOC benchmark rates were applied regardless of the companies' financial and credit risk situation. Also, companies received revolving loans which allowed them to immediately replace the capital repaid on loans at the maturity date by fresh capital from new loans.

347. The EC considered that the GOC had created a normative framework that had to be adhered to by the managers and supervisors appointed by the GOC and accountable to the GOC, and this normative framework was relied on by the GOC to exercise control in a meaningful way over the conduct of SOCBs whenever they were providing loans to the steel industry. The EC concluded that all banks in China, whether State-owned or private, were effectively acting as public bodies. The EC also considered that the interest rates paid by investigated exporters were not consistent with appropriate creditworthiness assessments, so even if rates were above the PBOC benchmark rate they were still preferential. The conclusions relating to creditworthiness were based on best facts available.

EC Staff Report

348. The High Court also referred to the EC Staff Report, and suggested that it would have provided new information for any fresh application, and referred to relevant parts of that Report which supported the findings in EC *Hot-Rolled Flat Products*.

349. The EC Staff Report was not available for the original investigation but since it was referred to by the High Court, and was also referred to in ADRP 63, it is being referred to in this reconsideration. The EC Staff Report was addressed in the recent MBIE investigation into the dumping of HSS from China (since the main purpose of the EC Staff Report was to assist in addressing claimed distortions in the Chinese steel market which affect the basis for determining normal values in dumping investigation).

350. In the HSS dumping investigation, MBIE reviewed the contents of the EC Staff Report. In summary, the EC Staff Report concluded that the Chinese steel industry is regarded as a key/pillar industry by the GOC, which guides the development of the sector in accordance with a broad range of policy tools and directives relating to market composition and restructuring, raw materials, investment, capacity elimination, product range, relocation and upgrading. It was suggested in the EC Staff Report that by these means the GOC directs and controls virtually every aspect in the development and functioning of the sector. Financial institutions, following the government's direction, provide access to finance to implement the government's policy objectives, while Chinese steel producers benefit from a wide array of State support measures and other market distortive practices. It was concluded that the overarching control of the government prevents free market forces from prevailing in the steel sector in China.

351. With regard to the financial sector, the EC Staff Report included a detailed examination of the players and practices in the sector, including banks. It noted that despite a number of transformations throughout the last thirty years the current Chinese financial system is still characterised by a strong presence of State-owned banks, and a widespread influence of the State which imposes a number of policy objectives on the financial system. It acknowledged that various legal provisions refer to the need to respect normal banking behaviour and prudential rules such as the need to examine the creditworthiness of the borrower. The EC Staff Report found that the evidence, including findings from trade defence investigations (i.e. EC *Organic Coated Steel* and EC *Hot-Rolled Flat Products*, as well as findings from other jurisdictions), suggested that these provisions play only a secondary

role in the application of the various legal instruments, which stress the priority of the needs of national economic and social development and the industrial policies of the State. The conclusion reached in the EC Staff Report was that the financial system remains highly distorted.

352. The EC Staff Report noted the findings in EC trade defence investigations which, it suggested, established that the GOC exercises meaningful control over steel SOEs, which are obliged to follow the government plans and policies. Much of the evidence referred to in this section was derived from the EU investigations discussed above (EC *Organic Coated Steel* and EC *Hot-Rolled Flat Products*), or referred to investigations undertaken by Australia and Canada, as support for claims that there are widespread State support measures in the Chinese steel sector.

MBIE Comment

353. In *Organic Coated Steel* the EC appears to have relied primarily on the extent of government ownership of banks, the previous role of the PBOC in relation to interest rates, and the lack of information from the GOC. The EC did not have the benefit of later elaboration by the AB and panels on the interpretation of DS379, and did not cite other paragraphs in DS379 which are relevant. In particular, the Appellate Body has noted that 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. Also, since the EC investigation there have been changes in the operation of interest rates, including the removal of ceiling and floor rates by the PBOC in 2013, which remove one of the main arguments of the EC for claiming that there was GOC control of banking. Also, more recent rules and measures have strengthened the requirements on banks to manage risk.

354. With regard to *Hot-Rolled Flat Products*, MBIE has commented in section 5.3.1.4 above on the laws, directives and plans affecting financial institutions and the steel industry referred to by the EC in its investigation. The EC noted that there is a significant degree of government ownership of SOCBs, and there is no doubt that such banks do provide loans to producers of steel products, including producers of galvanised steel coil. MBIE notes that the relevant laws and regulations now applying all require effective risk management processes, and the Annual Reports of the major SOCBs confirm that such processes are in place and are actively implemented. On the basis of its own analysis of the relevant documents, MBIE does not consider that they provide a basis for a conclusion that there is meaningful control of commercial banks such that they are required to provide preferential loans to producers of galvanised steel coil and are thereby undertaking governmental functions. MBIE has also taken into account the lack of differentiation by the EC of the roles of policy banks and SOCBs, since MBIE's conclusion is that there are significant differences between these categories, and that policy banks meet the criteria to be determined to be public bodies.

355. In the HSS dumping investigation, MBIE reviewed the matters raised in the EC Staff Report, and considered that none of the plans or instruments referred to provided any basis for concluding that the level and nature of GOC involvement in the steel sector was such that

HSS prices were substantially distorted by GOC interventions to the extent that they did not provide a basis for determining normal values for the purposes of establishing the existence of dumping.

356. MBIE notes that many of the findings in the EC Staff Report were based on interpretations and assumptions outlined in EC *Hot-Rolled Flat Products*, which MBIE does not consider to provide a basis for concluding that there is evidence that commercial banks possess, exercise or are vested with governmental authority. It could also be noted that the EC Staff Report drew upon EC *Hot-Rolled Flat Products* as supporting its findings, and not the other way around.

357. MBIE's interpretation of the WTO jurisprudence as it currently stands is that the questions posed by the EC go only part way in establishing the test for a whether an entity is a public body in a particular case. The test is whether a particular body in fact possesses, exercises or is vested with governmental authority. Evidence that this test is met can be provided by evidence that control over the entity has been in fact exercised, such that the entity's conduct falling within the scope of Article 1.1(a)(1) of the SCM Agreement is that of a public body. Evidence of control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body, and control by government over an entity is not necessarily meaningful control. For the reasons outlined above, MBIE does not consider that the EC investigations provide a reliable basis for concluding that SOCBs are public bodies.

5.3.2.4 USA

358. The High Court discussed USDOC *Corrosion Resistant Steel* and also identified USDOC *Cut-to-Length Steel Plate* as having applied established subsidy levels of 0.86% and 10.54% for policy loans. The High Court also noted that none of the overseas authority reports distinguished between SOCBs and policy banks in the way that MBIE did, and therefore their benefit and specificity findings did not distinguish between them.

359. MBIE notes that many USDOC investigations involving China have identified policy loans or preferential loans among the programmes investigated. The products covered by these investigations are many and varied, to the extent that if a financial contribution by a government or any public body providing a benefit was confirmed then any examination of specificity would need careful consideration in light of the provisions of Article 2 of the SCM Agreement.

Policy Banks

360. In a number of investigations over the years, the USDOC has noted that it was examining whether the GOC had encouraged the development of the relevant industry through financial support from SOCBs and government policy banks, such as the China Development Bank. In USDOC *Steel Wheels*, (2012), it was noted that in USDOC *Corrosion-Resistant Carbon Steel Flat Products from Korea* (USDOC *CORE from Korea*), the USDOC stated:

> *In both the* DRAMs Investigation *and the* CFS from the PRC Investigation*, we accorded different treatment under this section of the Act to government-owned banks that were commercial banks and those government-owned banks that acted as policy or specialized banks. Upon further review, we have determined that, with respect to determining whether a government-owned bank is a public entity or authority under the CVD law, it is more appropriate to focus solely on the issue of government ownership and control. This treatment of government-owned commercial banks is consistent with our treatment of all other government-owned entities, such as government-owned manufacturers, utility companies, and service providers. Furthermore, this treatment of government-owned commercial banks is also more consistent with 19 CFR 351.505(a)(2)(ii) and 351.505(a)(6)(ii). Thus, a government-owned or controlled bank, be it a commercial bank or a policy bank, is considered a public entity or authority under the Act.*

361. In USDOC *Wind Towers* (2012), the USDOC recalled that as in USDOC *Coated Free Sheet (CFS)*, the department's findings were not, and are not, based upon government ownership alone. In *CFS* (2007), the USDOC stated:

> *As discussed in the Preliminary Determination, under the Department's practice, loans provided by government Policy Banks, such as the China Development Bank, are considered government loans and, thus, constitute direct financial contributions under the Act. See, e.g., (DRAMS from Korea Admin Review, 72 FR 7015, and accompanying Issues and Decision Memorandum, at 6). Loans by SOCBs, however, are not necessarily treated as government loans because these types of banks may operate on a commercial basis in some countries. …. However, as discussed in the Preliminary Determination and in greater detail below, information on the record indicates that the PRC's banking system remains under State control and continues to suffer from the legacies associated with the longstanding pursuit of government policy objectives. These factors undermine the SOCBs ability to act on a commercial basis and allow for continued government control resulting in the allocation of credit in accordance with government policies. Therefore, treatment of SOCBs in China as commercial banks is not warranted in this case.*[36]

362. In reports of other investigations the USDOC has noted that it is investigating claims relating to loans from policy banks and SOCBs, and in some cases identified particular policy banks and the "Big 4" SOCBs. However, while making this distinction, the USDOC analysis of whether loans are provided by public bodies makes no differentiation between policy banks and SOCBs.

[36] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China*, C-570-907, 17 October 2007, page 55. This investigation marked the first time that USDOC had undertaken a countervailing duty investigation of China, since its previous practice had been not to apply the CVD law to NMEs.

Corrosion Resistant Steel

Use of AFA

363. In USDOC *Corrosion Resistant Steel* a number of the mandatory respondents withdrew or did not participate, so in its preliminary determination (November 2015) the USDOC found that each of these companies concerned had withheld information that had been requested and had failed to provide information within the deadlines established, and by not responding to the questionnaire had significantly impeded the proceeding. For this reason, CVD rates were based on facts otherwise available. Moreover, the USDOC considered that an adverse inference was warranted because the companies had not responded to the Initial Questionnaire to the best of their ability to comply, and AFA was warranted to ensure that these companies did not obtain a more favourable result by failing to cooperate than if they had fully complied with requests for information.

364. The GOC had provided sufficient information relating to programmes used by the cooperating company, but the GOC had not provided information on the programmes not used by the cooperating company. Accordingly, the USDOC selected an AFA rate for each of those programmes. However, for the policy loans programme, USDOC used information provided by the cooperating company and the GOC.

Policy Loans

365. In its preliminary determination, the USDOC noted that the petitioners had alleged that policy banks and SOCBs made loans to the corrosion-resistant steel industry at preferential terms as a matter of government policy. According to the petitioners, at least two banks, the CDB and the EXIM Bank, provided policy loans specific to the steel industry. The USDOC also noted that it had countervailed this programme in previous investigations.

366. The USDOC preliminarily determined that loans received by the corrosion-resistant steel industry were made pursuant to government directives. It was stated that the GOC had highlighted and advocated the development of the corrosion-resistant steel industry through the Steel Plan, which affirmed the steel industry's strategic importance to China's national economy, and stressed the need for the sound development of the iron and steel industry. Article 25 of the Steel Plan specifically encouraged financial institutions to "comply with development policies for the iron and steel industry."

367. The USDOC also noted that the 12th Five-Year Plan for the iron and steel industry, which covered 2011 to 2015, designated that "high-strength and high-toughness automobile use steel", i.e. cold-rolled corrosion resistant steel, should be given developmental priority in China. The plan required that government entities coordinate policies to this end, including fiscal policy, taxation policy, finance policy, trade policy, land policy, energy saving policy, and environmental protection policy. The GOC implemented Decision 40 in order to achieve the objectives of the 11th Five-year Plan. Decision 40 referenced the Guidance Catalogue, which outlined the projects which the GOC deems encouraged, restricted and eliminated. For encouraged projects several support options are available including financing.

368. On the basis of this information, the USDOC preliminarily determined that the GOC had in place a policy to encourage the development of production of corrosion-resistant steel through policy lending. Thus, loans to corrosion-resistant steel producers from policy banks and SOCBs constituted financial contributions from "authorities", and provided a benefit equivalent to the difference between what the recipients paid on their loans and the amount they would have paid on comparable commercial loans. The loans were *de jure* specific because of the GOC's policy, as illustrated in government plans and directives, to encourage and support the growth and development of the corrosion-resistant steel industry.

369. Based on the benchmarks derived for long-term renminbi-denominated loans, the subsidy amount calculated for the cooperating exporter was 0.76 per cent, and in accordance with US legislation, this rate was used as the AFA rate for non-cooperating exporters.

370. In the final determination (May 2016), the USDOC maintained its findings regarding use of AFA, and it also applied AFA to the cooperating exporter's use of the programme Export Buyer's Credits provided by the EXIM Bank.

371. The final determination also addressed comments made by the GOC regarding the policy loan programme. The GOC stated that no loans were issued to respondents linked to the alleged government policy to encourage the corrosion-resistant steel industry, and Chinese commercial banks, including policy banks and SOCBs, are not government authorities. The GOC claimed that the USDOC had not provided an analysis of the issue and had wrongly assumed that government ownership in itself indicated that an entity is a government entity, which assumption violated the US' WTO obligations. The GOC emphasised that all commercial banks in China operate on commercial principles, and pointed out that the new Capital Rules had resulted in substantial changes in commercial banking law in China. The Capital Rules eliminated industrial policies as a consideration, stipulated due diligence on the part of banks, and provided that loans be made on the basis of factors such as specified use, continuing operations, credit, scale, business characteristics, working capital, cash flow, and capital turnover. There was no evidence that banks operated inconsistently with these rules. The US nevertheless maintained its position, claiming that there had been insufficient time for the changes in the rules to be reflected in practice.

Cut-to-Length Steel Plates

372. In USDOC *Cut-to-Length Steel Plate*, the USDOC determined a countervailing duty rate of 10.54 per cent, covering Preferential Loans to SOEs and Policy Loans to the CTL Plate Industry, and applicable to all exporters. In that investigation, all subsidy levels established for individual programmes were based on AFA due to the failure of respondents to provide the information necessary to USDOC's analysis, and USDOC's belief that there was a failure to cooperate by the respondents not acting to the best of their ability to comply with requests for information. In rebuttal comments, one of the Chinese manufacturers noted that it had provided 4,646 pages of responsive information relating to 42 subsidy programmes and had sought to address supplemental questions. The USDOC responded that it had based its AFA determination on the totality of the deficiencies, and no one deficiency was determinative.

MBIE Comment

Corrosion Resistant Steel

373. With regard to the lack of differentiation between policy banks and SOCBs, the basis for the USDOC position appears to be that the GOC retains control of the banking system through ownership, and various economic and industry policies encourage lending to the industries concerned. Apart from the reference in USDOC *CFS*, which dates from 2007, it is difficult to find any indication of a "proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense" as indicated by the Appellate Body in DS379. In any event, it appears that the USDOC continued to focus on ownership by the state as the main element in determining if a bank is a public body, rather than an analysis of whether the nature and degree of control by the government over the body is meaningful in that the entity in fact possesses, exercises or is vested with governmental authority to exercise governmental functions. In USDOC *CFS*, the USDOC had identified key considerations as being the extent of GOC ownership of the banking sector, Article 34 of the Law on Commercial Banks, the lack of adequate risk management and analytical skills by banks, and the lack of evidence on loan processes.

374. In light of the evidence reviewed by MBIE, and MBIE's conclusions regarding the status of policy banks and their differentiation from SOCBs, it is difficult to see how the USDOC conclusions cannot differentiate between them. In this context, it could be noted that in USDOC *Corrosion-Resistant Steel* the petitioner identified loans from policy banks only, and not from SOCBs.

375. With regard to Chinese laws, regulations and plans, including Article 34 of the Law on Commercial Banks, MBIE's analysis in section 5.3.1.4 does not support the USDOC findings that loans received by the corrosion-resistant steel industry were made pursuant to government directives, where those loans were from commercial banks. There is also evidence that the Chinese banking sector is now required to effectively manage risk and creditworthiness.

Cut-to-Length Steel Plate

376. The totality of the findings in USDOC *Cut-to-Length Steel Plate* were based entirely on AFA, and there is no evidence of any analysis of the relevant programmes, or that the US process reflected the requirements identified by the Appellate Body. In particular, there is no specific determination that SOCBs possess, exercise or are vested with governmental authority.

Summary

377. For the reasons outlined above, MBIE does not consider that the USDOC investigations provide a reliable basis for concluding that SOCBs are public bodies.

5.3.2.5 NZ Steel Submissions

Professor Lardy's Opinion

378. Professor Lardy argued that there is large-scale state subsidisation of certain industries in China, including the steel industry, and that money-losing companies remain in operation through indirect subsidies provided by China's state-dominated banking system. Professor Lardy noted the magnitude of non-performing loans at RMB2.2 trillion in 2017 as a measure of the magnitude of credit available to Chinese enterprises. Professor Lardy also considered that MBIE's conclusions in relation to whether policy banks are public bodies was at odds with his understanding, as an economist, of that term.

379. Professor Lardy identified direct subsidies provided to Chinese companies, but also noted that indirect subsidies such as below market interest rates have an effect on reported profits or losses. He suggested that the magnitude of potential indirect subsidies of this kind had grown dramatically in recent years, and used data on non-performing loans to estimate the magnitude of subsidies firms receive through the banking system.

380. With regard to preferential interest rates, Professor Lardy discussed the situation that existed before the PBOC eliminated rate limits on loans in 2013. He noted that judging whether a firm is receiving a below market interest rate is now more challenging, although the central bank continues to publish benchmark interest rates for loans of various maturities, and also publishes information on the share of loans that are made at rates below, at or above the benchmark rate. Professor Lardy noted that as monetary conditions tightened in the course of 2017 the share of loans made below the benchmark rate fell significantly, and suggested that if a firm's share of lending at below benchmark rates is much higher than the overall share of loans from the banking system at below benchmark rates, it could indicate that the firm is receiving a special benefit.

381. Professor Lardy commented on some specific matters raised in the original Final Report. In particular, he referred to policy loans, and to the GOC's responses regarding short-term loans but not medium or long-term loans. With regard to MBIE's comments on the loan identified by Baosteel as coming from a "central bank", Professor Lardy suggested that it was not well-founded (but was a correct translation), and that the loan was not in fact from a bank. Professor Lardy suggested that the loan identified by MBIE from Baosteel's 2016 Annual Report may have been an incentive to agree with a merger with Wuhan Iron and Steel Co and may well have been from the central bank, and may even have been forgiven entirely. If so, then Professor Lardy suggested that the level of subsidisation would be above the negligible level.

382. With regard to the determination of SOCBs as public bodies, Professor Lardy stated that, as an economist, he found it difficult to understand why MBIE put policy banks in a different classification from SOCBs, which he considered should be similarly classified. Professor Lardy noted that both are controlled by the Chinese government through direct ownership or through a government body, such as the Ministry of Finance, while the CPC plays a role in both through appointments to top management. He then suggested that the separation of commercial from policy lending was not accomplished through the creation of three

policy banks in 1994, and that policy banks are funded through the purchase of bonds by SOCBs. He further suggested that the CDB, the largest policy bank had sought to become a commercial bank by changing its English name, although the original Chinese name – State Development Bank – remains.

Mr Gospage's Opinion

383. Mr Gospage did not consider that MBIE had a reasonable basis to conclude that SOCBs in China are not public bodies. He suggested that evidence from EU investigations (among others) demonstrated that the banking system in China is overwhelmingly State-owned, that directors are largely appointed by and accountable to the State, that banks are required to lend in accordance with industrial policy, and that there is no effective risk assessment when loans are made.

384. With regard to the level of benefit, Mr Gospage claimed that MBIE had relied on interest rates available on the Chinese domestic market and the credit rating of a single exporter to establish a benchmark. He stated that the weight of evidence from other investigations and independent sources demonstrated that, due to the government's dominance in the lending market and absence of any risk assessment, there were no meaningful benchmarks in China. Mr Gospage considered that MBIE should have used a constructed or external benchmark, and based its subsidy findings on reliable secondary information.

Submission of 31 January 2019

385. NZ Steel recalled that the High Court noted that no other overseas jurisdictions drew a distinction between policy banks and SOCBs, and that the High Court had considered that MBIE's advice to the Minister on the relevance of overseas findings was inadequate and wrongly stated that they were based on AFA.

386. NZ Steel considered that MBIE should take appropriate account of overseas findings, in particular of EC *Organic Coated Steel*, USDOC *Corrosion-Resistant Steel*, and EC *Hot-Rolled Flat Products*, and should make appropriate use of secondary sources. NZ Steel considered that the best information available to MBIE indicated that State-owned banks, including SOCBs, are public bodies.

Submission of 13 February 2019

387. NZ Steel noted the GOC's comments on the independence of the banking sector and suggested that this was inconsistent with overseas findings and the "international consensus in relation to State-owned banks in China." NZ Steel also noted that Professor Lardy addressed this topic in detail in his report.

Submission of 12 April 2019

388. NZ Steel's submission of 12 April 2019 commented on matters raised in the CCOIC's written submission regarding recent developments and the change in circumstances of the Chinese banking sector. NZ Steel claims that the CCOIC's claim is misplaced and points to 2019 research by Professor Lardy and news media comments which suggest that there has been a rollback of reforms since President Li came into power.

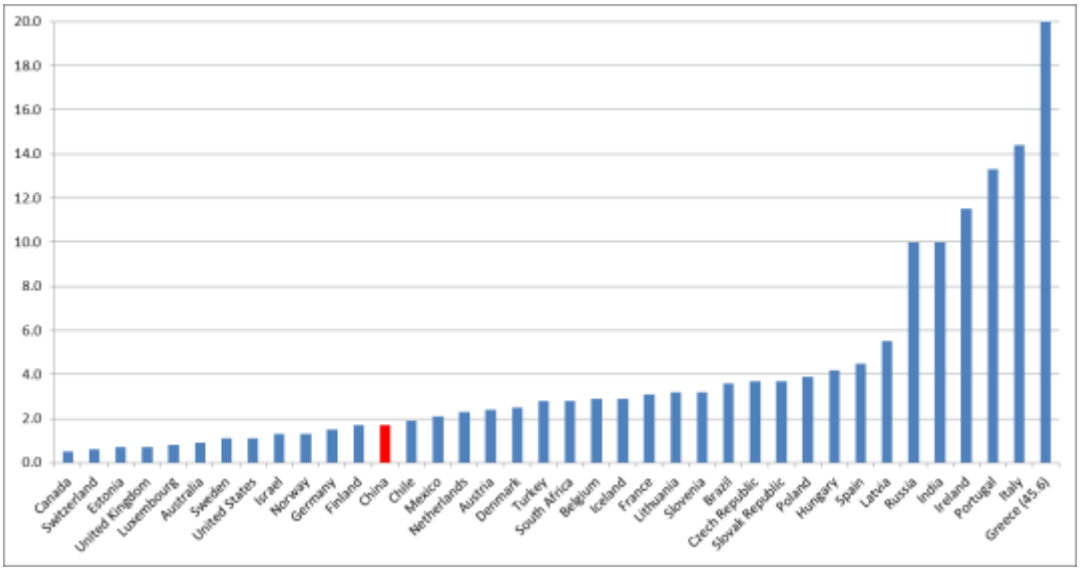
389. NZ Steel challenged the CCOIC's claim that SOCB's have walked away from risky and discredited loans, and cited a news and commentary website in support.

MBIE Comment

390. MBIE's comments on the role of policy banks is set out in section 5.3.1.4 above, while comments on the failure of other jurisdictions to draw a distinction between policy banks and SOCBs are set out above in the sections on the findings of other jurisdictions. MBIE has also commented in these sections on the findings of other jurisdictions in regard to meeting the test for public body identified by the Appellate Body and the High Court. Comments on the "international consensus" are included in Annex 3, and take account of the various statements by the Appellate Body on the need for a careful evaluation of the entity in question,[37] and to seek out relevant information and to evaluate it in an objective manner.[38]

391. With regard to non-performing loans, MBIE notes that on the basis of World Bank reporting, the ratio of non-performing loans to total loans in China is lower than in many other countries, including OECD countries, a point which Professor Lardy did not cover. This is illustrated in the chart below.

Chart 7.1: Non-performing loan ratios – OECD and BRICs[39] countries
%, Source: World Bank, 2017[40]



392. With regard to Professor Lardy's comments on the loan from the "central bank" identified in Baosteel's accounts, MBIE notes Professor Lardy's suggestion that it could be an

[37] *US – Anti-dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 318.
[38] Ibid, paragraph 344.
[39] BRICS – Brazil, Russia, India, China, South Africa. OECD - Japan, Korea and New Zealand not available.
[40] https://data.worldbank.org/indicator/fb.ast.nPer.Zs

incentive from the central bank, and that the full amount may have been forgiven. However, even if this was the case, the level of subsidy would be only 0.098 per cent.

393. MBIE's view on the different nature of policy banks from SOCBs is based on its analysis of the evidence examined in order to make a public body determination in each case. This is described in more detail elsewhere in this section in the comments on the findings of other jurisdictions.

394. Mr Gospage's comments confirm MBIE's conclusion that the EC relied heavily on information relating to the extent of State ownership and the appointment of directors and managers as a basis for concluding that SOCBs are public bodies. The claim that there is an absence of risk assessment appears to be at odds with the legislative and regulatory requirements applicable to commercial banks, which have been strengthened in recent years. Also, in regard to appropriate benchmarks, Mr Gospage's claims appear to be at odds with the approaches taken by the Australian and Canadian authorities, which have used PBOC interest rates as the benchmark.

395. With regard to NZ Steel's submission of 12 April 2019, MBIE notes that the reconsideration is dealing with the POI of 2016, and that it has carefully reviewed relevant laws, regulations and other documents in determining whether SOCBs are a government or any public body in that they possess, exercise or are vested with governmental authority (see section 5.3.1.4 above). NZ Steel's comments relating to non-performing loans are addressed in the comments above on Professor Lardy's opinion.

5.3.3 MBIE Analysis and Considerations

5.3.3.1 Findings

Financial contribution by a government or any public body

396. MBIE is satisfied that Zong Cheng has not received a financial contribution from a government or any public body under this programme.

397. MBIE notes that Baosteel may have received some form of financial contribution that was not provided by an SOCB and which involved concessional financing from the government. This has been treated as a loan from a policy bank or a government entity.

398. MBIE is satisfied that within the context of the Chinese economy, SOCBs operate as commercial banks, driven by market fundamentals, and employing risk assessment policies and models. The ratio of non-performing loans is at levels similar to those in better-performing OECD countries.

399. In reviewing the information available, MBIE has examined the role and functions of SOCBs, the legislation governing the operation of commercial banks, including matters relating to ownership and control, and in particular the requirements and practice relating to the management of risk and non-performing loans. In particular, and in the context of the matters set out in paragraph A2.6 of Annex 2, MBIE is satisfied that:

- There is no statute or legal instrument that expressly vests SOCBs with governmental authority

- The information available does not support a finding that SOCBs are in fact exercising governmental functions
- The information available does not support a finding that the GOC exercises meaningful control over SOCBs.

400. These conclusions are based on the examination summarised in this Chapter, and in particular in section 5.3.1.4 above. In summary:

- MBIE has reviewed the relevant laws and regulations, and there is no statutory or legal instrument that expressly vests SOCBs with governmental authority.
- More recent developments and reforms in the banking sector have emphasised that commercial banks are under clear requirements to operate on a commercial basis and to manage risk, while central bank controls over interest rates have been removed, indicating that SOCBs are not, in fact, exercising governmental functions.
- Loan decisions and applicable interest rates are agreed by negotiation with borrowers and in accordance with business principles, while the GOC stockholding entities do not intervene in the daily operations of the SOCBs, supporting the conclusion that the GOC does not exercise meaningful control over SOCBs.

401. MBIE is therefore satisfied that SOCBs are not public bodies, in that they do not possess, exercise or are vested with governmental authority, and the government has not, in fact, exercised meaningful control over their conduct. Accordingly, there is no financial contribution from a government or any public body.

402. MBIE has undertaken a similar analysis of policy banks, and is satisfied that the information available supports a finding that policy banks are in fact exercising governmental functions, and that the GOC exercises meaningful control over the conduct of policy banks.

Provision of a Benefit

403. In the absence of a financial contribution from a government or any public body in relation to loans from SOCBs, there is no requirement to assess the level of benefit.

404. With regard to the financial contribution provided to Baosteel, if it is treated as a fully forgiven loan from the government (in the narrow sense) or as a direct transfer of funds from PBOC (a public body), the level of the benefit would be the full amount divided by the company's operating income, which gives a subsidy level of 0.098 per cent.

Specificity

405. In the absence of a financial contribution from a government or any public body in relation to loans from SOCBs, there is no requirement to consider specificity.

406. In the absence of information on the nature and source of the financial contribution received by Baosteel, and bearing in mind Professor Lardy's (unsubstantiated) suggestion that it might relate to Baosteel's merger with Wuhan Steel, the potential subsidy appears to be specific to the company because in those circumstances it could apply only to Baosteel.

Conclusions

407. MBIE concludes that there is no programme of policy or preferential loans provided by SOCBs, since SOCBs are not public bodies in that they do not possess, exercise or are vested with governmental authority.

408. To the extent that there is reasonable cause to believe, on the basis of the information available, that the item identified by Baosteel in its financial reports as "Loans from the central bank" represents a financial contribution from the government, and is specific, there is a level of subsidy of 0.098 per cent.

5.3.3.2 Matters raised by the High Court

409. The High Court noted that it was not clear if MBIE's error of law regarding the determination of public bodies in respect of SIEs providing input materials affected its assessment of SOCBs, but there were other issues arising in MBIE's consideration of this matter. The High Court considered that MBIE had not articulated why it had not placed weight on the findings of other jurisdictions, and that the advice given to the Minister on the EC's reliance on adverse facts available in *Hot-Rolled Flat Products* was not correct. The High Court also noted that no other jurisdictions made a distinction between policy banks and commercial banks.

Other Jurisdictions

410. MBIE has elaborated in section 5.3.2 above on the reasons why it does not consider that the findings of other jurisdictions provide a reliable basis for reaching conclusions on the existence and level of subsidisation relating to policy or preferential loans. The findings of other jurisdictions do not, on the basis of MBIE's analysis, provide any reason for MBIE to change its conclusion that there is no financial contribution by a government or any public body which provides a benefit to the recipient in regard to the provision of preferential loans by SOCBs to producers of galvanised steel coil. In particular:

- In ADC *Steel Reinforcing Bar* 322, the ADC's public body analysis did not relate to banks, information relied on by the ADC appears to be dated, and the ADC does not identify the governmental authority or functions that are involved, nor does it provide evidence that the banks possess, exercise or are vested with governmental authority.
- Of the Canadian investigations, one was not based on any positive evidence of preferential loans nor did it include a public body determination (CBSA *Concrete Reinforcing Bar*); while the other was based on an analysis of a policy bank only, which MBIE agrees is a public body (CBSA *Line Pipe*), but does not consider that findings relating to policy banks can be extended to SOCBs.
- In EC *Organic Coated Steel*, the finding relies on dated information since developments in the rules governing the Chinese financial sector have changed since 2004-2005; the finding relied heavily on the formal indicia of control (ownership and appointment to boards and management); and on facts available. In EC *Hot-Rolled Flat Products* the EC also focused on the formal indicia of control; relied on facts available; and reached broad conclusions regarding the legal environment for

financial institutions that MBIE does not consider to be justified on the basis of its own reading of the relevant laws, regulations and plans. The EC Staff Report reaches conclusions which are similar to those in EC *Hot-Rolled Flat Products* on which it is partly based.

- In USDOC *Corrosion-Resistant Steel*, the USDOC focused on ownership while MBIE's interpretation of the updated Chinese laws, regulations and plans does not support the USDOC findings; USDOC *Cut-to-Length Steel Plate* was based entirely on AFA and did not include a specific public body determination relating to SOCBs.

411. MBIE also considers that other jurisdictions have conflated the roles and status of policy banks and SOCBs, without addressing the significant difference between them in terms of purpose, regulatory oversight, and the fact of their lending for development purposes.

412. MBIE does not consider that other jurisdictions have properly established that commercial banks providing finance to producers of galvanised steel coil are public bodies which possess, exercise or are vested with governmental authority, nor do they provide evidence that meaningful control over these banks has been in fact exercised, such that the banks' conduct falling within the scope of Article 1.1(a)(1) of the SCM Agreement is that of a public body.

5.3.3.3 Conclusion

413. MBIE concludes that there is evidence that Baosteel has received a benefit through a forgiven loan or grant from the government, but not from an SOCB, with a subsidy level of 0.098 per cent.

414. MBIE concludes that SOCBs are not public bodies, in that they do not possess, exercise or are vested with governmental authority. Accordingly there is no programme by which SOCBs provide policy loans to producers of galvanised steel coil at interest rates that are less than the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.

6. Provision of land use rights for LTAR

415. A finding of subsidisation in relation to the provision of land-use rights at less than adequate remuneration would require that evidence is available to confirm that under the programme:

- producers of galvanised steel coil paid for or received allocated land-use rights from a government or any public body
- a benefit to the recipient was provided in that the provision of land-use rights was made for less than adequate remuneration, with the adequacy of remuneration determined in relation to prevailing market conditions in China for land-use rights, and
- the programme was specific to certain enterprises.

416. The discussion in this Chapter is in three parts. The first part, in section 6.1, is a summary of the information and conclusions from the original investigation. The second part, in section 6.2, is a summary of the relevant parts of the High Court Judgment. The third part, in section 6.3, is a detailed reconsideration of the issue of policy loans.

6.1 Original Investigation

6.1.1 Application

417. The application stated that all land in China is owned by the State and land-use rights are transferred to companies for little or no cost, but provided no further evidence other than reference to the USDOC findings. USDOC findings appear to be based on similar assumptions arising from a lack of an expected response to a questionnaire by the GOC.

418. The NZ Steel application noted that news reports indicated that land rights are provided for "as little as US$ 0.02 per square foot." This claim was based on the Wiley Rein LLP Report, which focused on the use of land-use rights as collateral for financing, as well as on the differential between payments made and a market-determined value.

6.1.2 GOC Response

419. In its initial questionnaire response, the GOC claimed that there is no programme covering the provision of land-use rights, and there is no evidence that the GOC "provides lease agreement and then transfers land-use rights to companies for little or no cost."

420. Although private ownership of land is not possible in China, under the Constitution's Amendment Act in 1988 land-use rights became divisible from land ownership, thus making it possible for land-use rights to be privatised. In 1998 the Land Administration Law was promulgated and since then all land use rights have been granted in return for fees, with exceptions relating to governmental entities and military entities; municipal infrastructure and social welfare facilities; energy, transportation, and irrigation facilities with government support; and other entities explicitly set out by laws and regulations.

421. In 2001, the Ministry of Land Resources issued a "Catalogue of Allocation of Land (MOLAR Decree 9)", which set out the categories for allocated land, but land for profit driven industrial and commercial use was not included in those categories. The "Regulation on the Implementation of the Land Administration Law of the People's Republic of China", and the "Provisions on the Assignment of State-owned Construction Land Use Right through Bid, Invitation, Auction, and Quotation", provide that with respect to land for industry, commerce, tourism, entertainment, commercial housing or other business operations, or on which there are two or more intended land users, the assignment shall be conducted through bid invitation, auction or quotation.

6.1.3 Manufacturer Response

422. The questionnaire response from Zong Cheng provided evidence that the price it paid for land-use rights was based on market rates. The evidence was of a valuation for the price paid for land-use rights by a moulding company in the same locality as Zong Cheng. The price was assessed on an independent basis because it involved a related-party transaction, and was similar to, but not exactly the same as, the price that Zong Cheng indicated that it paid for land-use rights.

423. The information provided by Zong Cheng indicates that prices paid in its locality by itself and the moulding company were around RMB 89/m^2, which is equivalent to around USD 1.28/ft^2. Assuming the payment covered the 50-year period for industrial land-use, a straight-line amortisation of that amount is equivalent to RMB 1.78/m^2 or USD 0.026/ft^2.

6.1.4 MBIE Research

Other Manufacturers

424. The Baosteel Group Annual Report for 2015, in its consolidated balance sheet, included a reference to the prepayment for land-use right of Zhanjiang Steel, while the 2016 Annual Report for Angang identified the provision for land-use rights under intangible assets.

Subject Research

425. One of the consequences of the ongoing socio-economic reforms and developments being undertaken in China is the move to achieve convergence of Chinese Accounting Standards (CAS) with International Financial Reporting Standards (IFRS). One of the issues in addressing comparability of accounting systems is the impact of China's unique legal framework for land ownership. As a substantial asset, land has a very different legal status in China to the equivalent asset in most Western societies, and this poses a challenge when seeking to compare financial reports of Chinese firms with those of companies outside China.[41]

[41] See Zhang, Y. and Andrew, J., Land in China: Re-considering comparability in financial reporting, *Australasian Accounting, Business and Finance Journal*, 4(1), 2010, 53-75 at http://ro.uow.edu.au/aabfj/vol4/iss1/4/.

6.1.5 Secondary Information

Other Jurisdictions

Australia

426. A previous Australian investigation concluded that a programme for land-use tax deductions was not a countervailable subsidy.[42]

EU

427. The EC investigation into *Organic Coated Steel* reviewed specific land-use right transactions, and concluded that since not all of them were subject to bidding or auction processes, the situation in China was unclear and non-transparent, and the prices were often arbitrarily set by the authorities. The EC claimed that these prices were set according to the Urban Land Evaluation System which instructed the authorities, among other criteria, to consider also industrial policy when setting the price of industrial land. The EU used industrial land prices in Taiwan as a benchmark, and established rates of subsidy as 0.73% as the weighted average for cooperating exporters and 1.36% for non-cooperating companies.

428. The EC investigation into *Hot-Rolled Flat Products* was referred to MBIE by NZ Steel following the release of the original EFC Report. MBIE noted that in the brief time available it had considered the EC report on its investigation, but did not consider that there was a financial contribution provided by way of the provision of land-use rights for LTAR, and it did not consider that the EC report would cause it to change its view.

USA

429. The USDOC investigation *Corrosion-Resistant Steel* referred to a US set of questions to the GOC through the WTO subsidy notification process which included reference to a Jiangsu Province plan for the iron and steel industry for 2009-2011. This plan identified land policies to promote the plan's objectives, which include transformation and improvement of the steel used in, *inter alia*, anti-corrosion. The USDOC considered that the GOC had not adequately responded to requests for information so relied on facts available. The USDOC calculated a level of subsidy for YFC at 0.36%, based on the benchmark of land values in Thailand from an earlier investigation, having concluded that Chinese land prices are "distorted by the significant government role in the market" and that world prices were not appropriate, since not available to Chinese purchasers (it is not clear how "world prices" for land could be determined).

[42] The relevant investigation was ADC *Aluminium Extrusions* 148. The Australian authority had determined that there had been no applicable exemption in land use fees since 1995, so this programme was not in operation during the period of investigation and any benefit that may be have been conferred under the programme prior to its cessation had not carried into the investigation period.

6.1.6 MBIE Analysis and Considerations

Financial Contribution Providing a Benefit

430. The information provided by the cooperating manufacturer is that the price it paid for land-use rights was similar to the price paid by another business in the same locality in a different business activity.

431. The information provided by the GOC is that there is no legislative basis for concluding that the provision of land-use rights at LTAR is a national or provincial programme.

A Government or any Public Body

432. In China land is owned by the State or by peasants' collectives, and its use is subject to legislation and regulations, with municipal and county governments responsible for allocating land-use rights in accordance with the requirements of the legislation and regulations.

Level of Benefit

433. There is a question as to the comparability of land costs between China and any other economy. In MBIE's view it is difficult to realistically compare the price paid for land-use rights in China with the price of land in another jurisdiction, when what is being provided or purchased is different. Rather, the proper approach would be a comparison between the charges for land-use rights for the Chinese producers of galvanised coil exported to New Zealand and other producers or industries in China, in order to determine if the charges to Chinese galvanised steel coil producers represent LTAR. When the EC undertook this analysis, it is not clear if the land use transactions rejected by the EC were influenced by the fact that there was one party only. If so, presumably, no bidding or auction process would be required (the price would be set by quotation) and the price paid for the land-use rights could well be lower than if there had been multiple parties bidding for the rights.

434. The EC investigation also established that a number of the transactions it investigated were based on bidding or auction processes, but questioned the validity of prices which appear to be based on quotation by the local authority, which is also envisaged in the governing legislation.

Specificity

435. The GOC has pointed out that it does not set or direct the land-use right price specific to any industry or any region. The transfer of land-use rights in China is based on market principles, and the price is typically determined by public bidding, public auction, independent appraisal and negotiations, according to Article 29 of the Regulation on the Implementation of the Land Administration Law.

436. The other jurisdictions which have undertaken investigations into similar products referred to the various government instruments identified in previous sections as providing a basis for concluding that access to land is by law limited to companies respecting the industrial policies set by the State.

437. MBIE has concluded that the relevant industrial policies set by the State do not mean that the steel industry as such is an "encouraged" industry, nor is it clear that land-use rights provided to steel companies are somehow differentiated between those usages which might fall within "encouraged" status, such as corrosion-resistant steel, and those that do not.

Conclusions

438. MBIE considered that information provided by the GOC and the responses from the cooperating manufacturer were the best information available.

439. Accordingly, the conclusion was that there is no financial contribution provided by way of the provision of land-use rights for LTAR.

440. MBIE therefore concluded that there is no countervailable subsidy in respect to government provision of land-use rights.

6.2 High Court Judgment

Overseas Jurisdictions

441. The High Court reviewed the analysis in the Final Report and the basis for MBIE reaching its conclusions, including the USDOC reliance on facts available, the Australian finding, and the use of land values in Thailand from an earlier investigation as a benchmark, and the EC's use of Taiwan land prices as a benchmark. The High Court inferred that MBIE concluded that information from the GOC and Zong Cheng was the best information available, partly because of MBIE's view that the overseas investigating authorities had used AFA and partly because of the benchmarking issue.

442. The High Court referred to NZ Steel's argument that MBIE had failed to take into account the findings in EC *Hot-Rolled Flat Products*, and reviewed the matters raised in the report of that investigation and the EC's conclusion that land-use rights should be considered a subsidy and that prices in Taiwan provided an appropriate benchmark. It was noted that the Shougang Group had received refunds from local authorities to compensate for prices they had paid for land use rights and payment for some of the land only had to be made several years after the land had been put to use. MBIE had not alerted the Minister to the fact that the EC had reached a contrary conclusion to MBIE, and that the EC conclusion was based on a detailed investigation which had included visits to the Shougang sites. This meant that the Minister was not properly informed about this recent and relevant investigation involving verified information (rather than "assuming the worst" analysis).

443. The High Court noted the arguments as to why it was not appropriate to extrapolate the EC findings on the Shougang Group to the New Zealand investigation, but considered that the significance of EC *Hot-Rolled Flat Products* was that it indicated that the GOC and Zong Cheng responses may not have been reliable and therefore raised doubt about whether MBIE should have relied on those responses as best evidence.

444. The High Court noted that MBIE's disregard of the view in EC *Organic Coated Steel*, that prices were determined by local government even where an auction process was held, was

not a reviewable error, nor was MBIE's approach to considering the price information provided by Zong Cheng. Finally, the High Court noted that arguments regarding the appropriateness of benchmarks could be put forward in any reinvestigation.

445. Other investigations by other jurisdictions identified in the comparative table included in the Judgment were CBSA *Concrete Reinforcing Bar*, CBSA *Line Pipe*, USDOC *Corrosion Resistant Steel* and USDOC *Cut-to-Length Steel Plate*.

6.3 Reconsideration

6.3.1 Primary Information

446. The primary information available to MBIE includes questionnaire responses from the original investigation and this reconsideration, and MBIE research conducted for the original investigation and for the reconsideration.

6.3.1.1 GOC Response

447. The GOC stated that there is no government programme of the provision of land-use rights at LTAR, and recalled its questionnaire response to the original investigation.

448. The GOC confirmed that under Article 4 of the "Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation, Auction and Quotation (2007 Revision)", land for industry purpose must be conducted through the public process of bid invitation, auction or quotation. If only one party participates in the process and its offer exceeds the floor price, it will win the land use right as the buyer. The floor price is determined by land authority based on land price evaluation.

449. The GOC stressed that there is no specificity with regard to the provision of land-use rights, because the GOC does not regulate or direct the provision of land-use rights to any industry or region. All industries across the country have equal access to land-use rights according to the laws. The land-use right price in China is based on market principles, and is typically determined by a range of methods, including public bidding, public auction, independent appraisal and negotiations according to Article 29 of the Regulations on the Implementation of the Land Administration Law of China.

6.3.1.2 Manufacturer Response

450. Yong Cheng's questionnaire response in the original investigation provided information showing that the prices it paid for land-use right were not dissimilar to prices paid by a nearby industrial user on the basis of an independent appraisal.

451. The other manufacturers covered by this reconsideration have not provided information relating to land-use rights.

6.3.1.3 MBIE Research

452. In China all land is owned by the State, but the relevant laws and regulations provide the basis for land-use rights to be purchased by industrial and other users. The issue to be

addressed is whether land-use rights are provided at less than adequate remuneration and thereby confer a benefit on the recipient

453. The process set out in the "Provisions on the Assignment of State-owned Construction Land Use Right through Bid Invitation Auction and Quotation (2007 Revision)" encompasses the three types of process where there are two or more intended land users (Article 4), and with the base bid price or base price set by the local department of land and resources according to land valuation results and the government industrial policy (Article 10). Where there is only one applicant, the floor price will apply.

454. The "Regulations on the Implementation of the Land Administration Law of China (2014 Revision)" provide for the competent department of land administration to conclude a contract on the paid-for use of State-owned land with the land user (Article 23.3), and that forms of paid-for use of State-owned land include transfer of State-owned land-use right, leasing of State-owned land, and contribution at a fixed value or equity participation for State-owned land-use right (Article 29).

6.3.2 Secondary Information

455. The secondary information available to MBIE includes the findings of other jurisdictions and submissions made by NZ Steel.

6.3.2.1 Australia

456. The Australian review, ADC *Aluminium Extrusions* 248 (2015) concluded that a programme for the provision of land-use rights for LTAR was not a countervailable subsidy. In that review, the ADC considered the findings of other countries to be informative and provide a solid understanding of the issues that appear to relate to land-use rights in China. However, the data provided by the exporters in that review had revealed that there had not been any land-use rights granted to aluminium extruders during the period of investigation. As a result, the ADC was not in possession of sufficient information to satisfy itself that the programme should be found to be countervailable in relation to aluminium extrusions. [43]

457. The findings of other countries referred to by the ADC included USDOC *Laminated Woven Sacks* (2008) which the ADC noted as appearing to have relied on the US adverse facts available provision; USDOC *Solar Cells* (2012), which involved an in depth study of the Chinese land sector and included meeting with GOC officials; and EC *Organic Coated Steel*, which found that there was no functioning market for land in China and most land in China is State-owned.

458. A number of other investigations, including ADC *Galvanised Steel Coil* 193 and ADC *Steel Reinforcing Bar* 322 (2016), addressed land-use tax deductions as tax concessions, and now

[43] USDOC *Laminated Woven Sacks* found subsidies of 13.36%, based on AFA; USDOC *Solar Panels* found subsidies of 0.15%-0.67%, also based on AFA, for cooperating exporters; and EC *Organic Coated Steel,* which found subsidy rates of 0.34% and 1.12% for cooperating exporters.

determined that they were countervailable subsidies, not having done so in ADC *Aluminium Extrusions* 148 in 2010. However, these findings did not relate to the provision of land-use rights at LTAR.

MBIE Comment

459. Australian investigations do not provide any useful secondary information in regard to the provision of land-use rights at LTAR.

6.3.2.2 Canada

460. The High Court made no specific references to any analysis in CBSA *Concrete Reinforcing Bar* and CBSA *Line Pipe*, but in the summary of overseas investigation findings did note that overall subsidy rates set in *Concrete Reinforcing Bar* ranged from 0.4%-14.7%, and in *Line Pipe*, from 0.38-17.32%.

CBSA *Concrete Reinforcing Bar*

461. CBSA *Concrete Reinforcing Bar* did not include any consideration of the provision of land-use rights.

462. The application identified a large number of programmes, so due to a lack of government response, subsidy amounts for all non-cooperating exporters were determined on the basis of ministerial specification. Without a complete response to the subsidy RFI from the GOC and all known exporters, the CBSA did not have sufficient information to determine that any of the 176 programmes identified did not constitute actionable subsidies. The amount of subsidy was determined by ministerial specification on the basis of the amount of subsidy for the five programmes found for the cooperating exporter, plus the average amount of the subsidy so found applied to each of the remaining 176 potentially actionable programmes for which sufficient information was not available or had not been provided. It does not appear that the CBSA conducted any verification visit to the GOC or to Chinese exporters.

463. The subsidy rates identified by the High Court ranged from 0.4%-14.7%, with 0.4% being the total subsidy level across five programmes of the named exporter (which did not receive a benefit relating to land-use rights), and 14.7% being the sum of the subsidy rate found for the named exporter plus the average per programme subsidy for the named exporter applied to 176 potentially actionable subsidy programmes for which sufficient information was not available or was not provided at the final determination. Effectively, the estimated average subsidy level for each non-investigated programme was 0.08%, but the provision of land-use rights was not one of the programmes listed.

464. There was no actual investigation or finding relating to the provision of land-use rights for less than adequate remuneration, so it is not clear why the High Court included it in its summary of overseas investigation findings.

CBSA *Line Pipe*

465. In CBSA *Line Pipe* it was established that one of the named exporters purchased land in Jiangsu Province for less than adequate remuneration, with the benefit equal to the

difference between the actual purchase of the land and the benchmark land price provided by the exporter. The CBSA Statement of Reasons did not provide any details of the transaction concerned and the basis for concluding that it was at LTAR. It is not clear what the benchmark may have been, but there is no reference to it not being a domestic benchmark.

466. The subsidy rates identified by the High Court relate to the total levels of subsidy for all programmes, with 0.38% being the lowest total applicable to one of the named exporters and 17.32% being the total subsidy applied to all other exporters than the named exporters. The all others rate was based on highest amount for each of 72 programmes for named exporters plus the simple average of the 72 applied to each of the remaining 89 programmes for which sufficient information was not available or was not provided at the final determination. Four of the named importers were located in Jiangsu Province so three of those did not benefit from this programme. The average per programme subsidy levels for these four exporters ranged from 0.25% to 1.94%, with the total subsidy levels for the Jiangsu exporters ranging from 1.48% to 15.50%. The average per programme rate for all other exporters was 0.108%.

MBIE Comment

467. Neither of these Canadian cases provides a reliable basis on which to conclude that there is a countervailable subsidy arising from the provision of land-use rights at LTAR. CBSA *Concrete Reinforcing Bar* did not examine any such subsidy. In CBSA *Line Pipe*, one of four potentially qualifying exporters was found to have received a subsidy, while the rate per programme assigned to exporters other than named exporters was equivalent to 0.11 per cent.

6.3.2.3 EU

468. The EC reviewed the provision of land-use rights at LTAR in EC *Organic Coated Steel* (2013) and EC *Hot-Rolled Flat Products* (2017). In its summary of overseas investigation findings, the High Court included EC *Organic Coated Steel*, with subsidy rates of 0.34%-1.36% and EC *Hot-Rolled Flat Products*, with subsidy rates of 1.20%-7.63%.

EC *Organic Coated Steel*

469. In EC *Organic Coated Steel*, it was noted that in China all land is government-owned but the relevant laws allow for the assignation of land-use rights through bidding or auction. Information provided by the GOC indicated that of thirteen land-use rights transactions concerning sampled exporters, only six were subject to a bidding or auction process. The EC reviewed the individual transactions and found that some involved only one participant and the final transaction price was the same as the initial price arbitrarily set by the local Land Resources Bureau, while bidding processes resulted in the same prices and other transactions involved exchanges for shares. In the case of the other cooperating exporter there was no confirmation that transactions were subject to bidding or auction.

470. The EC considered that the situation concerning land provision and acquisition in China is unclear and non-transparent, and the prices are often arbitrarily set by the authorities. The

authorities set the prices according to the Urban Land Evaluation System which instruct them among other criteria to consider also industrial policy when setting the price of industrial land. The EC also noted that the information submitted by the complainant suggested that the land in China is provided for below the normal market rate.

471. The EC concluded that the provision of land-use rights by the GOC should be considered a subsidy in the form of provision of goods which confers a benefit upon the recipient companies. There is no functioning market for land in China and the use of an external benchmark demonstrated that the amount paid for land-use rights by the cooperating exporters was well below the market rate. The subsidy was specific because access to industrial land is by law limited to companies respecting the industrial policies set by the State, only certain transactions were subject to a bidding process, prices were often set by the authorities, and government practices in this area were unclear and non-transparent.

472. In calculating the amount of the subsidy, the EC concluded that the situation in China with respect to land-use rights was not market-driven, so there appeared to be no available private benchmarks at all in China. The EC therefore used an external benchmark, and in the absence of cooperation from the GOC, resorted to facts available to establish a benchmark based on information from Taiwan on average industrial land prices, adjusted for currency depreciation and GDP "evolution". The subsidy amount was allocated to the investigation period using the normal lifetime of 50 years for land-use rights in China, and allocated over the total turnover of the cooperating exporter during the investigation period. The rates so established were 0.34 per cent and 1.12 per cent for the sample cooperating exporters, 0.73 per cent for other cooperating exporters, and 1.36 per cent for all non-cooperating exporters.

EC *Hot-Rolled Flat Products*

473. In EC *Hot-Rolled Flat Products*, the EC noted that in China all land is owned by the State, but under relevant laws companies and individuals may purchase land-use rights. For industrial land this is normally for 50 years, renewable for a further 50 years. As advised by the GOC, since August 2006, title to industrial land can only be granted from the State to industrial enterprises through bidding or a similar public offering process whereby the final deal price must not be lower than the minimal bidding price. The GOC considered that there was a free market for land in China and the price paid by an industrial enterprise for the leasehold title reflected the market price. The EC identified the relevant laws and regulations.

474. The EC noted that in previous investigations it had found that prices paid for land-use rights in China were not representative of a market price determined by free market supply and demand, since the bidding or public offering process was found to be unclear, non-transparent and not functioning in practice, and prices were found to be arbitrarily set by the authorities. Prices were set according to the Urban Land Evaluation System which instructed, amongst other criteria, to consider also industrial policy when setting the price of industrial land. The EC also claimed that in the steel sector, access to industrial land was by law limited only to companies respecting industrial policies set by the State (Article 24 of Decision 35 – "Policies for the Development of the Iron and Steel Industry"). The EC

stated that the current investigation had not shown any noticeable changes in this respect. It found that none of the sampled exporters had gone through a bidding or similar public auction process for any land-use rights, and noted that before 2000 land-use rights were usually allocated free of charge. More recent plots of land had been allocated by local authorities at negotiated prices.

475. In the investigation, the EC also found that some companies in the Shougang Group had received refunds from local authorities to compensate for the prices they paid for land-use rights for work done by the company itself as regards basic infrastructure on the land, while some of the land-use rights obtained by some companies in the Shougang Group only had to be paid for several years after the land had been put into use. Neither the GOC nor the sample companies provided any evidence that prices paid for allocated land-use rights were based on market prices, nor was evidence provided to support arguments that prices paid reflected the "real value" of the land. With regard to the Shougang Group, the EC rejected the GOC argument that the refunds involved works done by the company for basic infrastructure which was normally the task of local government. The rejection was on the grounds that only general infrastructure is exempted from the notion of a subsidy, and the activities involved in this case were for the exclusive use of the company.

476. In its conclusion, the EC noted that the situation concerning land provision and acquisition in China is non-transparent and the prices were arbitrarily set by the authorities. Accordingly, the provision of land-use rights by the GOC should be considered a subsidy in the form of the provision for goods which conferred a benefit on the recipient. There is no functioning market for land in China and the use of an external benchmark demonstrated that the amount paid for land-use rights by the sampled exporters was well below the "normal market rate." The steel industry was considered to be a pillar of the Chinese industry and was listed as an encouraged industry, while Decision 40 (see section 5.3.1.4) required that public authorities ensure that industries that are "restricted' will not have access to land-use rights. The subsidy was therefore specific since the preferential provision of land was limited to companies belonging to certain industries, in this case the steel sector, and government practices in this area are unclear and non-transparent.

477. In calculating the level of subsidy, the EC used information from Taiwan as an external benchmark, using the average industrial land price per square metre established in Taiwan corrected for inflation and GDP "evolution". The subsidy level so established was allocated on the same basis as in EC *Organic Coated Steel* as noted above. The subsidy rates for sampled exporters ranged from 1.20 per cent to 7.63 per cent (for the Shougang Group, which included the refund referred to above).

MBIE Comment

478. In the light of the information provided by the cooperating producer and MBIE's analysis of the relevant laws and regulations, MBIE has difficulties with a number of aspects of the EC conclusions. These include assumptions about the nature of land ownership in China and the implications for land values; the legal processes involved in establishing the value of land-use rights and the conclusions drawn by the EC when bid and auction processes were not involved; the relevance of external benchmarks and the basis for their establishment

in determining the existence and level of any benefit; the extent to which prices are affected by government industrial policies and whether the steel industry as such is "encouraged" and the implications for specificity.

479. In particular, MBIE notes that the EC had found it significant that in transactions involving only one participant there had been no bidding process, when surely this is self-evident, and referred to sales being made at negotiated prices. The EC appears to operate on the assumption that because the government owns the land there is no functioning market for land so prices cannot be at a normal market rate. However, MBIE does not consider that there is evidence that prices are not market driven within the framework of the Chinese land-use system. Also, in EC *Hot-Rolled Flat Products* it is suggested that under Article 10 of the "Provision on Assignment of State-owned Construction Land-use Right through Bid Invitation, Auction and Quotation" local authorities set land prices according to the urban land evaluation system and the government's industrial policy. In fact, the relevant provisions relate to the setting of minimum base prices for the bid, auction and quotation process, and cannot be taken as evidence that prices are distorted by government intervention.

480. In EC *Organic Coated Steel* the EC appears to have concluded that the situation concerning land provision in China was unclear and non-transparent and prices are arbitrarily set by authorities, when it is clear from the evidence cited by the EC itself that the transactions it investigated were carried out in accordance with the relevant laws, meaning that they were clear and transparent in that respect. The law provides for bid invitation, auction and quotation where there are more than two parties seeking land, and the basis for authorities to set minimum levels for the process is also set out in the law. The forms of paid-for use for State-owned land are set out in the relevant regulations as allowing for the transfer of State-owned land-use right, the leasing of State-owned land, and the contribution of a fixed value or equity participation for State-owned land-use right.

481. MBIE also has reservations about the treatment of refunds for work done on land as arising from any programme to provide land-use rights at LTAR, and does not consider that the EC's reference to general infrastructure is relevant in this context. It could well be argued that refunds for work undertaken by a company that should have been carried out by the local authority does not constitute a subsidy, let alone represent the provision of land-use rights at LTAR. Also, delays in payments for land-use rights do not mean that the original valuation of the land-use rights was not appropriate, but could reflect a different form of subsidy.

482. The refunds and payment delays identified by the EC related to some companies in the Shougang Group, and it is not clear if the company included in the current reconsideration, Shougang Jingtang United Iron and Steel Co, was one of those companies, or if the effect of any subsidy involved is applicable to that company on the basis set out in section 4.4 above (this question was also raised by the High Court). In this context, MBIE notes that Shougang Jingtang is located on land largely reclaimed from the sea, and is therefore likely to be the Shougang company referred to in EC *Hot-Rolled Flat Products* as having adjustments accepted to cover costs relating to the land filling exercise. This means that it is not the

Shougang company involved in the refunds for roading costs, which were not accepted by the EC, and is unlikely to be the company involved in the delays in payments for land-use rights. In these circumstances, and in light of the considerations set out in section 4.4 above, MBIE does not consider that the EC's subsidy findings relating to the Shougang Group can provide a reliable basis for assuming that such findings should apply to the Shougang company covered on this reconsideration.

6.3.2.4 USA

483. The High Court did not specifically discuss any USDOC investigations, but in its summary table of overseas findings identified USDOC *Corrosion-Resistant Steel* (2016), with subsidy rates of 0.36-13.6 per cent, and USDOC *Cut-to-Length Plate* (2017), with a subsidy rate of 2.55 per cent.

Corrosion-Resistant Steel

484. The USDOC noted that it was aware that there was a Jiangsu Province iron and steel industry plan applicable during the period 2001-2014 which apparently encouraged the development of certain sectors including the corrosion-resistant steel industry through, *inter alia*, priority in land use. The GOC had not provided this information in response to a specific request, so the USDOC found, as facts available, that Jiangsu Province provided preferential land-use rights at LTAR and that such land provision was specific because it was limited to the corrosion-resistant steel industry. The cooperating exporter, Yieh Phui, was located in Jiangsu Province and had received land-use rights from the local authority.

485. In determining a benchmark for establishing the level of benefit, the USDOC stated that it could not rely on Chinese land prices, because they were distorted by the significant government role in the market, and could not use world market prices available to purchasers in China, since this was not appropriate. Accordingly, the USDOC used as a benchmark prices of land in Thailand, adjusted according to inflation. The subsidy level so determined was 0.35 per cent, and this rate was applied to all other exporters (apparently irrespective of whether they were located in Jiangsu Province). The USDOC consideration of the benchmark location was drawn from USDOC *Laminated Woven Sacks*, in which USDOC stated "Taiwan cannot serve as an appropriate benchmark for land values because Taiwan is not economically similar to China." This appears to be at odds with the EC approach.

486. In addition, the USDOC used AFA to apply a rate of 13.36 per cent for a programme "Provision of Land-use Rights to SOEs for LTAR", based on findings in an investigation into *Laminated Woven Sacks* (2008). The use of AFA to suppliers other than YFC was based on the failure of the other suppliers, including Angang, Baosteel, and Changshu and the GOC, to respond or to respond adequately to requests for information, such that USDOC concluded that they did not cooperate to the best of their ability and an adverse inference was therefore warranted.

Cut-to-Length Plate

487. USDOC considered that the mandatory respondents had failed to cooperate by not acting to the best of their ability to comply with requests for information, so applied AFA to establish subsidy rates for all programmes under investigation. This included "Provision of Land-use Rights for LTAR" at 2.55 per cent (based on USDOC *Cold Rolled Steel* (2016), itself based on USDOC *Oil Country Tubular Goods* from 2009), and "Provision of Land to SOEs for LTAR" at 13.36 per cent (based on USDOC *Corrosion Resistant Steel*, itself based on USDOC *Laminated Woven Sacks* from 2008).

MBIE Comment

488. The USDOC findings in both cases were based on AFA, and in USDOC *Corrosion-Resistant Steel* including assumptions that land-use rights provided in a particular industrial park were provided at preferential prices and were specific. The notion of a "world price" for land is clearly not realistic, nor is it appropriate to seek to compare land costs in different countries with different systems and different physical conditions. If land-use prices in Jiangsu Province were lower because of the provincial plans encouraging the corrosion-resistant steel sector as identified by USDOC, then the appropriate comparator would be with prices in other locations in China, which involved 50-year land-use rights, and not in prices in another country which may reflect transfer of actual ownership of the land, and not land-use rights for a fixed period.

6.3.2.5 NZ Steel Submissions

Submission of 31 January 2019

489. In its submission, NZ Steel suggested that EC *Hot-Rolled Flat Products* was the best information available of the benefits conferred through the provision of land-use rights at LTAR, and the subsidy rate of 7.63 per cent found for Shougang should be applied, and should also provide the basis for determining a subsidy rate for non-cooperating producers.

Mr Gospage's Opinion

490. Mr Gospage challenged the accuracy of the information provided by Zong Cheng in the original investigation, and recalled that the EC *Organic Coated Steel* findings were based on verified information that reported transactions involving only one participant that had not been based on a bidding process, and prices were those set by the local Land Resources Bureau. Mr Gospage suggested that the WTO Appellate Body in *US – Softwood Lumber IV* had made it clear that in situations where the government is the sole or predominant supplier or where it administratively controls all the prices of the good or service in question then the market is distorted and in-country prices cannot be the correct benchmark.

491. With regard to EC *Hot-Rolled Flat Products*, Mr Gospage noted that none of the sampled manufacturers had gone through a bidding process, and one company had received refunds from the local authorities to compensate for prices they had paid for land-use rights. Mr Gospage noted the findings in USDOC *Corrosion-Resistant Steel* regarding Jiangsu

Province and evidence that the provision of land-use rights was part of policies to encourage steel production.

492. Mr Gospage concluded that MBIE had relied on GOC statements and unverified information from the cooperating manufacturer, and had not taken account of information from the EC regarding auction prices. With regard to benchmarks, Mr Gospage questioned whether MBIE's approach provided reliable evidence, given the specific information in the EU and US findings.

MBIE Comment

493. MBIE has carefully reviewed the information available, including information from investigations undertaken by other jurisdictions, and in particular those undertaken by the EC as described by Mr Gospage. MBIE is satisfied that on the basis of information from the GOC and the cooperating manufacturer, and from information that MBIE has gathered in other investigations involving steel products from China, it can conclude that land-use rights have not been provided at LTAR. For the reasons outlined in sections 6.3.2.1 to 6.3.2.4 above, and summarised in section 6.3.3.1 below, MBIE does not consider that the secondary information from the findings of other jurisdictions provides a reliable basis to reach a different conclusion.

6.3.2.6 Previous Investigations

494. MBIE has undertaken investigations into *Steel Reinforcing Bar and Coil from China* and *Hollow Steel Sections from China*, in which this programme was investigated.

495. In *Steel Reinforcing Bar*, MBIE was satisfied that there was evidence that the original value of the land-use rights utilised by a cooperating manufacturer was subject to an appraisal process, and that the lease amounts paid by the manufacturer exceeded that amount, and did not permit a conclusion that a benefit had been conferred.

496. In *Hollow Steel Sections*, MBIE noted that in EC *Hot-Rolled Flat Products* the EC claimed that no evidence was provided by the GOC or by exporters to confirm that prices not based on bidding or auction were not set arbitrarily by the authorities, and recalled that before 2000 land-use rights were usually allocated to a company free of charge. MBIE considered that this would appear to illustrate a reliance on facts available where a negative cannot be proved, and the reliability of such assumptions must therefore be carefully considered in the context of other information that is available. It was difficult to see how such cases necessarily led to a conclusion that the price paid was questionable. MBIE noted that there may well be situations where there is only one customer for land-use rights, in which case setting the price by quotation would be appropriate. The information available to MBIE in *Hollow Steel Sections* and previous investigations was that prices have been based on valuation processes.

497. In *Hollow Steel Sections*, MBIE noted that the sample manufacturers who had responded had claimed that they had not paid prices for land that were different from those charged for other enterprises in their area. MBIE had satisfied itself that the information provided

by the cooperating sample manufacturers was accurate in relation to the provision of land-use rights at LTAR.

6.3.3 MBIE Analysis and Consideration

6.3.3.1 Findings

Financial contribution by a government or any public body

498. MBIE concludes that because in China all land is owned by the State (and peasants' collectives) and land-use rights are granted by the State, then it is clear that any financial contribution is provided by the government.

Provision of a benefit

499. MBIE notes that the purpose of the "Provisions on the Assignment of State-owned Construction Land-use Right through Bid Invitation, Auction or Quotation (2007 Revision)" is to regulate the assignment of State-owned construction land-use right, optimise the allocation of land resources, and establish an open, fair and impartial land-use system. MBIE also notes that the information from the cooperating manufacturer in the current reconsideration is that the price it paid for land-use rights was similar to the price paid by another industrial user in its locality, which was based on a valuation process. MBIE also notes that this is consistent with the information obtained by MBIE in previous investigations involving steel products from China.

500. In considering secondary information from other jurisdictions, MBIE notes:

- Australia has not found any countervailable subsidy relating to the provision of land-use rights.
- In the Canadian cases, CBSA *Corrosion-Resistant Steel* did not address the provision of land-use rights at LTAR; CBSA *Line Pipe* found that one manufacturer in Jiangsu Province received a subsidy, but the investigation report does not provide any details on the basis for concluding that the transaction was a subsidy or the benchmark that was used.
- In both EC *Organic Coated Steel* and EC *Hot-Rolled Flat Products* the EC appears to have concluded that the situation concerning land provision in China was unclear and non-transparent and that there was no functioning market for land in China, whereas MBIE's understanding of the operation of the Chinese laws and the evidence from its own investigations suggests otherwise.
- In EC *Hot-Rolled Flat Products* the EC reached conclusions relating to some Shougang companies which MBIE considers are unlikely to be applicable to the Shougang company subject to this reconsideration because the descriptions of the companies concerned differ.
- Both of the USDOC investigations discussed here reached conclusions based on AFA without any apparent analysis of any actual transactions.

501. MBIE does not consider that benchmarks based on land prices in other countries are appropriate for the determination of any benefit from the provision of land-use rights in

China. The correct approach would be to ascertain whether the amounts paid for land-use rights were at less than adequate remuneration in relation to in-country benchmarks.

502. MBIE is satisfied that, based on the information provided by the GOC and the cooperating manufacturer, and from information that MBIE has gathered in other investigations involving steel products from China, it can conclude that land-use rights have not been provided at LTAR. MBIE does not consider that the secondary information from the findings of other jurisdictions provides a reliable basis on which to reach a different conclusion.

503. Accordingly, MBIE concludes that having regard to all available information that it considers reliable, it does not consider that there is any financial contribution by a government through the provision of land-use rights at less than adequate remuneration that provides a benefit to the recipient.

Specificity

504. In the absence of a financial contribution from a government that provides a benefit, there is no requirement to consider specificity.

Conclusions

505. MBIE concludes that for this reconsideration there is no provision of land-use rights at LTAR.

6.3.3.2 Matters raised by the High Court

506. The High Court noted that in the original investigation MBIE had not alerted the Minister to the fact that the EC, in EC *Hot-Rolled Flat Products*, had reached a contrary conclusion to MBIE, and that that decision was based on a detailed investigation that included visits to Shougang sites. This suggested that the responses from the GOC and Zong Cheng may not have been reliable and raised doubts as to whether MBIE should have relied on those responses as the best evidence.

507. The High Court did not consider that MBIE's disregard of the view in EC *Organic Coated Steel* was a reviewable error, nor was MBIE's approach to considering the price information from Zong Cheng. The High Court did note that arguments regarding the appropriateness of benchmarks could be put forward in any reinvestigation.

508. MBIE has set out above the reasons why it does not consider that the investigations by other jurisdictions provide a reliable basis for concluding that in this reconsideration there are grounds for finding that land-use rights are being provided at less than adequate remuneration. In particular, in section 6.3.2.3 above MBIE has outlined why it does not consider that the EU findings with regard to some Shougang companies provide a reliable basis for assuming that those findings are applicable to the Shougang company covered in this reconsideration.

6.3.3.3 Conclusion

509. MBIE concludes that on the basis of information it considers reliable, there are no grounds for determining that in this reconsideration land-use rights have been provided at less than

adequate remuneration. In reaching this conclusion MBIE has taken into account the matters raised by the High Court.

7. Provision of input materials at LTAR

510. A finding of subsidisation in relation to the price of inputs would require that evidence is available to confirm that under the programme:

- input products were provided by a government or any public body
- a benefit to the recipient was provided in that the provision of input materials was made for less than adequate remuneration, with the adequacy of remuneration determined in relation to prevailing market conditions in China for the input goods, including price, quality, availability, marketability, transportation and other conditions of purchase, and
- the programme was specific to certain enterprises.

511. The discussion in this Chapter is in three parts. The first part, in section 7.1, is a summary of the information and conclusions from the original investigation. The second part, in section 7.2, is a summary of the relevant parts of the High Court Judgment. The third part, in section 7.3, is a detailed reconsideration of the issue of policy loans.

7.1 Original Investigation

7.1.1 Application

512. In its application NZ Steel referred to purchases of hot-rolled coil (HRC), cold-rolled coil (CRC), zinc and primary aluminium as input materials. MBIE confirmed that the subject goods do not include aluminium-coated steel, so excluded the claim relating to the provision of primary aluminium at LTAR.

513. NZ Steel's application claimed that mills receive a financial contribution from a public body in the form of provision of HRC, CRC, zinc and primary aluminium at LTAR. NZ Steel understands that these materials are predominantly produced in state invested enterprises (SIEs) in China, which are public bodies.

514. In its submission of 6 April 2017, NZ Steel provided information to support claims that providers of input materials were primarily government-owned, and also provided information from an EU investigation concerning the calculation of the amount of the subsidy. In the submission, NZ Steel also provided information supporting claims that providers of input materials are public bodies, citing the main functions of the SASAC and regulations on the supervision and management of State-owned assets, and investigations by authorities in Canada, Australia, and the EU, which concluded that steel SOEs were public bodies.

7.1.2 GOC Response

515. The information provided by the GOC emphasised that input producers in China are independent business entities operating on a commercial basis, in accordance with the Company Law of the People's Republic of China.

516. The GOC noted that economic structure differs from country to country. China has transitioned from a planned economy to a market economy and this process has included the reform of State-owned enterprises. As a result State-owned enterprises operate in the same manner as other market players in response to market forces. Therefore, input producers in China are independent business entities, operating on a commercial basis, making decisions independently with respect to their day-to-day commercial operations, including production, contract signing, price setting and commercial negotiations, without any interference or influence from any government agencies.

517. Input producers are bound by and comply with the Company Law of the People's Republic of China. Key provisions of this law include Article 36, which prescribes that the shareholders' meeting of a limited liability company is the authority of the company and shall exercise its powers according to the Law; Article 37 which prescribes that the shareholders' meeting shall determine all the significant operational issues and plans for the company; Article 46 which prescribes that the board of directors shall be responsible for the shareholders' meeting and shall implement the resolutions made at the shareholders' meetings as well as manage daily business operations; Article 49 which prescribes that the manager shall be responsible for the board of directors and oversee the daily management of the company; and Article 147 which prescribes that the directors, supervisors and senior managers shall comply with the laws, administrative regulations, and bylaws, and shall bear the obligations of fidelity and diligence to the company. The articles of association of a company establish the corporate governance structure and are formulated by the shareholders in compliance with the Company Law.

518. The GOC further stressed that the prices of inputs function in accordance with market dynamics. The HRC, CRC and zinc markets in China operate under market conditions, and the GOC does not interfere in or influence pricing in these markets.

7.1.3 Manufacturer Response

519. In its questionnaire response, Zong Cheng confirmed that it purchases hot-rolled coil, cold-rolled coil and zinc ingots from a range of suppliers.

520. The information provided by Zong Cheng indicated that it purchased hot-rolled coil, cold-rolled coil and zinc ingots for use in the manufacture of galvanised steel coil. Lists of suppliers and details of transactions for all three products were provided. Virtually all of the suppliers were identified as government-owned companies. Zong Cheng claimed that the purchase price of the raw materials reflected the market price of the goods and no reductions were received. An analysis of the prices paid indicated that they were not inconsistent with prices available in the Chinese market.

7.1.4 MBIE Research

521. Angang, Baosteel and Shougang are integrated steel producers, so do not purchase HRC and CRC from other suppliers.

522. In its 2016 Annual Report, Angang noted that its pricing principles for billets in connected party transactions were to apply market prices. Baosteel's 2015 Annual Report included similar provisions relating to the sales of products between related parties.

7.1.5 Secondary Information

Other Jurisdictions

Australia

523. The ADRP addressed an appeal by the GOC against the findings in ADC Galvanised Steel 193 that SIEs that produced and supplied HRC to producers of coated steel in China were public bodies. The ADRP noted the indicia for determining whether entities are public bodies which the Australian authorities had drawn from the WTO Appellate Body in its DS379 report, and which were set out in an Australian court decision.[44] The Australian authority relied on this analysis in its Investigations 203 and 177 relating to hollow structural sections of steel, and applied these findings in Investigation 193. The ADRP reviewed the analysis undertaken by the Australian authorities, including the review undertaken by the Trade Measures Review Officer (TMRO) of Investigation 177.

524. The ADRP noted the conclusions reached by the TMRO with regard to the exercise of governmental functions by an entity, and suggested that it conflated the purpose of acting in accordance with government policy and carrying out government functions. The ADRP stated that compliance with government policy does not of itself evidence that an entity possesses, exercises or is vested with government authority, which was the over-riding test established by the WTO Appellate Body. With regard to the evidence that a government exercises meaningful control over an entity and its conduct, the ADRP noted that the material relied upon by the Australian authorities did demonstrate that the GOC regulated the iron and steel industry and that there was a degree of control over the participants in the industry, but the material did not show that the control amounted to meaningful control in the sense intended by the WTO Appellate Body. The ADRP did not consider the control exercised by the GOC over SIEs in the iron and steel industry was such that those SIEs were in effect exercising government authority. The overall conclusion of the ADRP was that the decisions made by the Attorney-General with respect to countervailing duties should be revoked.

525. In a subsequent Australian case (ADC *Rebar and Rod in Coils* 322) the Australian ADC noted that WTO dispute settlement findings made subsequent to the ADRP conclusions clarified "meaningful control" to the extent that Chinese suppliers of inputs could be considered to be "public bodies". However, MBIE did not agree with the ADC's interpretation of the WTO Appellate Body findings in those cases. In particular, the Appellate Body considered that in *US – Carbon Steel (India)* the Panel erred in its interpretation of Article 1.1(a)(1) by construing the term "public body" to mean any entity that is "meaningfully controlled" by a

[44] *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870.

government, and the suggestion that a government's ability to control an entity was determinative for purposes of establishing whether that entity constitutes a public body.[45]

526. In Investigation 322, the Australian ADC also considered that an integrated steel mill that was a public body providing billet (a production input for HRC and CRC and other steel products) to itself was a benefit from a public body. This was on the basis that inputs (coking coal) into billet production were sourced from an SIE at LTAR, and the benefit extended to the production of the billet, so the internal supply of the billet is a benefit. MBIE considered that this leads to a risk of double counting, particularly if the internal accounting provision for billet costs was treated by an investigating authority as being at LTAR. This risk also applies in relation to coil produced from the billet which is also an input into galvanised coil. For these reasons MBIE would not be comfortable pursuing this approach.

EU

527. In the report of its investigation into *Organic Coated Steel* from China, the EC considered the provision of HRC and CRC for LTAR. The EC noted that in view of the limited information provided by the GOC, publicly available factual information from similar proceedings conducted by other investigating authorities as well as other publicly available information, provided the basis for the EC's consideration. The EC reviewed the report of the WTO Appellate Body in DS379, and noted the definition of a public body as an entity that "possesses, exercises or is vested with governmental authority" and are also characterised by the "performance of governmental functions" which would "ordinarily be considered part of the governmental practice in the legal order of the relevant Member." The EC noted the role of the GOC in the management of the economy, including the operation of various 5-year plans. The EC report also identified the Steel Plan, and the right of the state to intervene in the purchase of raw materials (Article 30 of the Steel Plan),[46] and the leading role given to the biggest State-owned steel producers, including Angang and Baosteel.

528. The EC considered that SOEs producing HRC and CRC often performed government functions described in the sectoral plans for the iron and steel industry, such that it was a fact that the GOC is using the iron and steel industry as a prolonged arm of the state in order to achieve goals and targets set in those plans. Governmental control through ownership, administrative regulation and involvement of the SASAC, the composition of boards of directors, and the plans governing the iron and steel industry, indicated, to the EC, that the SOEs possess, exercise or are vested with governmental authority. The EC also

[45] In fact, the Panel did not say this, it concluded that "…in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by the government. We further recall that government shareholding, when combined with other factors, may well be indicative of the government's "meaningful control" of an entity." (WT/DS436/R, at paragraph 7.89, emphasis added)

[46] In fact, Article 30 refers to cooperation in accessing offshore sources of raw materials, and the restriction of preliminary processed products with high energy-consumption and serious pollution.

concluded that any SOE in which the government is the majority or the largest shareholder is a public body, while all private bodies in the steel sector are entrusted or directed by the State and behave in the same way as public bodies.

USA

529. In its Issues and Decision Memorandum for the Final Determination on *Corrosion-Resistant Steel* from China, the USDOC continued to find that companies producing hot-rolled steel, cold-rolled steel, zinc, and primary aluminium purchased by Yieh Phui China were "authorities" within the meaning of the US legislation. The USDOC also noted that the GOC had failed to cooperate to the best of its ability in responding to the USDOC's requests for information, so remaining producers were considered to be "authorities" on the basis of AFA. In addition to failing to provide information on specific input suppliers, the GOC had failed to respond to explicit requests for information on the extent that owners, managers, or directors of a producer were officials of the Chinese Communist Party, or were otherwise influenced by State-owned entities.

530. The USDOC found that SOEs in China possess, exercise, or are vested with governmental authority. The USDOC claims that the GOC exercises meaningful control over these entities and uses them to effectuate its goals of upholding the socialist market economy, allocating resources, and maintaining the predominant role of the state sector.

7.1.6 MBIE Analysis and Considerations

Financial Contribution Providing a Benefit

531. MBIE considered that the evidence did not show that SIEs supplying inputs into the production of galvanised steel coil were pricing those inputs on the basis of any government direction or authority, which indicated that the positive evidence of prices, as provided by Zong Cheng, reflected the market prices available to it. Similar conclusions applied with regard to any non-government-owned suppliers.

A government or any public body

532. In reaching its conclusions on whether suppliers of HRC, CRC and zinc were "public bodies," MBIE had considered the points made by the GOC, the evidence from the cooperating manufacturer, as well as the views of the ADRP, and the analyses undertaken by the US and EU authorities. MBIE had analysed the status of input suppliers and their role and functions on the basis of the considerations it had identified for a public body analysis, and in the context of the alleged subsidy programme under consideration, which is the provision of raw materials at LTAR.

533. MBIE was satisfied that the information available indicated that while suppliers of input materials are, in the main, State-owned enterprises, they were not "public bodies" in the context of Article 1.1(a) of the SCM Agreement. This view reflected, in particular, the arguments of the ADRP, which reviewed the position in light of WTO jurisprudence to date. The ADRP noted that compliance with government policy does not of itself evidence that an entity possesses, exercises or is vested with government authority, and there was no evidence that SASAC had delegated its authority to SIEs to control participants in the iron

and steel industry. Thus, the ADRP was unable to agree with the conclusion that hot-rolled coil producing SIEs possessed or had been vested with governmental authority. The ADRP noted while there was a degree of control by the GOC over participants in the industry, the evidence did not show that such control amounted to meaningful control in the sense intended by the Appellate Body, and did not show that SIEs in the iron and steel industry were exercising government authority. *[This is the conclusion which the High Court found to be based on a misinterpretation of DS379 and was the wrong test.]*

Conclusions

534. On the basis of its analysis above, MBIE concluded that providers of hot-rolled coil, cold-rolled coil and zinc as inputs into the production of galvanised steel coil, were not "public bodies" in the sense required by Article 1.1(a)(1) of the SCM Agreement, as interpreted by the Appellate Body. Accordingly, there was no programme which provided for inputs of hot-rolled coil, cold-rolled coil or zinc, supplied by a public body, to be priced at LTAR.

535. MBIE therefore considered that there was no countervailable subsidy in respect to the provision of raw materials at LTAR.

7.2 High Court Judgment

Public Body

536. The High Court considered that there was "an international consensus that Chinese steel products are subsidised by public bodies," and went on to consider whether NZ Steel had established that MBIE had made a reviewable error in providing its advice to the Minister. The High Court reviewed the findings of other jurisdictions and WTO dispute findings, and concluded that MBIE had misunderstood the effect of the Appellate Body's findings in DS436 on the conclusion reached in ADRP 2013, and this misunderstanding was an error of law as to the "public body" test.

537. The High Court reviewed the matters considered by MBIE, including ADRP 2013 and ADC 193, and the application of the three indicia that the ADC had drawn from the Appellate Body's findings in DS379. The High Court noted the ADRP's view that the Appellate Body had established that compliance with government policy was not itself evidence that an entity possesses, exercises or is vested with government authority. The High Court noted that the ADRP had concluded, based on the *Panasia* case[47] that there needed to be a delegation of authority (although not in the strict sense of delegation) such that those SIEs were in effect exercising government authority, and there was no material to demonstrate that there had been such a delegation of governmental authority to SIEs to impose State-mandated policies on participants in the iron and steel industry. According to the ADRP, meaningful control was therefore not established. The High Court noted that the basis of the ADRP approach was whether SIEs were vested with government authority with

[47] *Panasia Aluminium (China) Ltd v Attorney General* (Cth) [2013] FCA 870.

reference to the SIEs' control over third parties, but subsequent decisions showed that the ADRP had misinterpreted DS379 and as a result applied the wrong test.

538. The High Court went on to review DS436 and DS437. In DS436, the Appellate Body considered the power to regulate was not a necessary characteristic in order for an entity to be vested with government authority or to be exercising government authority. The Appellate Body considered that the panel had not addressed the question of whether there was evidence that the body in question was performing governmental functions on behalf of the Government and the formal indicia of control were not sufficient.

539. In reviewing subsequent Australian cases, such as ADC 237 and ADC 322, the High Court noted that they had taken account of the findings in DS436 and DS437, and noted that the authority to regulate, control, supervise or restrain the conduct of others was not necessary for a public body. With regard to ADC 322, the High Court noted that the decision in that case relied on matters relating to the role and authority of the SASAC, the central role of the GOC in restructuring the steel industry, and the lack of response by the GOC to questions about the rights of GOC representatives on boards.

540. The High Court then went on to review ADRP 63, which found that SIEs providing inputs were public bodies, and in doing so relied on findings in earlier investigations, background information about the Chinese hot rolled coil market, and the lack of response by the GOC to a questionnaire. The High Court noted that ADRP 63 was published after the release of MBIE's Final Report and was not therefore considered by MBIE.

541. The High Court set out that the test for a public body was whether an entity possesses, exercises or is vested with governmental authority. In addressing whether MBIE applied the wrong test because it relied on ADRP 2013, the High Court reviewed the matters considered in the Final Report. In particular, the High Court considered MBIE had not appreciated that the conclusions of ADRP 2013 had been made on an erroneous basis, namely that there was no material to demonstrate that there had been a delegation of governmental authority to SIEs to impose state-mandated policies on participants in the iron and steel industry. In the High Court's view, MBIE had misunderstood the effect of DS436 on the conclusion reached in ADRP 2013, and this misunderstanding was an error of law as to the "public body" test, and it could not be said that the error of law was inconsequential to the Final Report's conclusion that SIEs were not public bodies.

Overseas Jurisdictions

542. The High Court summarised the information that MBIE had used in support of its conclusion that suppliers of these inputs were not public bodies. This information included advice from the GOC, information from Zong Cheng regarding its purchases, and information relating to the integrated producers, Angang, Baosteel and Shougang.

543. The High Court noted that overseas investigations supported the opposite view. MBIE's position with regard to the findings in such investigations was summarised:

- In USDOC *Corrosion Resistant Steel*, suppliers to Yieh Phui China were public bodies, while the public body determination regarding other producers was based on AFA

- ADRP 2013 had overturned the ADC *Galvanised Steel* 193 finding that suppliers were public bodies
- MBIE did not agree with the interpretation of WTO decisions set out in ADC *Steel Reinforcing Bar* 322 which disagreed with ADRP 2013
- MBIE also disagreed with the ADC 322 finding that a vertically integrated firm could provide inputs to itself at LTAR because that approach risked double counting
- EC *Organic Coated Steel* had found that SOEs producing hot and cold rolled coil were public bodies. The EC views were based on publicly available information and information from other investigations because limited information had been provided by the GOC.

544. The High Court noted that MBIE had concluded that SIEs supplying inputs were not public bodies, based particularly on ADRP 2013; the evidence did not show that SIEs were providing the inputs on the basis of any government direction or authority; the positive evidence provided by Zong Cheng was that prices reflected market prices; and similar conclusions applied to any non-government suppliers.

545. The High Court pointed out that MBIE had placed no weight on USDOC *Corrosion-Resistant Steel* because MBIE considered that the USDOC had used AFA; it placed no weight on ADC *Galvanised Steel* 193 because it had been overturned by ADRP 2013; it placed no weight on ADC 322 because MBIE disagreed with its interpretation of the WTO decisions; and it placed no weight on EC *Organic Coated Steel* because it seemed to have been concerned about the reliability of that decision given the GOC's limited cooperation with the EU investigation. The High Court noted that MBIE did not discuss the Canadian decisions.

546. The High Court reviewed the relevance of the overseas investigations. The High Court noted that in USDOC *Corrosion Resistant Steel*, YPC had been the only cooperating producer, it had provided a questionnaire response and allowed a verification visit. The High Court stated that all subsidies found for YPC were based on information obtained from it except for export buyer's credits, for which the subsidy was determined using AFA. The High Court identified the amounts of subsidy found with regard to input subsidies, and suggested that given that YPC had cooperated with the investigation, the advice to the Minister that the public body determination involved AFA was "possibly not entirely accurate."

547. With regard to the Australian cases, the High Court noted that MBIE's advice to the Minister about the test for public body as discussed in ADRP 2013 and ADC 322 was not correct, and the findings in ADC *Galvanised Steel* 193 remained a potentially relevant source of information. The High Court quoted from ADC *Galvanised Steel* 193 and noted the overall levels of subsidy found for YPC and Zong Cheng, although noting that the usefulness of this case was diminished because the investigation period was around four years prior to MBIE's investigation period and the particular subsidy levels for inputs at LTAR were not identified. The High Court suggested that the advice to the Minister might have said that weight could not be put on ADC *Galvanised Steel* 193 for these reasons, rather than because it had been overturned by ADRP 2013, and that ADC *Steel Reinforcing Bar* 322 was of limited relevance because the inputs at issue were billet and coke.

548. With regard to EC *Organic Coated Steel*, the High Court noted that the fact that the EC had found that SIEs providing hot rolled coil and cold rolled coil were public bodies was of some relevance to MBIE's investigation, and that the weighted average subsidy rate was 25.37 per cent for the cooperating producers. MBIE might have considered that little weight could be put on it because the information was dated and involved different producers, rather than because it was not reliable given the limited level of cooperation from the GOC.

549. The High Court also looked at CBSA *Concrete Reinforcing Bar*, which found that SOEs providing inputs were public bodies. The GOC had not cooperated so the finding was based on other material. The High Court quoted statements from the CBSA report regarding the role of the GOC in the steel industry and the functions undertaken by SIEs, which led the CBSA to conclude that SOE suppliers were "government". The High Court noted that this was another investigating authority reaching the same conclusion on a "legitimate factual basis" that SIEs and SOEs supplying inputs such as hot rolled coil were public bodies.

550. The High Court considered that, overall, the advice to the Minister had incorrectly dismissed the relevance of overseas investigations because they had used AFA. The High Court stated that the overseas investigations had consistently found that SIEs supplying hot rolled steel to Chinese producers of steel products were public bodies and they had done so on legitimate factual bases, and there was also information indicating that hot rolled coil had been supplied at less than cost through government influence. The important point for MBIE's consideration was whether there was a factual basis for concluding that something had or might have changed subsequent to these investigations, but that question was not part of MBIE's advice to the Minister.

551. The High Court noted its view that information following the investigation indicated that nothing had changed, and referred to the EC Staff Report, which discussed the continuing role of the GOC in the steel sector, and ADRP 63, which upheld the ADC's view that a Chinese exporter, Tianjin Youfa, was the beneficiary of the subsidies in the form of hot rolled steel provided by public bodies at LTAR. ADRP 63 relied on findings from earlier investigations, background information about the Chinese hot-rolled coil market, the EC Staff Report, and the lack of response from the GOC. The ADRP had commented that if the situation had changed it would have expected the GOC to have provided information to support this. The High Court suggested that ADRP 63 provided a useful confirmation that other investigations may be a relevant source of information in the face of a lack of cooperation.

552. The High Court concluded that MBIE's advice to the Minister did not properly inform her that there was a "consistent international consensus, legitimately based on facts available, that SIEs supplying the inputs of relevance in this case were public bodies." The consensus was somewhat dated but later overseas reports provided reliable evidence that nothing had changed.

553. In its summary table of the findings of the overseas jurisdictions, the High Court identified ADC *Galvanised Steel* 193, ADC *Reinforcing Steel Bar* 322, ADRP 63 *HSS*, CBSA *Concrete Reinforcing Bar*, CBSA *Line Pipe*, EC *Organic Coated Steel*, USDOC *Corrosion-Resistant Steel*

and USDOC *Cut-to-Length Plate*, as investigations which had found levels of subsidisation for the provision of input materials at LTAR.

7.3 Reconsideration

7.3.1 Primary Information

554. The primary information available to MBIE includes questionnaire responses from the original investigation and this reconsideration, and MBIE research conducted for the original investigation and for the reconsideration.

7.3.1.1 GOC Response

555. The GOC RFI response included information on the Chinese steel industry, as summarised in section 4.2.2 above.

556. The GOC reiterated its statement from the original investigation that there is no government programme for the provision of goods or services to the galvanised steel coil industry at less than adequate remuneration, including the alleged provision of hot-rolled steel, cold-rolled steel and zinc at less than adequate remuneration.

557. The GOC stated that it did not have access to information on the purchase transactions of any individual company.

558. The GOC did provide data from the NBS which showed the extent of SOE and non-SOE production of the input materials concerned. This information showed that non-SOE producers were in the majority by numbers for all of the input materials, were responsible for the majority of HRC and CRC production, and a significant proportion of zinc production.

559. As noted in section 4.2.2 above, the GOC also emphasised that since galvanised steel coil is typically produced in an integrated process, the alleged programme of inputs at LTAR could not exist for integrated producers. Information on the goods produced and the production processes of the major producers were provided in order to demonstrate that they produced their own inputs into galvanised steel coil production.

560. The GOC suggested that given the extraordinary number of producers and the large number of privately-owned manufacturers, the markets of HRC, CRC and zinc are commercially operated in fierce competition. This competition, coupled with over-capacity in the global steel market, meant that neither the GOC nor the Chinese steel makers themselves, whether SOE or not, had any intention or ability to further suppress market prices for galvanised steel coil, or to subsidise domestic competitors by way of providing input materials at less than adequate remuneration. This was particularly the case given that galvanised steel coil is typically produced in an integrated process, since it would be illogical for an integrated producer to sell inputs to its competitors at less than its own costs, or in any manner that made its galvanised steel coil less competitive.

561. The GOC also claims that no specificity exists in the provision of these goods because, as in other countries, there is a vast number of down-stream users consuming them. The GOC identified a number of the industrial sectors and activities concerned.

7.3.1.2 Zong Cheng

562. In the original investigation Zong Cheng provided details of suppliers of input materials, virtually all of which were identified as government-owned companies (and included ▒▒▒▒▒▒ in relation to HRC). Zong Cheng claimed that the prices paid reflected the market price of the goods and no reductions were received. MBIE's analysis of the prices paid indicated that they were not inconsistent with prices available in the Chinese market.

563. An analysis of the prices paid by Zong Cheng for HRC indicates that the delivered prices were above the SteelBenchmarker China and World prices, and reflected similar trends. Some of the price difference is attributable to the different bases for the prices – SteelBenchmarker China price is ex-works and the World price is FOB export port.

564. MBIE has also compared the prices paid by Zong Cheng with international market prices for zinc and has established that the prices paid were above world prices reported by FocusEconomics[48] with price trends reflecting international prices.

7.3.1.3 Other Manufacturers

565. Other manufacturers did not respond to the RFI, although Angang and Baosteel did provide advice that they were integrated producers and did not receive subsidies in relation to input purchases. Shougang, which is also an integrated producer, did not provide any comment. Changshu and Huangshi did not respond to the RFI and MBIE has no evidence which would indicate that they should be regarded as integrated steel producers (the evidence provided by the GOC indicates that Changshu is now part of a broader group, but that was not the case during the POI). All of the non-cooperating manufacturers, except for Huangshi, are State-owned or State-invested entities.

566. Angang, Baosteel and Shougang are all integrated steel producers, and provide their own HRC and CRC. To the extent that inputs are transferred between related parties in the relevant groups, Annual Reports covering the POI for Angang and Baosteel state that pricing principles are to apply market prices.

7.3.1.4 MBIE Research

Steel Industry Plans and Directives

567. Section 5.3.1.4 above includes an outline of MBIE's research into steel industry plans and directives. In summary, and in relation to the determination of whether input providers are public bodies:

[48] At https://www.focus-economics.com/commodities/base-metals/zinc.

- Order No 35, which is a guidance document not a law, dates from 2005, and the situation of the Chinese steel industry has changed substantially since then. In particular, Order No 35 made no reference to controls over the commercial activities of steel producers.
- The 13th Five-year Plan for the Steel Industry, covering 2016-2020, which is a guidance document not a law, recognises the role of the market in resource allocation and the need to reduce over-capacity, and identifies indicators of success. There is no reference to controls over the commercial activities of steel producers.
- Decision 40 (2005) and the Guidance Catalogue (2013 Amendment), identified specific economic activities that are encouraged, restricted or to be eliminated, and included corrosion-resistant steel in the encouraged category, but did not cover the steel industry as a whole. Encouraged areas could receive support but in accordance with the provisions of relevant laws, while such support was not available for restricted or eliminated categories.
- The 2016 Opinion of State Council for the Steel Industry to Resolve Excess Capacity addressed overcapacity, and is reflected in the 13th Five-year Steel Plan.

SASAC

568. In addition, MBIE reviewed the operation of SASAC, and in particular the "Interim Regulations on Supervision and Management". MBIE notes that the SASAC regulations cover both the central SASAC and similar authorities established at provincial and local levels. The regulations emphasise that a SASAC performs the responsibilities of investor, and supervises and administers State-owned assets of enterprises according to law (Article 6). The separation of government functions of social and public administration from the functions of investor of State-owned assets is required, as is the separation of government functions from enterprise management and separation of ownership from management (Article 7). SASACs are required to support the independent operation of enterprises according to law and shall not interfere in their production and operation activities, apart from performing the responsibilities of investor (Article 10).

569. The main responsibilities of a SASAC include performing the responsibilities of investor in accordance with the Company Law of China and other related laws and regulations; guide and push forward the restructuring of State-owned enterprises; despatch supervisory panels to the invested enterprise pursuant to regulations; appoint or remove responsible persons and evaluate their performance in accordance with statutory procedures and grant rewards or impose punishments based on the evaluation results; and supervise and administer the preservation of and increase in value of State-owned assets of enterprises (Article 12). The obligations of a SASAC are to promote the reasonable flow and optimised allocation of State-owned assets and propel the adjustment of the layout and structure of the State economy; maintain and improve the controlling power and competitive power of the State economy in areas which have a vital bearing on the lifeline of the national economy and State security, and improve the overall quality of the State economy; explore systems and ways to enhance the supervision and management of State-owned enterprises, and promote the preservation and increase in their value; guide and promote

the establishment of modern enterprise systems; respect and safeguard the operational autonomy of State-owned enterprises; and to guide and encourage State-owned enterprises to overcome difficulties and solve problems in the process of their reform and development (Article 14). Other parts of the Regulation deal with the administration of responsible persons or enterprises, the appointment of directors, and with major matters facing enterprises, such as joint-stock transformation plans, mergers, bankruptcy, and capital increase or decrease.

570. The central SASAC currently oversees Angang and Baosteel, while Shougang is subject to the Beijing Municipality SASAC.

7.3.2 Secondary Information

571. The secondary information available to MBIE includes the findings of other jurisdictions and submissions made by NZ Steel.

7.3.2.1 Australia

572. The High Court referred to ADC *Galvanised Steel* 193 and ADRP 63 as bases for information that could have been provided to the Minister. In its summary table of overseas investigation findings, the High Court included ADC *Galvanised Steel* 193, with subsidy rates of 0%-22.8%, ADC *Steel Reinforcing Bar* 322, with subsidy rates of 0.26%-29.61%, and ADRP 63, which concluded that input suppliers were public bodies. The High Court noted that ADRP 63 was published in February 2018 after MBIE's Final Report and the Minister's decision in the original investigation, and was therefore not considered in MBIE's Final Report.

573. MBIE also notes that ADC *Steel Reinforcing Bar* 322 and ADC *Rod in Coils* 331 (2016) included the ADC's elaboration of its basis for considering that integrated steel producers self-supplied inputs at LTAR.

Galvanised Steel

574. In ADC *Galvanised Steel* 193 (2013), the ADC noted that the Chinese producers being investigated included some integrated producers, which manufactured their main raw material, HRC, as well as non-integrated producers which purchased HRC. The investigation covered exporters of both galvanised and aluminium zinc coated steel. Among the cooperating exporters of aluminium zinc coated steel was Zong Cheng (due to its volume of exports relative to other exporters, the ADC did not visit Zong Cheng but assessed its subsidy benefit on the basis of information contained in the questionnaire response). Other cooperating exporters included Angang, an integrated steel producer, for which there was a verification visit. The ADC undertook an assessment of whether SIEs producing HRC were public bodies. This assessment recalled that in ADC *HSS* 177 the conclusion was that SIEs providing HRC were public bodies. The ADC concluded that non-integrated producers received a financial contribution through the purchase of HRC at LTAR from SIEs (as public bodies), but determined that fully integrated exporters did not purchase HRC from SIEs, so a zero amount of subsidy was calculated for Angang and the other integrated producer concerned.

575. The reinvestigation, ADC *HSS* 203 (2013), found sufficient evidence that the original finding (the subject of ADRP 2013) should stand, in that the reinvestigation considered that SIEs producing and supplying HRC should be considered public bodies in that they exercised government functions and that there was evidence that the government exercises meaningful control over SIEs and their conduct, and in performing government functions SIEs were controlling third parties. The reinvestigation confirmed that there was no information that showed that SIEs had been expressly vested with governmental authority. However, the reinvestigation considered that there was evidence that steel SIEs exercised government functions as they played a leading and active role in implementing GOC policies and plans for the development of the iron and steel industry, and in carrying out these functions they compelled private bodies to act in certain ways. This conclusion took account of information relating to government directions in regard to the streamlining and restructuring of the iron and steel sector; the elimination of backwards capacity; the GOC's Five-year Plans; and research and development. The reinvestigation considered that it was reasonable to conclude that SIEs producing HRC and narrow strip had indirect control over private enterprises that were engaged in the manufacture of HSS and other processed goods because of the market dominance of SIEs and their ability to affect the activities of downstream producers. The reinvestigation also reviewed legislation and other documents relating to the controls over SIEs and the steel industry, and concluded that there was evidence to demonstrate that the GOC exercises meaningful control over SIEs and their conduct in the iron and steel sector. The reinvestigation determined that SIEs that produce and supply HRC and narrow strip should be considered to be public bodies, in that they perform government functions in relation to the iron and steel sector and the GOC exercises meaningful control over them and their conduct.

576. Based on the finding from ADC *HSS* 203, the ADC, in *Galvanised Steel* 193, considered it reasonable to conclude that for the purposes of the investigation SIEs that produced and supplied HRC to manufacturers of galvanised steel should be considered public bodies. The level of subsidy was based on comparing prices paid for HRC with prices available in Korea and Taiwan. However, the ADC determined that fully integrated exporters did not purchase any HRC from SIEs, and therefore calculated a zero amount of a subsidy under this programme for the integrated producers.

577. It should be noted that the subsidy rates identified by the High Court covered all subsidy programmes investigated and not just the provision of inputs at LTAR. Of the four cooperating exporters of galvanised coil, three were integrated producers so a level of 0 per cent was allocated to them for the provision of HRC at LTAR. The 22.8% identified by the High Court as the upper level of subsidy applied to non-cooperating exporters over the 38 programmes investigated, giving an average of 0.6% per programme.

Steel Reinforcing Bar

578. In ADC *Steel Reinforcing Bar* 322 and ADC *Rod in Coils* 331 (2016), the ADC determined that SIE steel producers that produced steel reinforcing bar and rod in coils were public bodies, as were SIE integrated steel producers that were self-supplying steel billets. The ADC considered that fully integrated steel manufacturers which were SIEs (and therefore public

bodies) self-produced/supplied billet during the investigation period and those billets may have generated a benefit in terms of the programme "Billet provided by the Government of China at less than adequate remuneration."

579. One of the exporters and the GOC challenged the view taken by the ADC. In its response, the ADC stated that it considered that exporters that produce their own billet can receive a benefit, if the billet is produced and supplied by a public body (that is, if they themselves are a public body). In the bar and rod cases, the ADC had found that the billet had been supplied (including self-supplying) by an SIE resulting in a benefit.

580. The ADC considered the following factors while assessing the benefit:

- the cooperating SIEs were found to be public bodies
- the SIE had purchased coking coal at LTAR from another SIE, and that coking coal was used to produce coke to use in the production of billet
- the SIE also purchased coke from another SIE for LTAR, for the production of billet
- the benefit of the purchase of raw materials from an SIE at LTAR is specific to the production of the billet
- the billet supplied by the SIE to itself is a benefit from a public body: the benefit arises from the SIEs ability to produce the billet with raw material inputs purchased from other SIEs at LTAR, and those raw materials being further processed to billet which was used in the production of *inter alia* rod in coils and rebar for LTAR based on benchmark prices
- the ADC had determined that the benefit conferred on the SIE extends to the production of billet rather than just the purchase of the raw materials to make the billet, as the SIE itself receives additional government support to produce the billet; this support is for the increase in steelmaking capacity through increasing blast furnace capacity, and is specific to the iron and steel industries as well as to rod in coils and rebar manufacturers and integrated producers specifically
- if the SIE was to sell the billet to another entity, the ADC would consider this to be a countervailable subsidy at the billet level rather than the raw material input, and as such, the ADC considered that the supply of the billet at LTAR by the SIE to itself is also a countervailable subsidy for the purpose of calculating a subsidy margin
- if the integrated producer was a private entity, the purchase of the raw materials at LTAR from a public body would confer the benefit, rather than the supply of billet by the private body back to itself, due to the fact that the production of the billet is not supported by a public body, just the raw material inputs.

581. In considering whether SIEs are public bodies, the ADC reviewed the indicia it had developed from DS379, and noted that evidence that a statute or other legal instrument expressly vested government authority in the entity was provided by the laws governing the operations of SASAC, which also provided evidence that a government exercises meaningful control over an entity. The ADC noted that SASAC operated a supervision and management system over State-owned assets and, in relation to meaningful control, noted that in the context of the United Nations System of National Accounts, a government controls a corporation if it has the ability to determine general corporate policy, while

according to the International Federation of Accountants International Public Sector Accounting Standards Board, a government controls a corporation if it has the power to govern its financial and operating policies so as to benefit its activities. The ADC considered that this control was provided by the "Decree of the State Council of the People's Republic of China, No 378"[49] and cited a number of its articles to support this view.

582. In addition to the role of SASAC, the ADC took the view that the central role of the GOC in the restructuring of the Chinese steel industry and its role in the development of the industry had resulted in excess supply and suppressed prices experienced during the POI. There was no comment on whether evidence existed that an entity was exercising de facto governmental functions. The ADC held that the GOC had materially contributed to the excess supply of steel reinforcing bar in the domestic Chinese market and therefore significantly influenced the price for steel reinforcing bar. This influence had occurred through GOC directives, subsidies and involvement in strategic enterprises, and taxation arrangements, including VAT and export rebates. CBSA *Concrete Reinforcing Bar* was cited in support of this view (see section 7.3.2.4 below).

583. The ADC also reviewed its previous consideration of the issue and the findings of the ADRP and WTO dispute bodies. It noted the guidance provided by the WTO Appellate Body in DS379 in regard to the indicia to help assess whether an entity is a public body which is vested with or exercising governmental authority, and that these indicia had been used by the ADC and the ADRP. The ADC mistakenly attributed to the Appellate Body a Panel view from DS437 (the public body findings in DS437 were not appealed), and went on to attribute to the WTO Dispute Settlement Body (DSB) statements by the Panel in DS436 (that were effectively overturned by the Appellate Body before the matter reached the DSB). The ADC went on to set out relevant provisions of the "Interim Regulations on Supervision and Management of State-owned Assets of Enterprises" and noted that the GOC had failed to respond to questions concerning relevant entities. The information requested included a list of all manufacturers of steel reinforcing bar and rod in coils and upstream raw material suppliers and the percentage of GOC ownership in each, GOC representation in the business organisational structure and annual reports. This would cover potentially hundreds or thousands of firms. The ADC did not consider that the provisions of the Interim Regulations on Supervision and Management which prevent SASAC from exercising any government functions conflicted with its finding that SIEs are public bodies, and cited the "DSB" in DS436 in support of its argument (for the reasons noted above this is a misapplication of the outcome of that proceeding).

584. The ADC considered that on balance, on the basis of the information collected in the investigation, in addition to its prior rulings on the issue, and in the absence of detailed information from the GOC in relation to its role in the operation of SIEs, it was reasonable

[49] "Interim Regulations on Supervision and Management", May 2003.

to conclude that SIEs that produce and supply raw materials to manufacturers of steel reinforcing bar and rod in coils constituted public bodies.

585. The ADC went on to review whether there was entrustment or direction of private bodies, in the sense referred to in Article 1.1(a)(1)(iv) of the SCM Agreement, but it was considered that there was insufficient evidence to reach a conclusion on this matter. However, the ADC did note that the specific analysis which was a necessary part of a public body analysis was different from the broader interventions of a government in the market and its likely effects on price which is the subject of a particular market situation finding in the related dumping cases. The ADC observed that a market situation finding has a different focus in that it is examining suitability of price for normal value purposes, although it was recognised that some information from a particular market situation analysis could be relevant to the analysis regarding entrustment or direction.

586. The subsidy rates of 0.26%-29.61%, which the High Court cited in respect to ADC *Steel Reinforcing Bar* 322, included *de minimis* rates for two of the cooperating exporters which meant that the investigation was terminated in regard to exports from those companies. The higher rate cited was that established for non-cooperating exporters and covered 90 programmes for steel reinforcing bar considered to be countervailable, giving an average of 0.33% per programme.

ADRP 63

587. In February 2018, the ADRP issued a report, ADRP 63, in response to requests for review of the decision to continue anti-dumping and countervailing duties on HSS (ADC *HSS* 379). The applicants included Dalian Steelforce (relating to anti-dumping only) and Tianjin Youfa (including the public body determination). With regard to the public body finding, the ADRP noted that the GOC had not responded to requests for information from the ADC, and the ADC had relied on information from ADC *Grinding Balls* and the ADC "Report on the Steel and Aluminium Industry" published in August 2016. The ADRP stated that the ADP *Grinding Balls* investigation related specifically to providers of raw materials to manufacturers of grinding balls, so requested the ADC to reinvestigate the finding that Tianjin Youfa had received a countervailable subsidy in respect to HSS. The ADC based its reinvestigation findings on information gathered during the course of the continuation investigation ADC *HSS* 379, previous findings in ADC *HSS* 177, and the findings of the EC in the EC Staff Report. The ADRP noted that the ADC could place some reliance on the general report on the steel and aluminium industry in relation to establishing a benchmark in working out costs of production for the Chinese exporters (in relation to dumping).

588. The ADRP noted that the reinvestigation following ADC *HSS* 177 confirmed the original findings and were upheld by the Federal Court in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs*. With regard to ADC *HSS* 379, the ADRP noted that the analysis relied upon was not specifically in respect to the issue of SIE HRC providers being public bodies, but was directed at assessing whether there was a particular market situation for the purposes of the anti-dumping investigation, but did provide, at a general level, updated information on intervention in and influence over the HRC market by the GOC and the role of SIEs in the Chinese economy.

589. On the EC Staff Report, the ADRP considered that it did provide a basis for the findings relied on by the ADC, in particular, that the GOC controls the behaviour of SIEs; that current GOC plans were to strengthen SIEs and their control and influence to better serve strategic goals of China and create larger SIEs to serve the GOC's strategic industrial policies rather than focus on their own economic performance; SIEs and large private companies execute the GOC's policy objectives; and that the GOC no longer directs SIEs to adapt to the market environment or to promote market oriented allocation of resources.

590. The ADRP recalled that the ADC reinvestigation had found that it was reasonable to assume that the SIEs possess, exercise and are vested with governmental authority and, therefore, considered SIEs providing HRC to Tianjin Youfa to be public bodies, and considered that there was a sufficient factual basis for the ADC to be so satisfied. The ADRP found persuasive the original findings in ADC *HSS* 177; the background to the Chinese HRC market (for particular market situation purposes) from ADC *HSS* 379; the reinvestigation report requested by the ADRP and in particular the EC Staff Report; and the lack of response from the GOC, which the ADRP found the most persuasive. The ADRP thought that if the situation had changed since ADC *HSS* 177, the GOC would have provided information to support that, but did not respond to the ADC's questionnaire for the continuation review.

MBIE Comment

Public Bodies

591. In ADC *Galvanised Steel* 193, the ADC based its findings on the conclusions reached in ADC *HSS* 203 in determining that suppliers of HRC were public bodies, but the programme did not apply to integrated steel producers. The conclusion was that HRC suppliers exercised government functions and that there was evidence that the government exercises meaningful control over SIEs and their conduct, and in performing government functions SIEs were controlling third parties. The conclusions that the GOC exercised meaningful control over SIEs producing HRC were based on an examination of documents and policies governing SIEs and the steel industry.

592. In section 5.3.1.4 above, MBIE summarised its review of the various plans and directives applicable to the Chinese steel industry as they related to loans from SOCBs and to the public body determination. Similarly, MBIE has considered the operation of these laws, regulations and other instruments in relation to providers of input materials, and considers that they do not provide a basis for concluding that the conduct of providers of input materials – HRC, CRC and zinc – is subject to meaningful control by the GOC such that they possess, exercise or are vested with governmental authority. ADC *Galvanised Steel* 193 relied on the findings in the investigation and reinvestigation of ADC *HSS*, which related to periods that by the time of the POI of the current reconsideration were some time in the past, and do not take into account more recent developments in Chinese law and planning.

593. The findings in ADC *Steel Reinforcing Bar* 322 focused on the role of SASAC and conclusions about the nature and extent of GOC control over the steel market that MBIE does not consider to be justified by the evidence available, and do not provide a basis for a

conclusion that the entities in fact possess, exercise, or are vested with governmental authority. MBIE notes that Article 7 of the SASAC Interim Regulations make it clear that there is a separation between the government functions of social and public administration and the functions of an investor of State-owned assets, and that there is a separation of government functions from enterprise management and operation of ownership from management; while Article 10 provides that invested enterprises enjoy autonomy in their operation as provided by the relevant laws and regulations, and that SASAC shall support the independent operation of enterprises according to law and shall not interfere in their production activities, apart from performing the role of investor. The ADC noted the GOC's claims regarding Article 7, but did not consider that this provision conflicted with its finding that SIEs are public bodies, and quoted from the Panel report in DS436 in support of its view. However, this aspect of the Panel's findings was overturned by the Appellate Body.

594. The ADC, in quoting from Article 14 of the SASAC Interim Regulations regarding the main obligations of SASAC , stopped short of Article 14(5) which sets out the obligation "to respect and safeguard the operational autonomy of State-owned enterprises and State-owned holding enterprises, safeguard the legitimate rights and interests of enterprises according to law, impel enterprises to operate and manage according to law, and strengthen their competitive power." It should also be noted, in the context of the ADC's citation of United Nations and other definitions, that the Appellate Body, in DS379, considered that the "everyday financial concept of a 'controlling interest' in a company" was not sufficient to establish that an entity is a public body.[50] This view was endorsed by the Panel in DS437.[51]

595. The analysis of WTO dispute findings in the ADC *Steel Reinforcing Bar* 322 was confused and appears to have misapplied the guidance of the relevant findings (see paragraph 583 above), which related to a quite different fact situation. The extent and nature of the information requested of it could be considered to provide some justification for the GOC not responding to some questions.

596. The ADRP 63 report also relied on ADC *HSS* findings, market analyses undertaken by the ADC and the EU in relation to concluding if there was a particular market situation to justify a benchmark approach to establishing normal values in a dumping investigation (which, in in its *Hollow Steel Sections* dumping investigation, MBIE had concluded is not the case) and, most persuasively for the ADRP, the lack of response from the GOC. While one explanation could be that the GOC could not point to any changes, there are other possible explanations. For example, MBIE notes that for the original investigation, ADC *HSS* 177, the GOC provided a significant amount of material and explanations to the ADC and may not have considered that a similar level of response for a continuation review would lead to any different outcome in view of the rationale given by the ADC for its findings.

[50] *US – Anti-dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 320.

[51] *US – Countervailing Measures (China)*, WT/DS437/R, paragraph 7.71.

Self-supply of Inputs by Integrated Producers

597. The ADC's position changed between 2013 and 2016. In 2013, in ADC *Galvanised Steel* 193, it was determined that there was no subsidy in relation to integrated producers. The 2016 position as outlined in ADC *Steel Reinforcing Bar* 322 appears to be based on an assumption that if the SIEs are public bodies and are subsidised, then any self-supply of materials used in the final product constitutes the provision by a government or any public body of a good at less than adequate remuneration. The ADC noted that if an integrated producer was to sell the input at LTAR to an unrelated producer then it could be a countervailable subsidy.

598. This position does not appear to be consistent with the provisions of the SCM Agreement, which refer to the provision of a good by a government for less than adequate remuneration. A good produced by an entity and used by that entity within its own production process is not provided to it by a government body, nor is there remuneration in the sense required by Article 14(d) of the SCM Agreement. In particular, the internal transfer of materials within a firm cannot be held to provide a benefit to that firm, when the internal process includes the firm as both provider and recipient at the same time. The ADC also appears to conflate any other subsidies received by the integrated producer with the self-provision of input materials.

599. In MBIE's current reconsideration the investigated programme is not the supply of raw materials such as iron ore, coal and coking coal, but the supply of HRC, CRC and zinc to galvanised steel producers. The self-supply of HRC within an integrated steel producer does not meet the requirements for a subsidy involving the provision of inputs at less than adequate remuneration, in that there is no supply of HRC or CRC by a government or any public body to the integrated steel producers, and there is no price transaction between such parties. There is therefore no financial contribution, irrespective of whether a government or any public body is involved, and there is no benefit in terms of the SCM Agreement.

Conclusions

600. MBIE does not consider that the ADC investigations referred to provide a reliable basis for concluding that there is a subsidy programme by which a government or any public body provides HRC and CRC to non-integrated steel producers at less than adequate remuneration, and there is certainly no basis for concluding that the self-supply of such goods by integrated steel producers can be considered to be a financial contribution of the kind envisaged in Article 1.1(a)(1) of the SCM Agreement.

7.3.2.2 Canada

601. The High Court noted that MBIE had not discussed the CBSA decisions in the original investigation, and referred to CBSA *Concrete Reinforcing Bar* as "another investigating authority reaching the same conclusion on a "legitimate factual basis" that SIEs and SOEs supplying inputs such as hot rolled coil were public bodies." In its summary table of overseas investigation findings, the High Court included CBSA *Concrete Reinforcing Bar*, with subsidy rates of 0.4%-14.7%, and CBSA *Line Pipe*, with subsidy rates of 0.38%-17.2%.

Concrete Reinforcing Bar

602. In CBSA *Concrete Reinforcing Bar*, the CBSA noted that an SOE may be considered to constitute "government" if it possesses, exercises, or is vested with, governmental authority. The CBSA noted that it considered that indicative factors for an SOE to meet this standard included the SOE being granted or vested with authority by statute, the SOE performing a government function, the SOE is meaningfully controlled by the government, or any combination of these factors. In the investigation, the GOC did not respond to an RFI, and only one exporter responded (and did not identify the supply of inputs at LTAR as a subsidy received). Due to the lack of government response, the amount of subsidy was determined by ministerial specification on the basis of the amount of subsidy for the five programmes found for the cooperating exporter (which did not include the provision of inputs at LTAR), plus the average amount of the subsidy so found applied to each of the remaining 176 potentially actionable programmes for which sufficient information was not available or had not been provided. There was no specific public body analysis of input providers (although there was a public body analysis of banks providing loans).

Line Pipe

603. In CBSA *Line Pipe*, the CBSA noted that an SOE may be considered to constitute "government" if it possesses, exercises, or is vested with, governmental authority. The CBSA noted that it considered that indicative factors for an SOE to meet this standard included the SOE being granted or vested with authority by statute, the SOE performing a government function, the SOE is meaningfully controlled by the government, or any combination of these factors. Although some exporters provided information regarding their purchases of inputs, the GOC did not provide an RFI response, which limited the CBSA's ability to determine if suppliers were vested with governmental authority.

604. The conclusion that SOE suppliers of input materials were government (public bodies) was based on the conclusions reached by the CBSA in its section 20 investigation[52] in the parallel dumping investigation (which the CBSA considered to be "quite relevant" to the public body analysis), and the CBSA's interpretation of Article 36 of the Law on State-owned Assets of Enterprises, which the CBSA cited as stating that SIEs must comply with all national industrial policies. The CBSA also noted that this Law provides that the GOC is the only entity that may determine who is eligible to be a director or supervisor within an SIE, and provides for other evaluation and control processes. On this basis, the CBSA concluded that the GOC exercised meaningful control over State-owned suppliers and producers, such that they possessed, exercised or were vested with governmental authority. The level of

[52] In Canada, the provisions of section 20 of the Special Import Measures Act 1985 (SIMA) allow the determination of normal values in a dumping investigation on a basis other than domestic prices in the country of export where the country is a "prescribed country" (as is China), and where the CBSA considers that domestic prices in the country of export are substantially determined by the government of that country, and there is reason to believe that prices are not substantially the same as they would be if they were determined in a competitive market.

subsidy was based on a comparison of prices paid with world prices reported in the *Metal Bulletin*, excluding Chinese prices.

MBIE Comment

605. In CBSA *Concrete Reinforcing Bar* there was no specific analysis or investigation of the facts relating to suppliers of inputs as public bodies, nor was there any determination that the indicative factors identified by the CBSA could be applied in this particular case. Accordingly, it is difficult to see how the findings in that case could be characterised as having a "legitimate factual basis."

606. With regard to the finding in CBSA *Line Pipe*, MBIE notes that the full text of Article 36 of the Law on the State-owned Assets of Enterprises states:

> *When making investment, a State-invested enterprise shall adhere to the industrial policies of the State, and conduct feasibility studies according to relevant State regulations; and it shall conduct transactions on a fair and paid basis, and gain reasonable consideration.*[53]

This is not quite as simplistic as suggested in the CBSA *Line Pipe* determination, since it relates to situations when State-invested enterprises are making investment decisions, and to the extent that the second part of the provision might be considered to apply to pricing decisions it suggests that prices should be fair and reflect a reasonable consideration. The appointment powers and the evaluation and control provisions of the Law appear to reflect the fact that the GOC is the main shareholder and owner of such enterprises, and set out the responsibilities and processes arising from that fact.

607. MBIE does not consider that either of these investigations provides a reliable basis on which to conclude that input providers are public bodies and that there is a countervailable subsidy arising from the provision of inputs at LTAR.

7.3.2.3 EU

608. The High Court referred to EC *Organic Coated Steel* as having found that SOEs producing hot and cold rolled coil were public bodies, and referred to the EC Staff Report as indicating that nothing had changed since the original investigation. The High Court also noted that MBIE might have considered that little weight could be put on the findings of EC *Organic Coated Steel* because the information was dated and involved different producers. In its summary table of overseas investigation findings, the High Court included EC *Organic Coated Steel*, with subsidy rates of 23.02%-32.44%.

609. EC *Hot-Rolled Flat Products* investigated the provision of iron ore, coke and coking coal, and concluded that there was no subsidy for the purchase of these inputs during the POI.

[53] At http://www.npc.gov.cn/englishnpc/Law/2011-02/15/content_1620615.htm.

Organic Coated Steel

610. As noted in relation to the original investigation described above, the EC's consideration took account of the limited information provided by the GOC, and was based on publicly available factual information from similar proceedings conducted by other investigating authorities, as well as other publicly available information. The EC noted the Appellate Body findings in DS379, and reviewed the operation of relevant plans and laws affecting the steel industry in China. The EC considered that SOEs producing HRC and CRC often performed government functions described in the sectoral plans for the iron and steel industry, such that it was a fact that the GOC is using the iron and steel industry as a prolonged arm of the state in order to achieve goals and targets set in those plans. Governmental control through ownership, administrative regulation and involvement of the SASAC, the composition of boards of directors, and the plans governing the iron and steel industry, indicated to the EC that the SOEs possess, exercise or are vested with governmental authority. The EC also concluded that any SOE in which the government is the majority or the largest shareholder is a public body, while all private bodies in the steel sector are entrusted or directed by the State and behave in the same way as public bodies.

EC Staff Report

611. The EC Staff Report is introduced in Chapter 4 of this Final Report, and is also referred to in Chapter 5 relating to the Chinese financial system.

612. A detailed examination of the steel sector was included in the EC Staff Report. This examination reviewed the regulatory framework, considered the presence of SOEs in the steel market, looked at State support measures and raw material and input distortions, and outlined the current situation. The EC Staff Report noted the findings in EC trade defence investigations which, it suggested, established that the GOC exercises meaningful control over steel SOEs, which are obliged to follow the government plans and policies. Much of the evidence referred to in this section was derived from the EU investigations discussed above (EC *Organic Coated Steel* and EC *Hot-Rolled Flat Products*), or referred to investigations undertaken by Australia and Canada, as support for claims that there are widespread State support measures in the Chinese steel sector. Similar evidence was used in relation to the discussion on the provision of inputs at LTAR.

613. The EC Staff Report concluded that the steel industry is regarded as a key/pillar industry by the Chinese government, which guides the development of the sector in accordance with a broad range of policy tools and directives relating to market composition and restructuring, raw materials, investment, capacity elimination, product range, relocation and upgrading. It suggested that by these means the GOC directs and controls virtually every aspect in the development and functioning of the sector. Financial institutions, following the government's direction, provide access to finance to implement the government's policy objectives, while Chinese steel producers benefit from a wide array of State support measures and other market distortive practices. It was concluded that the overarching control of the government prevents free market forces from prevailing in the steel sector in China. The EC Staff Report did not provide for any comments from the GOC.

MBIE Comment

614. MBIE notes that the investigation period for EC *Organic Coated Steel* was 2010-2011, which would not have taken account of the developments in the steel sector and in the legal framework for State-owned entities as identified by the GOC. Also, the Chinese entities involved in the EC investigation are not included in the current reconsideration. These points reflect the comments made by the High Court as possibly providing a basis for not giving weight to the EC findings.

615. In addition, MBIE considers that in EC *Organic Coated Steel* the EC did not adequately address the evidential question of whether in fact the GOC exercised meaningful control over input suppliers such that they possessed, exercised or were vested with governmental authority. MBIE's analysis of the relevant laws and policies reaches a different conclusion from that of the EC. In particular, MBIE does not consider that there is a sufficient evidential basis for concluding that all suppliers of input materials, including private companies, are public bodies.

616. MBIE notes that in EC *Hot-Rolled Flat Products* it was concluded that the government had not provided input materials, or electricity, for less than adequate remuneration because the producers investigated had received their raw materials at market prices.

617. More generally, and in response to the matters raised by the EC Staff Report, MBIE has undertaken its own research into the Chinese steel market, including the relevant Chinese legislation, regulations, plans and directives, as outlined in section 5.3.1.4 above, and as referred to in the GOC's RFI response. MBIE does not consider that the matters in the EC Staff Report provide compelling evidence that prices for HRC in China are significantly distorted or are directed by GOC interventions. Similarly, MBIE does not consider that the EC Staff Report provides a basis for concluding that, in fact, the GOC exercises meaningful control over SOEs providing input materials such that they possess, exercise or are vested with governmental authority. In this context, MBIE recognises that the purpose of the EC Staff Report was not directly related to a public body determination in a subsidy investigation.

618. MBIE does not consider that either EC *Organic Coated Steel* or the EC Staff Report provide a reliable basis on which to conclude that input providers are public bodies and that there is a countervailable subsidy arising from the provision of inputs at LTAR.

7.3.2.4 USA

619. The High Court noted that with regard to USDOC *Corrosion-Resistant Steel*, the advice to the Minister that the public body determination involved AFA was "possibly not entirely accurate." In its summary table of overseas investigation findings, the High Court included USDOC *Corrosion-Resistant Steel*, with a subsidy rate of 26.13%, and USDOC *Cut-to-Length Plate*, with a subsidy rate of 23.74%.

Corrosion-Resistant Steel

620. In USDOC *Corrosion-Resistant Steel*, USDOC identifies that the finding of a subsidy in relation to the cooperating exporter was based on AFA in regard to the determination that

input producers were "authorities", i.e. "public bodies"; the specificity of the provision of inputs at LTAR; and the establishment of an appropriate benchmark as a basis for establishing the level of benefit.[54] The USDOC did use prices and sales from the cooperating exporter to compare with the AFA-based benchmark to establish the actual benefit level, rather than relying on its approach to using levels from other programmes or investigations to establish benefit levels in the absence of such information, but the overall outcome is still a level of subsidy that is based on use of AFA.

621. The USDOC confirmed its approach in the Final Determination in its response to comments from the GOC on the Preliminary Determination. It was explained that several producers of inputs identified by the GOC as SOEs were "authorities" because, as majority SOEs they possess, exercise or are vested with governmental authority. Since the GOC failed to cooperate to the best of its ability in responding to requests for information, USDOC, using AFA, determined that remaining producers were also "authorities." USDOC also noted that it considers information regarding the CPC's involvement in China's economic and political structure is relevant, but the GOC did not provide requested information with regard to CPC officials and CPC primary organisations. Thus, USDOC had concluded that privately-owned producers of HRC, CRC and zinc were "authorities" because the GOC had failed to provide all requested information, including a failure to report whether board members, owners or senior managers were government or CPC officials. An adverse inference (AFA) was warranted because USDOC considered that the GOC had failed to cooperate to the best of its ability in responding to requests for information.

622. The USDOC stated that it had found that majority-owned SOEs possess, exercise or are vested with governmental authority, and this finding was based on the GOC exercising meaningful control over these entities and using them to effectuate its goals of upholding the socialist market economy, allocating resources, and maintaining the predominant role of the state sector. The GOC had not placed information on the record that contradicted these findings.

Cut-to-Length Plate

623. In USDOC *Cut-to-Length Plate*, USDOC determined that it should apply rates based entirely on AFA for the all investigated subsidy programmes because information had not been provided and exporters had failed to cooperate by not acting to the best of their ability to comply with requests for information. The rates for the programmes relating to the provision of inputs were based on USDOC *Corrosion-Resistant Steel*.

[54] The basis for these findings is set out in the *Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China*, C-570-027, 2 November 2015.

MBIE Comment

624. In relation to USDOC *Corrosion-Resistant Steel*, the overall outcome was a level of subsidy that was based on the use of AFA, and MBIE's original advice to the Minister that the public body determination involved AFA was accurate and justified.

625. The USDOC's finding that input suppliers were authorities (public bodies) in USDOC *Corrosion-Resistant Steel* appears to derive primarily from considerations relating to ownership and the view that the involvement of government and CPC officials as board members, owners or senior managers indicates meaningful control, i.e. to the formal indicia of control, without evidence that meaningful control has, in fact, been exercised in the performance of governmental functions, such that goods have been provided by public bodies at LTAR.[55]

626. The findings in USDOC *Cut-to-Length Plate* were not derived from any fact-based determination that suppliers of input materials in the case at hand were public bodies providing goods at LTAR. The subsidy rates used were based on findings from USDOC *Corrosion-Resistant Steel*, which themselves were based on AFA, and are subject to the reservations noted above.

627. MBIE does not consider that either of these investigations provides a reliable basis on which to conclude that input suppliers are public bodies and that there is a countervailable subsidy arising from the provision of inputs at LTAR.

7.3.2.5 NZ Steel Submissions

Professor Lardy's Opinion

628. Professor Lardy noted that non-financial enterprises in China are classified by criteria established by the government based on, among other things, ownership and contributions of capital. Professor Lardy stated that the top management of larger enterprises that are classified as State-owned is appointed by the Organisation Department of the CPC, and all such enterprises are required to form a Party Committee which oversees the management of the entity to assure that the goals of the Party are achieved. Smaller State-owned enterprises are likely to have their management appointed by the provincial or municipal level organ of the CPC and are also required to have a Party Committee.

629. Professor Lardy claimed that the GOC statement in its original questionnaire response that input producers "operate on a commercial basis without interference or influence from any government agency" is not an accurate characterisation of SOEs. Professor Lardy pointed to data from China's Ministry of Finance which showed that in the period 2005-2016 between two-fifths and one-half of all SOEs were unprofitable in every year and the

[55] In DS437 *US – Countervailing Measures (China)*, the original panel rejected the USDOC's "rebuttable presumption" that any entity that is majority-owned by the government is a public body, and found that the USDOC policy was "as such" inconsistent with the SCM Agreement. This finding was not appealed.

magnitude of their losses grew seven-fold over the period. Professor Lardy suggested that it stretched credulity to say that firms that persistently lose larger and larger amounts of money over a period of more than twenty years are operating on a commercial basis.

630. Professor Lardy suggested that even if GOC claims that it does not influence pricing were true, most producers of these inputs are operating at a financial loss. According to Professor Lardy there is a programme which allows money-losing firms to stay in business, seemingly indefinitely. The government may not be setting prices in these markets but it is providing indirect subsidies to SOEs through the State-dominated financial system which allows these firms to sell products at less than the cost of production, seemingly year after year, and therefore constitutes a programme that allows these producers to sell inputs at LTAR.

Mr Gospage's Opinion

631. Mr Gospage's comments relating to the public body determination on the provision of HRS and CRS were directed primarily to MBIE's approach as set out in the original Final Report. He claimed that MBIE relied on unverified factual assertions and ultimately based its findings on the flawed conclusions of the ADRP.

632. Mr Gospage considered that for a public body determination there was no requirement to show that the government was directing or influencing pricing in order to demonstrate that an entity is a public body. He suggested that an entity may exercise government authority and therefore be a public body, while operating entirely on market terms.

633. Mr Gospage could not see how MBIE could have reached its conclusion that input suppliers were not public bodies without completely discounting the evidence that he referred to. He recalled that in the EC *Organic Coated Steel* investigation the factors considered which indicated that input producers were exercising governmental authority included the GOC's strong grip on the economy evidenced by the Chinese Constitution and Five-year Plans; and its deep involvement in management and development of the steel industry by means of sectoral plans setting targets and goals and directing specific outcomes. The EC had considered a number of plans and laws, including Order No 35 and the 12th Five-year Plan, and had taken account of the role of SASAC and the extent of State ownership of major HRS and CRS producers, and considered that SOEs are required to follow legally-binding government plans, with sanctions for non-compliance. Mr Gospage claimed that MBIE did not appear to have directly addressed these factors.

634. Mr Gospage also commented on issues relating to specificity and the amount of subsidy.

Submission of 31 January 2019

635. NZ Steel noted the matters referred to by the High Court in the Judgment, and on that basis considered that the reconsideration should:

- Disregard ADRP 2013, which was no longer good law
- Apply the correct test, which was whether State-owned input producers possess, exercise or are vested with governmental authority

- Take appropriate account of the international consensus confirming that State-owned input producers are public bodies, and the limited cooperation from the Chinese Government and the Chinese producers.

636. NZ Steel also noted that subsequent overseas reports confirmed the international consensus, and noted that the High Court had referred to the EC Staff Report.

637. NZ Steel also commented on the calculation of benefits in relation to inputs provided at LTAR, noting that if MBIE concluded that State-owned input providers were public bodies then, in view of the price distortions in the Chinese HRC market, MBIE would need to apply an external benchmark. The Appellate Body's endorsement of external benchmarks when a domestic market is subject to price distortion was noted, and that all overseas investigating authorities have applied external benchmarks when assessing the HRC market in China.

638. NZ Steel suggested that MBIE has extensive evidence, including from overseas investigations regarding distortions in the Chinese HRC market and the use of external benchmarks, and provided an Appendix setting out the relevant evidence and references. NZ Steel also emphasised the international consensus that State-owned input producers are public bodies; that State-owned steel input producers account for 70 per cent of the market; China's steel-making economics are substantially based on import-parity input prices, but Chinese HRC prices have been on average USD ▒/tonne lower than the SteelBenchmarker World Export Price; and there is an international consensus that government intervention in the Chinese market for steel inputs requires the use of an external benchmark.

Submission of 13 February 2019

639. NZ Steel commented on a number of points in the GOC response to the RFI. In particular, it suggested that there were several factual errors and omissions that NZ Steel wished to draw to MBIE's attention, including:

- In relation to the consequences of non-compliance with GOC policy, GOC claims that policies were not laws and not enforceable, NZ Steel noted that EC *Organic Coated Steel* had identified incentives and penalties linked to compliance with GOC steel sector policies, and cited Order No 35.
- In relation to the subsidisation of integrated steel companies, NZ Steel cites ADC *Steel Reinforcing Bar* 322 as setting out a basis by which an integrated manufacturer could receive inputs at LTAR, and also noted that in EC *Organic Coated Steel* an integrated producer, Angang, had been found to have received HRC at LTAR. NZ Steel also noted that not all of the manufacturers covered by the reconsideration are integrated producers.
- In relation to ownership by the State, NZ Steel suggests that the fact that the majority of galvanised steel coil producers are not owned by the State is not the point, which is that whether they are receiving subsidies from entities that are public bodies, in that they are State-owned input producers, and banks.
- In relation to the provision of HRC at LTAR and specificity, NZ Steel considers that the GOC's analysis is incorrect, since HRC is used in a limited number of processes to

make value-added steel products, and the provision of HRC at LTAR benefits the steel sector specifically.

Submission of 1 March 2019

640. NZ Steel commented on the communication from Angang in which Angang referred to the zero subsidy duty applied by Australia on galvanised steel coil. NZ Steel pointed out that Angang was subject to an anti-dumping duty and that the zero countervailing duty was applied in order to ensure that there was not double-counting of the same situation of dumping or export subsidisation.

641. NZ Steel also noted that information provided by the GOC confirmed that Changshu was not a subsidiary of Handan during the POI.

Submission of 20 March 2019

642. NZ Steel provided a summary of the 2019 CBSA review of anti-dumping duties on corrosion-resistant steel, and a copy of a 2019 speech by an EC Commissioner which mentioned the EU's trade interactions with China. NZ Steel claimed that this material addressed Chinese steel market distortion and subsidies.

Submission of 12 April 2019

643. NZ Steel responded to the CCOIC statement that the 13th Five-year Steel Plan is not mandatory and has no binding effect, by referring to the EC Staff Report and to statements in EC *Organic Coated Steel* referring to order No 35, and to USDOC information in USDOC *Corrosion-Resistant Steel* regarding the Chinese Constitution and the Chinese "party-state". NZ Steel argued that this information provides evidence that the 13th Five-year Steel Plan is binding.

644. NZ Steel challenged the CCOIC claim that the market is given "full play in allocating resources while the intervention of the government is discouraged," and also challenged the CCOIC statement that no manufacturers of galvanised steel coil, either private or state-owned, is capable of manipulating the market price of galvanised steel coil. NZ Steel pointed out that the pricing issue relates to HRC at LTAR which is used to make galvanised steel coil, while it is pointless to distinguish between State and private companies because the major producers are State-owned and there is no price differential with private producers. NZ Steel noted that there is an "international consensus" that Chinese steel is subsidised which by definition is a market distortion. Information from EC *Organic Coated Steel* was cited in support of NZ Steel's arguments.

645. With regard to specificity, NZ Steel considered that the CCOIC's claims regarding the wide range of uses for HRC and CRC are incorrect because there are a limited number of enterprises relating to use in production at the immediate next level of trade.

646. NZ Steel also challenged the CCOIC statements that non-SOE producers constitute the majority in galvanised steel coil production. NZ Steel quoted World Steel figures to support its view that the State-owned company share of production is approximately 70 per cent, and also noted that it was not consistent with findings in EC *Organic Coated Steel*. NZ Steel suggested that the CCOIC figures omitted to count SIEs.

MBIE Comment

647. Professor Lardy's comments focused on the role of the CPC and general statements concerning the profitability of SOEs across the board. He provided no specific information on the steel industry and his conclusion relating to the provision of inputs at LTAR appears to be based on his view that indirect subsidies allow suppliers to operate at a loss for year after year. This information is not sufficiently specific to the matters or the entities under investigation to provide a basis for making a public body determination.

648. MBIE notes that the examples Professor Lardy provides of subsidies to specific companies confirm that the overall level is not, perhaps, as significant as he proposes, since they are equivalent to around 1 per cent of sales. This is consistent with information from other sources. MBIE also notes that Professor Lardy refers to about two-fifths of SOEs being loss-making firms, but also notes that he also states that four-fifths of subsidised firms were profitable even prior to receiving subsidies. In any event, MBIE notes that both Angang and Baosteel were profitable during the POI, although Angang did have a loss-making year in the period ending December 2015.

649. Mr Gospage referred to the findings in EC *Organic Coated Steel*, which MBIE has directly addressed in the comments above on the EC investigation, particularly in regard to the dated nature of the information involved.

650. NZ Steel's submissions related to the test for the public body determination and the "international consensus" that State-owned producers in China are public bodies. NZ Steel also referred to the "international consensus" on the need to use external benchmarks in calculating the level of benefits from the provision of inputs at LTAR. For the reasons outlined elsewhere in this section MBIE does not consider that State-owned suppliers of input materials are public bodies, and has commented in Annex 3 on the notion that New Zealand should follow an "international consensus."

651. The matters referred to in NZ Steel's submissions on the GOC RFI response are covered elsewhere in this section where necessary and relevant.

652. With regard to the status of Angang in relation to countervailing duties applied in ADC *Galvanised Steel* 193, MBIE notes that the 2018 review undertaken by the ADC confirmed that anti-dumping duties should continue to apply to Angang, but also noted that Angang was not subject to the countervailing duty order under review. In the original investigation, because the ADC determined that integrated steel producers were not receiving HRC at LTAR, and while they were receiving coking coal at LTAR, the total level of subsidy for Angang did not exceed *de minimis* levels. NZ Steel's claim that the zero countervailing duty applied to Angang reflected the need to avoid double-counting anti-dumping duty does not appear to be correct.

653. The 2019 material provided by NZ Steel, relates to proceedings in 2019 and not to the POI for the reconsideration, and it relates to a dumping review. The review did include a

section 20[56] inquiry to determine the normal value that may be applied where certain conditions prevail in the domestic market of the exporting country. In the case of a country that Canada prescribes as a non-market economy this means that if the CBSA considers that the country substantially determines domestic prices and there is sufficient reason to believe that domestic prices are not substantially the same as they would be in a competitive market, then in a dumping investigation normal values can be based on prices and costs in a surrogate country.

654. With regard to NZ Steel's submission of 12 April 2019, MBIE notes that:

- MBIE has reviewed all relevant laws, regulations and plans in determining whether suppliers of input materials are a government or any public body in that they possess, exercise or are vested with governmental authority (see section 5.3.1.4 above).
- MBIE has reviewed all relevant investigation and other reports from other investigating authorities in regard to determining whether suppliers of input materials are a government or any public body in that they possess, exercise or are vested with governmental authority (see sections 7.3.2.1 to 7.3.2.4 above).
- MBIE notes that EC *Organic Coated Steel* had a period of investigation of 2010-11, and is therefore quite dated in light of the more recent developments discussed in this reconsideration.
- The existence of subsidisation does not necessarily mean that a market is distorted by government intervention to the extent that producers of steel products are public bodies in that they possess, exercise or are vested with governmental authority.
- With regard to specificity, MBIE notes that it has not addressed this issue because it has determined that suppliers are not public bodies and there is no subsidy programme for the provision of inputs at LTAR.
- The information provided by the GOC in its RFI response identified the basis for NBS definitions, repeated in footnotes 11 and 12 above. The GOC confirmed that SIEs are included in its figures.

7.3.2.6 Previous Investigations

655. MBIE investigated claims relating to the provision of inputs at LTAR in *Steel Reinforcing Bar* and in *Hollow Steel Sections*.

- In *Steel Reinforcing Bar*, all of the sample manufacturers were integrated producers. The cooperating manufacturer was an SOE, while the non-cooperating manufacturers were not SOEs. MBIE did not consider that that integrated steel producers self-supplying steel billets could be considered to be providing inputs at LTAR even if they were considered to be "public bodies." The raw materials or billet which are self-supplied by integrated steel producers are not a financial contribution

[56] See footnote 48.

provided to them, as required by the SCM Agreement, and an entity cannot subsidise itself – the financial contribution provided to it must be made by a government or any public body. On the basis of its analysis of the criteria for a public body determination, MBIE did not consider that suppliers of raw material inputs (iron ore, coking coal and coke) were public bodies, or that integrated steel producers self-supplying billets were public bodies.

- In *Hollow Steel Sections*, none of the sample manufacturers were SOEs, and the input considered was HRC. The suppliers of HRC included major steel producers as well as private companies. MBIE concluded that on the basis of its analysis of the criteria for a public body determination, it did not consider that suppliers of HRC were public bodies.

7.3.3 MBIE Analysis and Considerations

7.3.3.1 Findings

Financial contribution by a government or any public body

656. The matters to be determined are:

- Whether the self-supply of inputs by integrated steel producers can constitute government provision of goods
- Whether suppliers of input materials to galvanised steel producers are public bodies.

Self-supply by integrated producers

657. MBIE is satisfied that for the reasons outlined in section 7.3.2.1 above integrated steel producers do not receive a financial contribution from a government or any public body under this programme. In particular:

- a good produced by an entity within its own production process is not provided to it by a government body
- there is no remuneration in the sense required by Article 14(d) of the SCM Agreement
- the internal transfer of materials within a firm cannot be held to provide a benefit to that firm when the internal process includes the firm as both provider and recipient at the same time.

658. For these reasons, and also because the ADC appears to conflate any other subsidy received by an integrated producer with the self-provision of input materials, MBIE does not consider that the secondary information from ADC *Steel Reinforcing Bar* 322 provides a reliable basis for concluding that the self-supply of input materials can be treated as the government provision of goods in the sense provided for in Article 1.1(a)(1)(iii) of the SCM Agreement.

659. This means that there can be no subsidy in relation to Angang, Baosteel and Shougang in regard to the self-supply of HRC and CRC.

Public Body

660. The information available regarding providers of input materials is that virtually all of the suppliers to Zong Cheng, including [redacted], were State-owned or State-invested. MBIE considers that it is reasonable to assume that the major integrated steel companies, Angang, Baosteel and Shougang, may have been providers of HRC and CRC to galvanised steel producers included in this reconsideration.

661. Information provided by the GOC shows that non-SOEs are the numerical majority of providers of the inputs being considered in this reconsideration, and make up the majority of production of HRC and CRC, and a significant proportion of zinc production.

662. MBIE has reviewed the information available on input providers in the context of the criteria set out in Annex 2 for the public body determination. In particular, and in the context of the matters set out in paragraph A2.6 of Annex 2, MBIE is satisfied that:

- There is no statute or legal instrument that expressly vests SIEs producing input material with governmental authority.
- The information available does not support a finding that SIEs providing inputs are in fact exercising governmental functions.
- The information available does not support a finding that the GOC exercises meaningful control over SIEs providing inputs.

663. These conclusions are based on the examination summarised in this Chapter, and in particular in section 7.3.1.4 above. In summary:

- MBIE has reviewed the relevant laws and regulations, and there is no statutory or legal instrument that expressly vests SIEs with governmental authority.
- The information available indicates that SIEs producing input materials operate in a competitive market; recent industry plans have emphasised the role of the market in addressing over-capacity and also the need to address environmental issues; and while SIEs operate within the legal requirements for companies and State-owned bodies, active compliance with such governmental policies and/or regulations does not equate to the exercise, in fact, of governmental functions or authority.
- While some of the SIEs investigated are wholly or majority owned by the State, this is not sufficient to demonstrate meaningful control; the applicable laws and regulations confirm that SASACs operate to represent the interests of the State as owner/shareholder, in the context of the operation of the relevant laws and regulations, and emphasise the autonomy of enterprises in regard to management of their production and operation activities.

664. MBIE is therefore satisfied that input providers are not public bodies, in that they do not possess, exercise or are vested with governmental authority, and the government has not, in fact, exercised meaningful control over their conduct. Accordingly, there is no financial contribution from a government or any public body.

665. On the basis of the conclusion that input providers are not public bodies, there is no subsidy in relation to inputs purchased by Changshu, Huangshi or Zong Cheng.

Level of benefit

666. In the absence of a financial contribution from a government or any public body in relation to the provision of HRC, CRC and zinc, there is no requirement to assess the level of benefit.

Specificity

667. In the absence of a financial contribution from a government or any public body in relation to the provision of HRC, CRC and zinc, there is no requirement to consider specificity.

Conclusions

668. MBIE concludes that there is no programme of the provision of inputs at less than adequate remuneration in respect to HRC, CRC and zinc provided to manufacturers of galvanised steel coil exported to New Zealand. This conclusion reflects findings that:

- Angang, Baosteel and Shougang are integrated steel producers and consequently cannot receive a financial contribution under this programme
- Changshu, Huangshi and Zong Cheng are not receiving a financial contribution from a government or any public body under this programme.

7.3.3.2 Matters raised by the High Court

669. With regard to the public body determination, the High Court considered that there was an international consensus that Chinese steel products are subsidised by public bodies, and that MBIE had misunderstood the effect of the Appellate Body's findings in DS436 on the conclusion reached in ADRP 2013, and this misunderstanding was an error of law as to the public body test.

670. In its discussion on MBIE's determination of a public body, the High Court did note that some references to ADRP 2013 in the original Final Report were not entirely clear on whether MBIE was not saying that ADRP 2013 was correct to have found that a power to regulate over third parties was a necessary component of the public body test. The High Court considered it was not clear that MBIE appreciated that ADRP 2013 had concluded that meaningful control in the sense intended by DS379 was on an erroneous basis, and that the correct position as stated by the Appellate Body in DS436 was that SIEs could potentially possess, exercise or be vested with government authority even if they did not have a power of control over third parties. However, the High Court noted that in its conclusions MBIE stated that its conclusion that SIEs were not public bodies reflected, in particular the arguments in ADRP 2013, and noted that those arguments included the points that compliance with government policy does not of itself evidence that an entity possesses, exercises or is vested with government authority, and that there was no evidence that SASAC had delegated its authority to SIEs to control participants in the iron and steel industry. The High Court considered that MBIE had misunderstood the effect of DS436 on the conclusion reached in ADRP 2013.

671. With regard to the findings of other jurisdictions, the High Court considered that MBIE's advice to the Minister had incorrectly dismissed the relevance of overseas investigations because they had used AFA. The High Court stated that overseas investigations had

consistently found that SIEs supplying HRC to Chinese producers of steel products were public bodies and they had done so on legitimate factual bases, and there was information indicating that HRC had been supplied at less than cost through government influence. While the consistent international consensus that SIEs supplying inputs were public bodies was somewhat dated, later overseas reports had provided reliable evidence that nothing had changed.

Public Body

672. In section 4.2.4 above MBIE has set out the status of WTO dispute proceedings in relation to WTO agreements. On the question of the effect of DS436 on the conclusions reached in ADRP 2013, MBIE notes that the question of the exercise of control over third parties was not raised in the panel proceedings in DS436. The relevant remarks by the Appellate Body in DS436 were in response to an argument made by India in the appeal proceedings to the effect that it followed from the Appellate Body's reasoning in *Canada – Dairy* and in *US-Anti-Dumping and Countervailing Duties (China)* that, in order to be a public body, an entity must have the power to regulate, control or supervise individuals, or otherwise restrain conduct of others. In response to this argument, the Appellate Body noted:

> *Although certain entities that are found to constitute public bodies may possess the power to regulate, we do not see why an entity would necessarily have to possess this characteristic in order to be found to be vested with governmental authority or exercising a governmental function and therefore to constitute a public body.*
> *We also do not consider that it follows from the Appellate Body's reasoning in* US – Anti-Dumping and Countervailing Duties (China) *that, in order to be a public body, the relevant entity must have the power to entrust or direct private bodies to carry out the functions identified in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement. The Appellate Body did not find in* US – Anti-Dumping and Countervailing Duties (China) *that an entity must have the power to "entrust" or "direct" a private body to carry out functions identified in Article 1.1(a)(1)(i)-(iii) in order to constitute a public body exercising governmental functions.*[57]

673. In the original Final Report, MBIE set out, at section 4.3.2, paragraph 175, a listing of the evidence to be assessed that it had drawn from the relevant WTO jurisprudence, including the Appellate Body's report in DS436. It was noted that this was not an exhaustive list and would not necessarily be determinative on its own as to whether an entity is a public body. The list included ten areas of such evidence, including consideration of whether the entity had the power to regulate and whether the entity had the power to entrust or direct a private body to undertake the functions in Article 1.1.(a) of the SCM Agreement.

674. In assessing entities in terms of the evidence listed, MBIE considered that, for example, PBOC had the power to regulate and to direct private entities, whereas there was no evidence that policy banks, such as the China Development Bank, had such powers.

[57] *US – Carbon Steel (India)*, WT/DS436/AB/R, paragraphs 4.17-4.18.

Nevertheless, based on the totality of evidence, MBIE concluded that the PBOC and policy banks were public bodies. In its analysis of SOCBs and input producers in terms of the considerations set out in section 4.3.2,[58] MBIE had no evidence that they had any power to regulate, entrust or direct, and the totality of the evidence for such entities was that they were not public bodies. These conclusions were not dependent on the views expressed in ADRP 2013, and MBIE was fully aware of the views of the Appellate Body quoted above.

675. In any event, for the purposes of this reconsideration, MBIE has not taken any account of the findings of ADRP 2013, and has applied the guidance provided by the Appellate Body in DS379 and in other proceedings in assessing entities against the test of whether they possess, exercise or are vested with governmental authority.

676. The question of "an international consensus that Chinese steel products are subsidised by public bodies" is addressed in Annex 3 in the context of the obligation on investigating authorities to be objective and unbiased, and to undertake investigations on the basis of the information relevant to the investigation before them. The discussion in Annex 3 also looks at where the "consensus" has come from, as an explanation of the perspective that some jurisdictions bring to bear when investigating Chinese subsidies.

677. MBIE's approach, as the New Zealand investigating authority, is to apply the Act and the SCM Agreement in accordance with the guidance provided by relevant Appellate Body and panel findings, and on the basis of the situation applying to the investigation before it. The existence of any "international consensus" cannot provide grounds for adopting any conclusion that does not follow this approach.

Other Jurisdictions

678. MBIE has carefully reviewed the findings of other jurisdictions identified by the High Court, and in particular in relation to the use of AFA and the factual bases for their findings, including the extent to which there was evidence that nothing had changed from earlier findings.

679. In relation to particular findings of other jurisdictions, as outlined above, MBIE has noted that:

- The findings in ADC *Galvanised Steel* 193 relied on findings in ADC *HSS* 177 and 203 which are dated and do not, in MBIE's view reflect more recent developments in Chinese law and planning; while it is noteworthy that in this investigation the ADC did not consider that the programme for the supply of inputs at LTAR applied to integrated steel producers.
- ADC *Steel Reinforcing Bar* 322 focused on the role of SASAC but provided only a partial description of the provisions of the legislation, while its analysis of the WTO jurisprudence was confused; and the basis for now concluding that integrated

[58] As noted in paragraph 303 of the original Final Report.

producers can self-supply inputs at LTAR is not consistent with the provisions of the SCM Agreement.

- The ADRP 63 report relied on the dated ADC *HSS* 177 finding and market analyses by the ADC and the EC in relation to dumping, which MBIE does not consider to be well-founded, and took the view that the failure of the GOC to respond to requests for information suggested that nothing had changed from earlier findings, which MBIE considers makes assumptions about non-response, while the information available to MBIE is that there have been changes in the situation in China.
- In CBSA *Concrete Reinforcing Bar* there was no specific analysis or investigation of the facts relating to suppliers of input materials, while CBSA *Line Pipe* did not correctly cite Chinese law or the role of SASAC and also relied on an analysis relating to dumping to conclude that the GOC's control and influence over the primary steel industry through five-year plans was applicable to a determination that input providers were "government".
- EC *Organic Coated Steel* is now dated, as noted by the High Court, focused on the extent of government ownership and the role of SASAC, and also concluded that all private producers of input materials behave in the same way as public bodies. MBIE considers that the EC did not adequately address whether in fact the input suppliers possessed, exercised or were vested with governmental authority and were meaningfully controlled by the GOC, while MBIE's analysis of the relevant Chinese laws and policies reaches a different conclusion from that of the EC.
- EC *Hot-Rolled Flat Products* found that there was no provision of inputs at LTAR.
- The EC Staff Report, in relation to subsidisation in the steel sector, follows EC findings in its trade-defence cases, which are addressed above, while its general conclusions relating to GOC intervention in the market do not, based on MBIE's own analysis, provide a compelling basis for concluding that steel prices in China are distorted, and do not directly relate to a public body determination in a subsidy investigation.
- In USDOC *Corrosion Resistant Steel*, the overall conclusion regarding the existence of subsidisation was based on AFA, and the finding that suppliers of inputs were public bodies was based primarily on ownership and the role of the CPC, being formal indicia of control, and was not based on evidence that in fact such suppliers possessed, exercised or were vested with governmental authority.
- The findings in USDA *Cut-to-Length Steel Plate* were not derived from any fact-based determination.

680. Given the conclusions summarised above, MBIE does not consider that the secondary information from overseas jurisdictions provides a sufficiently reliable factual base which would contradict MBIE's conclusion that suppliers of inputs are not public bodies.

Conclusion

681. MBIE concludes that suppliers of HRC, CRC and zinc to manufacturers of galvanised steel are not public bodies, in that they do not possess, exercise or are vested with

governmental authority. Accordingly, there is no programme by which such suppliers provide goods to galvanised steel producers at less than adequate remuneration.

8. Reconsideration of Subsidy Programmes

682. The reconsideration of the subsidy programmes has taken into account the information available in light of the matters raised in the High Court's Judgment. The reconsideration has addressed whether there is a financial contribution from a government or any public body conferring a benefit, and which is specific to certain enterprises.

683. The subsidy levels from the original investigation and this reconsideration are summarised below. There is no change from the subsidy rates determined in the original investigation, except to the extent that the subsidy level attributed to the "loan from the central bank" reported by Baoshan has now been calculated at 0.098 per cent compared with 0.005 per cent in the original investigation. The overall level of subsidy is less than 2.00 percent.

Table 8.1: Subsidy Levels
% - rounded to two decimal places

	Zong Cheng	Other manufacturers	
Reconsideration:			
Policy loans	nil	0.10%	Baoshan*
Land-use rights at LTAR	nil	nil	
Input materials at LTAR	nil	nil	
Original investigation:			
Electricity at LTAR	nil	nil	
Import tariff exemption	nil	nil	
Export buyer's credit	nil	nil	
Reported grants	nil	0.07%	Angang
		0.08%	Baoshan
		0.07%	Weighted average
Total - all programmes	nil	0.08%	
Overall weighted average for all manufacturers		0.08%	

* The "loan from Central Bank" is being treated as being fully forgiven in one year so the total amount of the "loan" is regarded as a subsidy.

684. This reconsideration has assessed the alleged programmes relating to preferential/policy loans, the provision of land-use rights at LTAR, and the provision of input materials at LTAR. The outcome of the reconsideration, which has taken into account the decisions of the High Court in *NZ Steel Limited v Minister of Commerce and Consumer Affairs*, is that with regard to the three programmes addressed, apart from the "loan" provided to Baosteel, there were no countervailable subsidies being provided to producers of galvanised steel coil exported to New Zealand during the POI. The total of subsidy levels for programmes covered in the original investigation and those addressed in the reconsideration were *de minimis*.

685. Section 13 of the Act provides for the Minister to make a final determination as to whether, in relation to the imported goods, the goods are being subsidised and material injury to an industry has been or is being caused because of the subsidisation.

686. Section 11 of the Act requires the Minister, at any time before making a final determination, to terminate an investigation where the Minister is satisfied that there is insufficient evidence of subsidisation to justify proceeding with the investigation; or there is insufficient evidence that material injury to a New Zealand industry is being caused or threatened; or that the imposition of countervailing duties in respect of the goods would be inconsistent with New Zealand's obligations as a party to the WTO Agreement.

687. Article 11.9 of the SCM Agreement requires that an investigation be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidisation or injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of subsidy is *de minimis*, or where the volume of subsidised imports, actual or potential, is negligible. In the case of developing countries, which includes China, the *de minimis* level of subsidy is two per cent of the value of the goods, calculated on a per unit basis. The volume of subsidised imports is negligible if it represents less than four per cent of total imports of the like product. The immediate termination is at the time of the final determination, which ensures that the final determination takes into account submissions made on the EFC Report.

688. As noted in the analysis above, the conclusion reached is that any subsidies are *de minimis*. Accordingly, on the basis of the findings and determinations in this Report, the reconsideration of galvanised steel coil from China is likely to result in a determination that there is no subsidisation causing material injury to the New Zealand industry. This would provide a basis for terminating the investigation under section 11 of the Act.

689. In light of the findings and determinations it is not considered necessary to address the question of material injury caused by subsidisation, since there is insufficient subsidisation to cause injury.

9. Conclusions and Determinations

691. This Reconsideration Final Report sets out the essential facts and conclusions that form the basis for any final determination to be made under section 13 of the Act.

692. In accordance with section 7 of the Act, MBIE has **determined** that the amount of the subsidy in relation to imports of galvanised steel coil from China is *de minimis* in terms of section 11(2)(b) of the Act and Articles 11.9 and 27.10 of the SCM Agreement.

693. In light of the determination on the amount of subsidy, and in accordance with section 8 of the Act, MBIE has **determined** that the subsidisation of galvanised steel coil imported into New Zealand from China has not caused material injury to an industry.

694. On the basis of these conclusions and determinations, MBIE will recommend that the Minister:

a. **Note** that as directed by the High Court MBIE has undertaken a reconsideration of aspects of its investigation into the subsidisation of galvanised steel coil from China.
b. **Note** that MBIE has determined that the amount of the subsidy in relation to imports of galvanised steel coil from China is *de minimis* in terms of section 11(2)(b) of the Act and Articles 11.9 and 27.10 of the SCM Agreement.
c. **Note** that MBIE has determined that that the subsidisation of galvanised steel coil imported into New Zealand from China has not caused material injury to an industry.
d. **Make a determination** under section 13 of the Act, that in relation to imports of galvanised steel coil from China into New Zealand the level of subsidisation is *de minimis* and material injury to an industry has not been and is not being caused because of the subsidisation.
e. **Agree** that in accordance with section 11(1)(a) to (c) of the Act, and in relation to goods subject to the investigation:
    i. there is insufficient evidence of subsidisation to justify proceeding with the investigation;
    ii. there is insufficient evidence that material injury to a New Zealand industry has been caused by means of the subsidisation of the goods;
    iii. the imposition of countervailing duty in respect of those goods would be inconsistent with New Zealand's obligations as a party to the WTO Agreement.
f. **Make a determination** under section 11(1)(f) of the Act to terminate the subsidy investigation in respect of imports of galvanised steel coil from China.
g. **Sign** a Gazette notice giving notice of the determinations, in accordance with sections 13 and 11(1)(g) of the Act.

:

ANNEX 1: LIKE GOODS AND SUBJECT GOODS

This Annex incorporates the following:

I MBIE Analysis of Like Goods
II Evidence of Dr Wolfgang Scholz
III MBIE Comments

I. MBIE Like Goods Consideration

The original Final Report included, as Annex Two, the following report on its consideration of like goods. The original Annex is repeated below, with only paragraph numbering changed from the original.

Key issues and findings

A1.1. During the investigation into alleged subsidisation of galvanised steel coil from China, some interested parties submitted concerns with the goods description. The concerns can be captured into two categories:

a. Spangle finish

b. Width

A1.2. In relation to both concerns outlined above, interested parties submitted that the New Zealand industry does not produce goods to the specification required, or desired.

A1.3. In response to each of the concerns, the New Zealand industry submitted against any exclusion or refinement of the goods description.

A1.4. The sections below outline MBIE's investigation process in arriving at the recommendation for this like goods analysis.

Recommendations

A1.5. MBIE recommends that:

a. The goods description is not changed to account for differences in spangled finishes

b. That the goods description is limited to goods with a width up to 1260mm.

A1.6. Therefore, MBIE proposes that the new goods description should read as:

Galvanised steel coil with a thickness equal to or greater than 0.3mm and less than or equal to 1.9mm, and a width greater than 600mm but not greater than 1260mm, with a hot dipped galvanised (zinc) coating.

Process

A1.7. Following initiation of the investigation into alleged subsidisation of galvanised steel coil from China, MBIE circulated questionnaires to interested parties. Those interested parties included importers, exporters, manufacturers and the government of China.

A1.8. In their responses to the questionnaires (hereafter "submissions"), a number of interested parties submitted that goods that they were trading were not being produced by the domestic industry, therefore should not be subject to the investigation.

A1.9. Interested parties raised two concerns in particular that are important for this like goods analysis: spangle finish and width of the subject goods. Those submissions are summarised in the paragraphs below.

A1.10. At the domestic verification visit, MBIE indicated to NZ Steel that some interested parties had raised those two concerns, and gave it an opportunity to comment on the matter. NZ Steel spoke on the matter at the domestic verification visit, and later made a written submission to support its position.[59]

A1.11. The NZ Steel submission and comments at the domestic verification visit are summarised below.

A1.12. MBIE has made some amendments to this Annex compared with the EFC Report to reflect its more detailed assessment of the matters relating to the CITT raised by NZ Steel.

Galvanised steel coil produced by New Zealand Steel

A1.13. The Dumping and Countervailing Duties Act 1988 defines like goods as:

> *Like goods, in relation to any goods, means -*
>
> *(a) Other goods that are like those goods in all respects; or*
>
> *(b) In the absence of goods referred to in paragraph (a) of this definition, goods which have characteristics closely resembling those goods.*

A1.14. In its application, NZ Steel submitted that the goods produced by the New Zealand industry are like the allegedly subsidised goods: those subject to this investigation:

<u>Physical characteristics</u>
Products made locally by NZS have the same physical characteristics as the allegedly subsidised goods from PRC. NZS' locally produced galvanised steel and the allegedly subsidised galvanised steel are manufactured to the same Australian Standard (AS1397).

[59] NZ Steel goods submission, received 28 March 2017: Public file document 153

Production methods for the locally produced products and the allegedly subsidised goods from PRC are substantially similar.

Function and usage
Both the locally produced and allegedly subsidised goods have comparable or identical end uses. Common (but not exclusive) uses of the products include general manufacturing, cladding, structural elements in building and construction, frames, heating and ventilation.

Submitters' claims

A1.15. During the investigation six interested parties submitted evidence or comment in respect of the like goods consideration that NZ Steel had made in its application, or noted that they trade in a product that NZ Steel does not produce:

a. *Stemcor*
b. *Easy Steel*
c. *CMC*
d. *Steel and Tube*
e. *Vulcan*
f. [redacted]

A1.16. Submitters raised two key issues in relation to like goods:

a. *NZ Steel does not produce variations of spangle finish*
b. *NZ Steel cannot produce galvanised steel coil wider than 1230mm.*

A1.17. MBIE has considered each of those concerns individually and outlined its findings in the sections below.

Spangle

CMC submission

A1.18. CMC submitted that some of the products that it was selling to New Zealand importers cannot be produced by the New Zealand industry. Particularly, CMC referred to spangle on a galvanised surface.

A1.19. CMC noted to MBIE that there are three common types of spangle in the market for galvanised steel. It provided MBIE with an explanation of the characteristics of each of those types summarised below:

a. *Regular/normal spangle: Crystal structure and gloss caused by the unrestricted growth of zinc crystals at ambient temperature during normal solidification.*
b. *Minimised spangle: crystals smaller than regular spangle due to the restricted growth of zinc crystals during normal solidification. More uniform surface and easier to paint compared to regular spangle.*

c. *Zero spangle: complete suppression of the growth of zinc crystals during solidification. Uniform surface, easier to paint.*

A1.20. MBIE understands that the zero spangle is commonly used where the galvanised steel is exposed on a product, particularly where a uniform cosmetic appearance is desirable.

A1.21. Further, MBIE understands that the surface spangle does not affect the performance of the galvanised steel and that the various levels of spangle are chosen on cosmetic grounds only.

NZ Steel submissions

A1.22. NZ Steel acknowledges that it is currently unable to produce minimised, or zero spangle galvanised steel. The company is currently only able to produce regular/normal spangle.

A1.23. At the domestic verification visit, NZ Steel noted that it could, over time, decrease spangle by changing the chemical compounds in its molten zinc dipping baths. However, NZ Steel noted that it would not make sense to do so as it does not believe that the market demand for minimised, or zero spangle galvanised steel is sufficiently large to warrant a change to its production processes.

A1.24. NZ Steel commented that minimised, and zero spangle galvanised steel is directly substitutable for regular spangle steel, in most cases. It noted that there may be examples where a manufacturer of a particular product would demand a zero spangle finish, but these would be on aesthetic, cosmetic grounds only.

A1.25. NZ Steel expressed concern in exempting minimised and zero spangle galvanised steel from this investigation. It stated that to do so would create a market distortion whereby users of galvanised steel will likely substitute normal/regular spangle for the minimised or zero spangle steel, which may not be subject to a countervailing duty.

A1.26. In a follow up to the domestic verification visit, NZ Steel submitted on 6 March 2017 that:

> *… zero and normal spangle is priced the same and are considered by [NZ Steel] to be substitutable, but some customers indicate a preference for zero on aesthetic grounds. The majority of [galvanised steel] coil is consumed in situation which can be seen (but does not involve an aesthetic factor), or cannot be seen at all (and thus does not involve an aesthetic factor).*

A1.27. In a further submission on 28 March 2017, NZ Steel highlighted to MBIE some Australian guidance on zero spangle galvanised steel coil. NZ Steel pointed to the Australian Customs and Border Protection Service (ACBPS) Report 193, noting that the Australian Anti-Dumping Commission stated that:

> *ACBPS considers zero spangle finish falls within the goods description for the investigation, provided it meets the other specifications stated in the goods description (for example, galvanised coating).*

A1.28. In that 28 March submission, NZ Steel also notes that the Australian domestic industry, in this case, BlueScope, does not produce galvanised steel coil with a zero spangle finish. NZ Steel quoted a BlueScope submission to the ACBPS:

> *Whilst BlueScope does not currently produce zero spangle steel specifically for use in motor vehicle panel exteriors, BlueScope may seek to produce like goods at some time in the future. BlueScope requests the applicant company requesting an exemption from dumping measures for zero spangled galvanized steel used exclusively in motor vehicle exposed skin panels, provide details of the galvanised steel specifications for the required end use to ensure that there is no substitutability with the minimal spangle galvanized steel that is manufactured locally by BlueScope. Further, BlueScope is concerned of possible circumvention of any exemption granted that permits the use of zero spangle galvanized steel in non motor vehicle applications e.g. for use as purlins as currently supplied by BlueScope.*

A1.29. NZ Steel noted that the outcome of the aforementioned Australian investigation (193) is that zero spangle galvanised Chinese coil for non-motor vehicle exposed skin panel application is subject to countervailing duties.

A1.30. MBIE understands that ACBPS made a specific exclusion for zero spangle galvanised steel where the stated use is for the manufacture of motor vehicles, and that this exemption was made after the final determination.

MBIE consideration

A1.31. The issue for consideration is whether or not imports of minimised and zero spangle galvanised steel are like that product produced by the domestic industry, which is exclusively produced and sold as regular spangle.

A1.32. Two factors in particular are important in this case: commercial interchangeability and the manufacturing methods of minimised and zero spangle in relation to regular spangle galvanised steel.

A1.33. Particularly, MBIE's consideration focuses on the fact that the NZ Industry does not produce minimised and zero spangle galvanised steel, and whether or not there is a commercially sensible substitutability between galvanised steel with different spangle finish.

A1.34. Of the imports from China over the period of investigation for which information is available on spangle, around [redacted] per cent was zero spangle.

Exemptions

A1.35. MBIE notes the ACBPS decision to exclude imports of zero spangle galvanised steel from countervailing duties, where the imports are intended for manufacture of motor vehicles. There is no commercial manufacture of motor vehicles in New Zealand.

A1.36. MBIE notes that the New Zealand Act does not envisage exclusion of payment of anti-dumping duties if the goods on which the payment has been made are subject to the duties. Therefore the way to exempt certain products from payment of anti-dumping duties, should they be imposed, would be through the goods description in the customs order.

A1.37. Describing subject goods on the basis of intended use leads to challenges in practicality and enforcement. Simply, there would be no sensible way for the government to ensure that the

intended use of the goods imported was accurately declared. For these reasons, MBIE considers it inappropriate to describe the subject goods on the basis of intended use.

Manufacturing methods

A1.38. In its submissions, NZ Steel noted that it could reduce or eliminate the spangle on its finished product by adding certain chemical compounds to the molten zinc bath to suppress the zinc crystal formation. NZ Steel noted that the visible spangle would reduce over a period of time as the balance of material in the molten zinc bath adjusts.

A1.39. NZ Steel noted that while it could reduce the spangle on its finished product with minimal additional cost to production, it has chosen not to. NZ Steel commented that only a very small segment of the market for galvanised steel demands minimised or zero spangle.

A1.40. MBIE is satisfied that, while the domestic industry does not currently produce zero/minimal spangle product, the differences in the manufacturing methods between galvanised steel with regular spangle and minimised or zero spangle are insignificant and that NZ Steel could produce the product under certain circumstances.

Commercial interchangeability

A1.41. The question then turns to the extent to which minimised and zero spangle galvanised steel is commercially interchangeable with regular spangle.

A1.42. MBIE notes that there are likely to be cases in New Zealand manufacturing where zero spangle galvanised steel is specifically demanded for aesthetic reasons. MBIE has not received any submissions illustrating examples of specific demand for zero-spangle galvanised steel.

A1.43. Three submitters (Vulcan, CMC, [redacted]) noted that they import or trade in galvanised steel coil with a zero spangle finish, and that they did so because NZ Steel does not produce galvanised steel coil with zero-spangle finish.

A1.44. MBIE also understands that in some cases, manufacturers prefer galvanised steel with regular spangle, on aesthetic grounds.

A1.45. Commercial interchangeability also considers the extent to which downstream industries and consumers would likely substitute importing different spangle specifications in the event that one type was subject to duties.

A1.46. Given that spangle variations appear to have cosmetic properties only, it seems reasonable to assume that users of galvanised steel coil will be indifferent between the various spangle finishes where the end product is not visible on the completed product.

A1.47. MBIE considers that there is not likely to be a price difference between the various spangle finishes, at least not to an importer which would be purchasing on a world market with many supply opportunities.

A1.48. A countervailing duty that is restricted to regular-spangle galvanised steel only, will likely lead to direct substitutions in importers' purchasing decisions, thus restricting the effectiveness of the duty in correcting any potential injury.

A1.49. Therefore MBIE concludes that for the purpose of this investigation, galvanised steel coil of all spangle finishes are considered within scope of the goods under investigation.

Widths

A1.50. NZ Steel can produce galvanised steel coil up to 1260mm wide, depending on the corresponding thickness and grade of that steel.

A1.51. Of the imports from China for which information on widths is available, 48 per cent of the goods imported that otherwise meet the goods description during the period of the investigation, have widths greater than 1260mm, thus outside NZ Steel's production capabilities.

Submissions

A1.52. Three importers (Vulcan, Easy Steel, Steel and Tube), and two exporters (Stemcor, CMC) submitted that they trade in galvanised steel coil with widths greater than what NZ Steel is capable of producing. Each of these importers supplied commercial invoices and other documentation to confirm this.

A1.53. All three importers above, that mention that they import wider galvanised steel coils, are also major customers of NZ Steel.

Vulcan

A1.54. In its submission to the investigation, Vulcan specifically notes that it only imports galvanised steel coil that is outside of NZ Steel's production capability range. Vulcan imports galvanised steel coil that is 1525mm wide.

A1.55. Vulcan specifically points to the width as a key issue for MBIE to consider when deciding whether or not to impose countervailing duties.

Easy Steel

A1.56. Easy Steel notes that it imports steel that falls beyond NZ Steel's production capability. Easy Steel particularly notes that it imports galvanised steel coil with widths between 1219mm (within range of NZ Steel's capabilities) and 1524mm.

Steel and Tube

A1.57. Steel and Tube notes that it imports galvanised steel coil from China that is 1524mm wide, which is beyond the production capability of NZ Steel.

CMC

A1.58. CMC notes that NZ Steel has a maximum width of 1250mmm and that a large proportion of its exports to New Zealand fall outside NZ Steel's production capabilities.

Stemcor

A1.59. Stemcor also notes that it sells galvanised steel coil that falls outside of NZ Steel's production capabilities.

A1.60. Stemcor comments that it is not aware of the end function or use for the product.

NZ Steel submission

A1.61. NZ Steel made a submission on 28 March 2017 to comment on the goods description within the investigation.

A1.62. In that submission, NZ Steel notes:

> *… some goods with width specifications outside the [NZ Steel] width specifications are like goods due to possible substitutability, and because of commercial likeness – that is, the pricing of wider goods [sic] is connected to pricing of narrower goods.*

A1.63. NZ Steel suggests that MBIE should assess each case on its own particular circumstances.

A1.64. NZ Steel submits that MBIE should consider price continuity between goods of varying dimensional boundaries, as the CITT did in case NQ-2015-002 in March 2016.

A1.65. Further NZ Steel notes that the CITT indicates that the onus is on the requestor to demonstrate that the product it requests to be excluded from duties is not likely to be injurious to the domestic industry.

MBIE consideration

A1.66. In its like goods analysis MBIE has considered the following key factors in reaching its conclusion:

a. *NZ Steel's argument for the use of exclusions in the goods description and the argument that the onus should be on the requestor for such exclusions*
b. *The manufacturing methods for producing galvanised steel coil to different widths*
c. *The commercial interchangeability between galvanised steel coil of differing widths.*

A1.67. MBIE stresses that its conclusion is based on all of the considerations described below, and that no single point should determine whether or not certain goods should be considered to be within the scope of the subject goods or not.

Exclusions and the onus of proof

A1.68. MBIE notes the argument that NZ Steel puts forward in citing the CITT case mentioned above. MBIE understands that that argument can be summarised for this case as:

> *Some goods with width specifications outside NZ Steel production capability are like goods due to possible substitutability and commercial likeness. The onus is on the importers, exporters or foreign manufacturers of galvanised steel coil from China, to prove to MBIE that such goods, when exported to New Zealand, are not causing injury to the domestic industry therefore should be excluded from the imposition of duties.*

A1.69. MBIE notes that the Act does not provide for the above onus of proof. Instead, MBIE's position is that it makes an assessment with all of the information that it has available to it during the investigation, including on matters relating to like goods.

A1.70. MBIE notes that the CITT considerations referred to related to requests for exclusion from the imposition of duties, which is a discretionary power available to the CITT. The report

cited by NZ Steel makes it clear that the evidentiary burden is to be shared by all parties either in support of or against an exclusion request so that the CITT can determine whether it will exercise its discretion on the basis of its assessment of the totality of the evidence on record.[60] The CITT report goes on to discuss substitutability in relation to the matters raised by the parties, with the CITT concluding that there was clear evidence that all standards or specifications for line pipe covered by the product definition were substitutable to varying degrees, and that there were some price spillover effects between the imported goods and the domestically produced goods.

A1.71. The CITT does not operate on any different standard of proof, rather its assessment of evidence from all parties reflects the approach taken by MBIE. MBIE notes that in the case of galvanised steel coil it has carefully considered the information gathered throughout the investigation on its individual merits and made its recommendations on balance after considering the whole of the information available to it.

A1.72. MBIE considers that interested parties have sufficient opportunity to make their positions heard throughout the investigation. Further, MBIE considers that there is no onus of proof for any position throughout the investigation in the manner apparent under the Canadian approach.

Manufacturing methods

A1.73. MBIE notes the range of submissions that it received from both NZ Steel and other interested parties.

A1.74. NZ Steel does not refute that it produces galvanised steel coil only up to approximately 1260mm wide (depending on the corresponding grade and thickness).

A1.75. MBIE quizzed NZ Steel about its production capabilities, particularly in relation to wider galvanised steel products.

A1.76. NZ Steel notes that it is physically constrained to producing galvanised steel coil to a maximum width of 1260mm. This is because the metal coating line factory has physical constraints that cannot easily be overcome (such as factory foundations).

A1.77. MBIE discussed with NZ Steel what it would take to start producing galvanised steel coil in wider specifications. NZ Steel noted that it would require significant capital investment to widen the factory.

A1.78. MBIE concludes that the manufacturing methods between the goods that NZ Steel produces, and those of greater widths, have sufficiently different manufacturing methods such that galvanised steel coil with widths greater than 1260mm should not be considered like those produced domestically.

[60] CITT Inquiry No. NQ-2015-2002, *Carbon and Alloy Steel Line Pipe, Findings and Reasons*, paragraph 208.

A1.79. MBIE's position above is based on the conclusion that NZ Steel cannot produce galvanised steel coil wider than 1260mm, and it would require significant capital investment to start producing wider coils.

Price continuity/connectivity

A1.80. MBIE understands that there are specific cases where wider galvanised steel coil (such as 1500mm or 1800mm) would be needed, and where narrower steel would be unacceptable. NZ Steel argues that these goods should be included in the product scope and subject to duties.

A1.81. NZ Steel provided air conditioning ducts as an example. This would be where an air conditioning duct is, say 1500mm in perimeter, requiring 1500mm wide galvanised steel coil. The manufacturers of the ducts could use narrower coil, but it would require multiple welded seams in the metal, which is undesirable.

A1.82. However, NZ Steel also notes that a large portion of the galvanised steel coil that is produced in New Zealand, or imported, is processed by slitting. Slitting refers to the steel being cut length-ways to manufacture narrower cuts of galvanised steel.

A1.83. NZ Steel notes that where a firm wants galvanised steel, say 300mm wide, it could conceivably import 1500mm wide steel (avoiding potential countervailing duties) and slit it into 5 sheets. This would be in direct competition, therefore price-connected, to 1200mm wide steel, which would be slit to 4 sheets.

A1.84. MBIE accepts there would likely be some price connectivity between galvanised steel coil at varying widths under these circumstances.

A1.85. MBIE also accepts that there would likely be some price-connectivity between the galvanised steel that NZ Steel produces, and other substitutable products. For example, MBIE understands that galvanised steel coil can be used to produce steel-framing for residential construction. Therefore, MBIE accepts that there is likely to be substitutability between the price of timber, and the price of galvanised steel coil.

A1.86. Particularly, MBIE concludes that there is price-connectivity between the steel that NZ Steel produces, and a wide range of other product. As such, price-connectivity in itself is not adequate for determining the scope of the goods under investigation and in particular what goods should and should not fall within the scope.

Commercial interchangeability

A1.87. Based on the assessment above, MBIE concludes that there is a level of commercial interchangeability between the wider steel, and that which NZ Steel produces. MBIE considers that the interchangeability is broadly limited to where the steel is further processed into narrower products.

A1.88. As noted above, there are also likely to be cases where wider steel has specific applications that cannot be easily interchanged with narrower steel.

A1.89. MBIE concludes that there is likely to be some level of commercial interchangeability between galvanised steel coil that NZ Steel produces, and the wider steel that it can't

produce. This interchangeability is limited to certain intended uses of the steel in further manufacturing, and does not in itself determine that the goods description should include the wider steel.

Conclusion

A1.90. To summarise, MBIE notes that:

a. *There are notable manufacturing differences between the steel that NZ Steel produces, and the wider products which are currently within product scope.*

b. *There is likely to be price connectivity between the wider steel, and that which NZ Steel produces but that this price connectivity likely extends to a range of substitutable products indicating that price connectivity is not a deciding factor in deciding if product is within scope.*

c. *There is some level of commercial interchangeability between the wider steel, and that which NZ Steel produces but that this is likely limited to specific intended uses of the steel in further manufacturing.*

A1.91. On balance, MBIE recommends that the goods description for the purposes of this investigation is changed to limit the width of the galvanised steel coil under investigation to a maximum 1260mm, reflecting NZ Steel's production capability.

A1.92. MBIE considers that the fact that the domestic industry is unable to produce galvanised steel coil wider than 1260mm, and that there are specific uses for wider steel, is sufficient grounds to limit the goods description to the widths that NZ Steel is capable of producing.

A1.93. MBIE considers that this determination is not outweighed by the price connectivity that is likely to exist between the steel wider and narrower than 1260mm, and the limited commercial interchangeability where the steel is further processed to narrower sheets.

A1.94. The conclusion reached by MBIE is that, for the reasons outlined above, galvanised steel coil of widths greater than 1260mm does not closely resemble lesser widths, so the latter are not like goods to the former, and the definition of the subject goods should be limited to galvanised steel coil of widths of 1260mm or less.

II. Evidence of Dr Wolfgang Scholz

During the High Court proceedings, NZ Steel filed a submission from Dr Wolfgang Scholz on MBIE's like goods consideration. The High Court noted that the submission was not before MBIE when it gave its decision and other parties had not had an opportunity to comment on it. However, the High Court also noted that Dr Scholz's evidence might be relevant in further proceedings, since it provided a strong challenge to the views reached by MBIE.

NZ Steel, in its submission of 31 January 2019, asked MBIE to "review its like goods decision in light of Dr Scholz's evidence, and adopt the definition of subject goods provided in NZ Steel's original application."

Dr Scholz's original submission is repeated below, with only paragraph numbering changed from the original. References are to Endnotes.

EXPERT EVIDENCE OF DR WOLFGANG SCHOLZ

Dated: 3 April 2018

Introduction

A1.95. My name is Dr Wolfgang Scholz. I live in Auckland and am Director Emeritus at the New Zealand Heavy Engineering Research Association (HERA).

A1.96. I have been engaged by New Zealand Steel Ltd (NZ Steel) to provide an expert opinion on the Ministry of Business, Innovation and Employment's (MBIE's) "Iike goods" determination in its final report on alleged subsidisation of galvanised steel coil from China (the Final Report). In particular, I have been asked to give my view on MBIE's decision to exclude from the definition of "Iike goods" galvanised steel coil greater than 1260mm in width.

A1.97. I have read and agree to comply with the High Court Rules 2016 Code of Conduct for Expert Witnesses. A copy of the Code is set out in Appendix 1 to this affidavit. *[Not attached]*

Background and qualifications

A1.98. My professional background is in metals-based engineering.

A1.99. I hold a Master's degree in Mechanical Engineering (Dipl. Ing.) from Stuttgart University In Germany, and a PhD degree which I began at the Fraunhofer Institute IPA (Institute for Production and Automation Technology) and completed at the University of Auckland on the topic of manufacturing automation technology. I also hold qualifications in welding engineering.

A1.100. I have worked at Fraunhofer IPA Institute and the University of Auckland as a researcher/lecturer, and with a German tool making company. For the past 30 years, I have worked at HERA, as Manager New Zealand Welding Centre, as Deputy Director and, for the last 17 years, as Director, a role which I retired from early this year.

A1.101. I retain Director Emeritus status with HERA, and am Director of my own consulting and product development company, Ideas in Design Ltd.

A1.102. During my time at HERA, and relevantly for this expert evidence, I have continued to engage in metals based engineering technology as an active researcher and commentator on technology development. I am in close contact with the metals industry base, including the light gauge steel sector and its supply chain. My role is to help our members innovate and remain competitive as an industry, and so I have a detailed and evolving knowledge of competing systems such as timber-based construction.

A1.103. A copy of my curriculum vitae appears at Appendix 2. *[Not attached]*

Material reviewed

A1.104. In preparing this affidavit, I have reviewed relevant sections of MBIE's Final Report, submissions by NZ Steel to MBIE dated 28 March 2017 and 23 June 2017, as well as relevant pricing data.

MBIE's "like goods" determination

A1.105. In its Final Report, MBIE excluded from its description of "like goods" galvanised steel coil with a width greater than 1260mm, on the basis that:

- there are notable manufacturing differences between the steel that NZ Steel produces, and galvanised steel coil greater than 1260mm in width (which NZ Steel does not produce);[1]
- there is likely to be price connectivity between steel greater than 1260mm in width, and the steel that NZ Steel produces, "but that this price connectivity likely extends to a range of substitutable products indicating that price connectivity is not a deciding factor in deciding if product is within scope";[2] and
- there is some level of commercial interchangeability between the wider steel, and that which NZ Steel produces but that this is likely limited to specific intended uses of the steel in further manufacturing.[3]

A1.106. On this basis, MBIE recommends that the goods description be limited to galvanised steel coil with a maximum width of 1260mm, reflecting NZ Steel's production capacity.[4] MBIE's view is that galvanised steel coil with widths greater than 1260mm do not closely resemble lesser widths, so the latter are not "like goods" to the former.[5]

A1.107. I deal with each of these points in turn.

Manufacturing differences

A1.108. Galvanised steel coil is manufactured using the same process, notwithstanding product width. The thin coiled steel is cold formed from thicker hot-rolled coiled steel via a continuous thinning process through a set of rollers. As an additional process the continuous steel sheet is then galvanised by running it through a galvanising bath.

A1.109. When setting up the manufacturing plant the decision on manufactured width is made and this cannot normally be adjusted. Accordingly, a particular manufacturing plant may have limits on the width of the coil it can produce. NZ Steel's plant, for example, cannot produce galvanised coil greater than 1260mm in width. I understand that this point is uncontroversial. However, in terms of the manufacturing process, it is identical as between galvanised coil of different widths.

A1.110. Given that the manufacturing methods between different width coils are substantially the same, ie, use the same source products/inputs and manufacturing processes/machinery, I disagree with MBIE's conclusion at paragraph 78 that the manufacturing methods between goods of greater and lesser widths have "sufficiently different manufacturing methods" that they cannot be considered "like".

Substitutability between galvanised steel coil of different widths

A1.111. As noted above, NZ Steel does not manufacture galvanised steel coil greater than 1260mm in width.

A1.112. There are a small number of applications that require coil greater than 1260mm. I understand those applications are primarily large ducting and hot water cylinders with a circumference greater than 1260mm, and account for around 6% of the galvanised coil market by volume. For these applications, it is accepted that NZ Steel cannot meet the required specifications (refer MBIE Final Report paragraph 88).

A1.113. For all other applications, however, galvanised steel coil can be easily slit to the desired width. Major steel coil distributors and some end-users will have the equipment to easily slit galvanised coil. For these reasons, wide coil can and does compete with narrower coil.

A1.114. As MBIE notes in paragraph 87, there is a level of interchangeability with wider coil as it can be processed into the range of width supplied by NZ Steel. There is in fact a very strong level of interchangeability, as I understand from the usage estimates provided, that some 94% of galvanised coil is locally manufactured into products in the narrower range NZ Steel supplies.

Price connectivity between coil of different widths

A1.115. The level of commercial substitutability is also reflected in strong price connectivity between coil of different widths. The price of galvanised coil increases proportionately with product width. This Is logical, because there is no difference in input costs or manufacturing process. All steel is sold on a per tonne basis; wider steel of the same thickness has proportionally more mass.

Impact if duties imposed on narrower coil

A1.116. I understand that the effect of MBIE's like goods determination is that, if duties were imposed, wider coil would be imported with a price advantage because it would not be subject to the same duties as narrower coil.

A1.117. For the reasons outlined above, it seems to me beyond doubt that, if wider coll comes In with a price advantage, then it will harm the narrower width range supplied by NZ Steel. This is inevitable because, as outlined above, consumers can easily switch to wider coil and slit to size. That is, wider coil is, for the vast majority of applications, substitutable with narrower coil.

A1.118. Although narrow coil cannot compete with wider coil in some circumstances (ie, large ducting), the inverse is not true - wider coil can always compete with NZ Steel product because it can be slit to size.

Substitutability and price connectivity with timber framing

A1.119. MBIE states that there Is likely to be some price-connectivity between galvanised steel coil and other substitutable products. In particular, MBIE states that, because galvanised steel coil can be used to produce steel-framing for residential construction, there is likely to be substitutability between the price of timber and the price of galvanised steel coil. Accordingly, MBIE concludes that there is price connectivity between the steel that NZ Steel produces, and a wide range of other products. I have serious concerns with this analysis and conclusion, which in my view is incorrect.

A1.120. In short, there is no price connectivity between galvanised steel coil and timber framing. The price of timber framing connects to the export price of logs. New Zealand exports around $2.6 billion of logs per annum (around 53% of all New Zealand logs), and so domestic logs

sales are priced to export parity. This is an entirely different pricing structure to steel. New Zealand steel goods are priced to import parity following the world steel price for commodity coiled steel products. Looking at recent longer term trends, the price of steel on the world market has declined significantly. At the same time, world log and processed timber prices have generally increased. At the product-level, I have reviewed pricing data for galvanised steel coil, and pricing data for timber. Data for the period 1 July 2013 to 31 December 2017 shows that there is no correlation (and in fact the correlation Is negative) between the price of a unit of steel and a unit of timber. That result also holds if the time series ends at 30 June 2016. The evidence shows that timber and steel prices are unconnected, and MBIE's conclusion is accordingly misguided in my view.

A1.121. It is true that, at a building system level, a light steel framing (LSF) system is price competitive with a timber framing system. A "building system" simply refers to a method of construction, for example, framing, insulating and cladding a building. But a LSF system is competitive with a timber framing system primarily because of system, design and performance features and not just the price of inputs. For example, in a LSF system, the steel is cut to length and so, unlike timber, there is zero waste. Labour costs also vary between LSF and timber framing due to methods used, and LSF framing being lighter, which has an impact on the price competitiveness of each system.

A1.122. I also note that LSF and timber framing systems use different design standards and there is no one-to-one exchangeability between a steel frame and a timber frame member. This fact combined with the different construction pathways reinforces my view that there Is no price connectivity between a framing member produced for a LSF building from galvanised coil and a member produced for a timber framed building.

Conclusion

A1.123. Technically, there is strong interchangeability between wider coiled steel and the narrower range NZ Steel supplies. Additionally, there is strong price connectedness between the wider coiled steel and the NZ Steel supplied range.

A1.124. Based on those two conclusions, and the fact that users likely will choose lowest price under technical parity, I have no doubt that, should wider coiled steel come into the New Zealand market with a cost advantage, this will harm the NZ Steel supplied galvanised coil range.

A1.125. For the reasons outlined above, I am also troubled by MBIE's conclusion regarding price-connectivity between galvanised steel coil and timber framing, which in my view does not withstand scrutiny.

[1] Final Report, Annex 2, (78], (90(a)].
[2] Final Report, Annex 2, [84) - [86), [90(b)].
[3] Final Report, Annex 2, [87) - [89], [90(c)].
[4] Final Report, Annex 2, [91).
[5] Final Report, Annex 2, [94).

III. MBIE Comments

A1.126. Dr Scholz addresses MBIE's conclusions in relation to:

- manufacturing methods
- price connectivity
- commercial interchangeability.

Comments

Manufacturing methods

A1.127. Dr Scholz notes that galvanised steel coil is manufactured using the same process, notwithstanding product width, and that when setting up the manufacturing plant the decision on manufacturing width is made and cannot normally be adjusted. He disageed with MBIE's conclusion that manufacturing methods between goods of greater and lesser widths have sufficiently different manufacturing methods that they cannot be considered to be like goods.

A1.128. With regard to manufacturing methods, MBIE noted that NZ Steel was physically constrained from producing galvanised steel coil of over 1260mm and to produce wider coil would require a significant capital investment. Given, therefore, that NZ Steel was unable to produce wider coil, MBIE concluded that manufacturing methods, i.e.the ability to produce wider widths, showed different manufacturing methods between domestic production and widths over 1260mm. MBIE was not suggesting that the general process for manufacturing galvanised coil was any different, but considered that an inability to manufacture widths above a certain limit indicated a difference in manufacturing methods compared with the manufacture of lesser widths.

A1.129. It would appear that the concerns raised by Dr Scholz arise from a difference in understanding of the scope of "manufacturing methods".

Price connectivity

A1.130. Dr Scholz considers that there is strong price connectivity between coil of different widths, reflecting the level of commercial interchangeability. The price of galvanised coil reflects product width because steel is sold on a per tonne basis and wider coil has more mass. Dr Scholz notes that if countervailing duties were imposed on coil of a width up to 1260mm then wider coil would have a price advantage, and would harm narrower coil sales because consumers could easily switch to wider coil and slit to size, reflecting that for the vast majority of applications, wider coil is subsititutable with narrower coil (although the inverse is not true).

A1.131. Dr Scholz also challenged MBIE's comments relating to subsitutability and connectivity with timber framing, stating that there is no price connectivity between galvanised steel coil and timber framing. He notes that timber prices connect to the export price of logs, while steel goods are priced to import parity with world steel prices. Dr Scholz does accept that at a building system level there is price competition between a light steel framing system and a

timber framing system, but maintains that there is no price connectivity between framing members used in each system.

A1.132. In its discussion, MBIE accepted that there was some price connectivity between galvanised steel coil of varying widths where slitting was possible, and also accepted that there could be some price connectivity between galvanised steel and other subsitutable products. The example of steel and timber framing was noted simply as an indication of an example of substitutability. MBIE concluded that price connectivity in itself was not adequate for determining the scope of the goods under investigation.

A1.133. MBIE notes that in its view the subject goods should be defined to include only those goods which are allegedly injuring domestic production of like goods, rather than those than might cause injury to the industry as a result of changes in purchasing behaviour following any imposition of duties. Such a circumstance is related to potential circumvention of duties, if or when imposed, rather than the focus of an investigation which is whether subsidisation of imported goods is causing material injury to an industry producing like goods to the imported goods.

Commercial interchangeability

A1.134. Dr Scholz noted that there were a small number of applications that require coil greater than 1260mm, which he understood to be primarily large ducting and hot water cylinders with a circumference greater than 1260mm. Such uses accounted for around 6 per cent of the market by volume. However, for all other applications galvanised steel coil could be easily split to the desired width, and some end-users had equipment that could do this.

A1.135. MBIE had concluded that there was a level of commercial interchangeability between wider steel and that produced by NZ Steel, but this was limited to uses where steel is further processed into narrower products, and did not in itself determine that the goods description should include the wider steel.

Conclusion

A1.136. MBIE does not consider that the matters raised by Professor Scholz provide a basis for any change in the definition of subject goods/like goods to include galvanised steel coil of widths greater than those produced by NZ Steel.

ANNEX 2: PUBLIC BODY

This Annex sets out the basis for MBIE's analysis of whether or not an entity is a "public body". It outlines the legal foundations for this approach, including relevant WTO jurisprudence, and summarises the approaches taken in a number of other jurisdictions which are relevant to the current reconsideration. The approach takes account of the High Court's ruling that in the original investigation the Minister's decision was unlawful because it was based on advice containing material errors as to the proper test for determining whether an entity is a public body, including the grounds on which overseas jurisdictions had made their findings, and as to the relevance of those investigations as providing a valid source of available information in light of the limited cooperation from the GOC and the Chinese producers of the subject goods.

Legal Foundations

A2.1. The relationship between the definitions relating to subsidies in the Act and the provisions of the SCM Agreement are set out in section 4.1 of this Final Report.

A2.2. Article 1.1(a)(1) of the SCM Agreement 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 which involves the particular conduct as set out in subparagraphs (i) to (iii) of the Article, or under subparagraph (iv) regarding entrustment or direction of a private body to undertake one of the functions described, and which provides a benefit. A subsidy is countervailable if it is specific in terms of Article 2 of the SCM Agreement.

A2.3. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body, as noted by the High Court in *NZ Steel v Minister of Commerce and Consumer Affairs*, has explained that "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."[61]

A2.4. MBIE has identified relevant Appellate Body and panel findings, which explain and clarify the matters to be considered by investigating authorities in a public body analysis (the following bullet points are all quotations from Appellate Body or panel reports):

[61] *US – Anti-dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 317.

- A public body must possess, exercise or be vested with governmental authority. [DS379 AB para 317] This suggests that the performance of governmental functions, or the fact of being invested with, and exercising, the authority to perform such functions are core commonalities between government and public body. [DS379 AB para 290]
- [I]t is only through a "proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense", that panels and investigating authorities will be in a position to determine whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body. [DS436 AB para 4.24]
- 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". [DS379 AB para 290]
- In our view, governments, either directly themselves or through entities that are established, owned, controlled, managed, run or funded by the government, commonly exercise or conduct many functions or responsibilities that go beyond "the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct". Such entities can include SOEs (including banks and other financial institutions); universities, libraries and other academic institutions; scientific research and development centres; hospitals and other healthcare institutions; museums, orchestras, and other cultural organizations; sports organizations; and many others. [DS437 Panel para 7.69]
- Where a statute or other legal instrument expressly vests authority in the entity concerned a determination may be straightforward, but the absence of an express statutory delegation of authority does not necessarily preclude a determination that a particular entity is a public body – what matters is whether authority is vested, not how that is achieved. [DS379 AB para 318]
- 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. [DS379 AB para 318]
- 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 in fact exercises such authority in the performance of governmental functions. [DS379 AB para 318]
- …the Appellate Body has explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means "an entity that possesses, exercises or is vested with governmental authority". The substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case. This

substantive standard should not be confused with the evidentiary standard required to establish that an entity is a public body within the meaning of the SCM Agreement. Although the Panel quoted extensively from the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, it appears to have blurred the distinction drawn by the Appellate Body in that report between the existence of control by a government over an entity, on the one hand, and "meaningful control", on the other hand. Thus, the Panel did not analyse, in our view, the question of whether the GOI in fact exercised control over the NMDC and its conduct. [DS436 AB para 4.37]

- Apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and a government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority, e.g. the fact that a government is a majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that it has bestowed it with governmental authority. [DS379 AB para 318]
- Although certain entities that are found to constitute public bodies may possess the power to regulate, an entity would not necessarily have to possess this characteristic in order to be found to be vested with governmental authority or exercising a governmental function and therefore to constitute a public body. [DS436 AB para 4.17]
- An entity does not need to have the power to entrust or direct a private body to carry out the functions referred to in Article 1.1(a) of the WTO SCM Agreement in order to constitute a public body exercising governmental functions. [DS436 AB para 4.18]
- Where evidence shows that the formal indicia of government control are manifold, and there is also evidence that control has been exercised in a meaningful way, then such evidence can permit an inference that the entity concerned is exercising governmental authority. [DS379 AB para 318]
- Evidence of a government's meaningful control over an entity can include the government's use of the entity's resources as its own, and government ownership of an entity, while not decisive, may serve in conjunction with other elements, as evidence. [DS436 AB para 4.20]
- Control of the entity by a government, in itself, is not sufficient to establish that an entity is a public body. [DS379, AB para 320]
- Control by government over an entity is not necessarily meaningful control. [DS436 AB para 4.37]
- Evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that an entity is vested with authority to perform a governmental function. [DS379, AB para 346]
- The Appellate Body specifically rejected the idea that an entity can be found to be a public body based on a notion of control in the sense of the "everyday financial

concept of a 'controlling interest' in a company". In our view, other than "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority", it is not self-evident that all activities that involve a government in fact constitute "governmental functions". DS437, Panel para 7.71]

- As we see it, too broad an interpretation of the term "public body" could equally risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a licence for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies. [DS379, AB para 303]
- In our view, the question of "meaningful control" is inherently specific to particular factual circumstances, and the existence of such control may be established through a variety of potentially relevant considerations that may be cumulatively assessed by an investigating authority. The extent to which the particular conduct of entities is relevant in the context of "meaningful control" may depend on a number of factors, including the particular government function identified by an investigating authority and the evidence in its investigation. [DS437, 21.5 Panel, para 7.70][62]
- We do not consider there to be any *a priori* limitation on what may be the relevant government function for the purposes of a public body analysis. Rather, where an investigating authority identifies a broader government function as part of a public body analysis, it must provide a reasoned and adequate explanation, based on relevant evidence, to support that identification. [DS437, 21.5 Panel para 7.28]
- Moreover, a finding that an entity is a public body does not, in itself, result in the application of the "disciplines" of the SCM Agreement, as the financial contribution by the public body must confer a benefit and the subsidy granted must be specific for such disciplines to apply. [DS379, AB, footnote 212 to para 302]
- The requisite attributes to be able to entrust or direct a private body, namely authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body. [DS379, AB para 294]
- A finding that a particular entity does not constitute a public body does not, without more, exclude that entity's conduct from the scope of the SCM Agreement. Such measures may still be attributed to a government and thus fall within the ambit of the SCM Agreement pursuant to Article 1.1(a)(1)(iv) if the entity is a private entity entrusted or directed by a government or by a public body. [DS379, AB para 302]

A2.5. The substantive legal question is whether an entity possesses, exercises or is vested with governmental authority. The answer to the question depends on the facts of the particular case and the available evidence. Evidence showing that an entity is in fact exercising governmental functions may be based on the concrete exercise of a certain function, or the

[62] Aspects of the DS437 21.5 Panel findings relating to public body have been appealed by both parties.

conduct of the entity may serve as evidence that an entity possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice.

A2.6. Key guidance to help ascertain that an entity possesses, exercises, or is vested with governmental authority, has been derived from the comments and findings noted above, including:

- Whether there is a statute or other legal instrument that expressly vests governmental authority in the entity concerned
- Whether there is evidence that an entity is, in fact, exercising governmental functions
- Whether there is evidence that the government exercises meaningful control over an entity.

A2.7. In applying the "public body" test described by the High Court, and taking into account the guidance described above, MBIE's consideration looks at whether the entity is vested with governmental authority, exercises governmental functions, or so conducts itself, by undertaking an activity envisaged in Article 1.1(a)(1). As noted by the Appellate Body in DS379 and DS436, the determination of whether the conduct of an entity is that of a public body in each case must be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.

A2.8. In considering whether or not a particular entity is a public body MBIE has noted the guidance provided by the Appellate Body and panels which indicates that there should be an individual analysis of an entity alleged to have provided a financial contribution to a recipient. In particular, in DS379, the Appellate Body said, "Investigating authorities shall undertake a careful evaluation of the entity in question and 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" and "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."[63]

A2.9. In DS379, the Appellate Body went on to say, "Investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner, and the reasoning of the authority must be coherent and internally consistent, and the conclusions reached and the inferences drawn by the authority must be based on positive evidence."[64] It also stated "In our view, merely incorporating by reference findings from other determinations into

[63] *US – Anti-dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 319.
[64] Ibid, paragraph 344.

another determination will normally not suffice as a reasoned and adequate explanation. Nonetheless, where there is a close temporal and substantive overlap between two investigations, such cross reference may, exceptionally, suffice."[65]

A2.10. In DS379, the Appellate Body found that with regard to SOEs providing inputs, information about ownership was insufficient, since it was not, on its own, evidence of meaningful control of an entity by government.[66] With regard to SOCBs, the Appellate Body noted that the USDOC had gone beyond reliance on ownership and control and had considered other factors, including relevant provisions of applicable laws, statements by the banks, and other evidence, and was satisfied that "whether or not we would have reached the same conclusion," in its determination the "USDOC did consider and discuss evidence indicating that they effectively exercise certain governmental functions."[67]

A2.11. In DS437, the Panel found that in 12 countervailing duty investigations the US had actred inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC found that SOEs were public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the GOC.[68] This finding was not appealed.

A2.12. In DS437, the Article 21.5 Panel, which reviewed whether the US had brought its actions into conformity with the SCM Agreement, noted that "In our view, the question of "meaningful control" is inherently specific to particular factual circumstances, and the existence of such control may be established though a variety of potentially relevant considerations that may be cumulatively assessed by an investigating authority. The extent to which the particular conduct of entities is relevant in the context of "meaningful control" may depend on a number of factors, including the particular government function identified by an investigating authority and the evidence in its investigation."[69]

Entrustment and Direction

WTO Rules

A2.13. Article 1.1(a)(1)(iv) of the SCM Agreement provides that a financial contribution from a government or any public body can be deemed to exist where "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments" and where a benefit is thereby conferred.

A2.14. In *US – Countervailing Duty Investigation on DRAMs*, the Appellate Body clarified that 'entrustment' occurs where a government gives responsibility to a private body, and

[65] Ibid, paragraph 354.
[66] Ibid, paragraphs 346-347.
[67] Ibid, paragraph 355.
[68] *US — Countervailing Measures (China)*, WT/DS437/R, paragraph 7.75.
[69] *US — Countervailing Measures (China)*, WT/DS437/RW, paragraph 7.70.

'direction' refers to situations where the government exercises its authority over a private body. The Appellate Body said:

> *The term 'entrusts' connotes the action of giving responsibility to someone for a task or an object. ... Delegation is usually achieved by formal means, but delegation also could be informal ...Therefore, an interpretation of the term "entrusts" that is limited to acts of "delegation" is too narrow.*
>
> *…*
>
> *As for the term 'directs' ... in our view, that the private body under paragraph (iv) is directed 'to carry out' a function underscores the notion of authority that is included in some of the definitions of the term 'direct' ... A 'command' (the word used by the Panel) is certainly one way in which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv), but governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a 'command' or may not involve the same degree of compulsion. Thus, an interpretation of the term 'directs' that is limited to acts of 'command' is also too narrow.*
>
> *…*
>
> *In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction."*[70]

A2.15. The Appellate Body agreed that there must be a demonstrable link between the government and the conduct of the private body, and that "mere policy pronouncements" are insufficient, and that "entrustment and direction" "imply a more active role than mere acts of encouragement" and cannot be "inadvertent or a mere by-product of government regulation."[71]

A2.16. In *Japan – DRAMs (Korea)*, the Appellate Body recognized that the "commercial unreasonableness" of a financial transaction is a relevant factor in determining the existence of entrustment or direction under Article 1.1(a)(1)(iv).[72]

A2.17. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body also emphasized that "[T]he question of whether an entity constitutes a public body is not tantamount to the question of whether measures taken by that entity fall within the ambit of the SCM Agreement. A finding that a particular entity does not constitute a public body does not, without more, exclude that entity's conduct from the scope of the SCM Agreement. Such measures may still be attributed to a government and thus fall within the

[70] *US – Countervailing Duty Investigation on DRAMs*, WT/DS290/AB/R, paragraphs 110-116.
[71] Ibid, paragraph 114.
[72] *Japan-DRAMs (Korea)*, WT/DS336/AB/R, paragraph 138.

ambit of the SCM Agreement pursuant to Article 1.1(a)(1)(iv) if the entity is a private entity entrusted or directed by a government or by a public body."[73]

Findings by Foreign Jurisdictions

A2.18. Australian investigations of the provision of inputs at LTAR have determined that SIEs providing inputs are public bodies and subsidy levels have been determined on that basis. However, it appears that where purchases of inputs have not been made from SIEs no subsidy level has been applied. It appears that the CBSA followed a similar approach and that subsidies have been found only in relation to inputs provided by SOEs or SIEs.

A2.19. In EC *Organic Coated Steel*, the EC concluded that its findings with regard to SOCBs should be extended to private banks because the same considerations applied with regard to the nature and level of control by the government. Similarly, the EC concluded that all private bodies in the steel sector are entrusted and directed by the State, and behave in the same way as public bodies. In particular, it was considered that private producers of HRS and CRS have no choice but to align their prices with those of SOEs. The EC concluded that GOC policies limited the freedom of private suppliers of HRS and CRS, obliging them to act in a non-commercial manner and accept economically irrational (below-market) prices which they would not do in a free and open market. Therefore the GOC entrusted and directed input suppliers to provided goods at LTAR in the same way as steel SOEs.

A2.20. In EC *Hot-Rolled Flat Products*, the EC concluded that in the absence of any divergent information from the private financial institutions, and insofar as the steel industry is concerned, all financial institutions (including private financial institutions) operating in China under the supervision of the CBRC have been entrusted or directed by the State to pursue governmental policies and provide loans at preferential rates to the steel industry. This investigation found no provision of inputs at LTAR.

A2.21. In USDOC *Corrosion-Resistant Steel* it was identified that some of the suppliers of inputs to the cooperating exporter were SOEs, and it was determined as AFA that all other suppliers to the cooperating exporter were “authorities” so they were all included in the calculation of the subsidy level applicable to the cooperating exporter. The analysis of loans appears to have been limited to policy banks and SOCBs, based on information provided by the cooperating exporter. The use of AFA rates for non-cooperating exporters takes no account of the source of loans or input materials. In USDOC *Cut-to-Length Steel Plate*, all subsidy levels were based on AFA, so there was no distinction considered in relation to the sources of loans or input materials.

Current Investigation

A2.22. MBIE has analysed the status of entities involved in the consideration of allegations of financial contributions made through preferential loans (banks) and the provision of input materials at LTAR (HRC, CRC and zinc suppliers), on the basis of the information available in

[73] *US – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, paragraph 2 (original emphasis).

this reconsideration, and in accordance with the considerations outlined above regarding the test for a public body. The analysis is set out in Chapters 5, 6 and 7 of this Final Report.

ANNEX 3: TREATMENT OF INFORMATION

This Annex sets out the basis on which MBIE uses information in its investigations. It outlines the legal foundations for this approach, including relevant WTO jurisprudence, and summarises the approaches taken in a number of other jurisdictions. It then outlines considerations relevant to the use of information from other jurisdictions, and summarises the position with regard to the current investigation.

One purpose of this clarification of MBIE's approach is because MBIE's original conclusions on *Galvanised Steel Coil* were subject to judicial review, with the High Court ruling that the Minister's decision was unlawful because it was based on advice (in that case) containing material errors as to the proper test for determining whether an entity is a public body, as to the grounds on which overseas investigations had made their findings, and as to the relevance of those investigations as providing a valid source of available information in light of the limited cooperation from the GOC and the Chinese producers of the subject goods.

To the extent necessary and appropriate to the facts of this reconsideration, and in the context of the requirements of the Act and the SCM Agreement, these matters are addressed in this Final Report.

Treatment of Information

A3.1. MBIE's general approach to an investigation is that it is an inquisitorial rather than an adversarial process, and it is MBIE's role to obtain and assess information from all sources necessary to assist in the making of the determinations required under the Act. This will include information from the parties to the investigation, as well as information obtained by MBIE from its own research. It is important that all such information be included on the record of the information through inclusion in Reports, inclusion on the Public File, or inclusion by references in these records to publicly available information.

A3.2. In an investigation MBIE seeks and obtains information directly relevant to that investigation, and satisfies itself as to the accuracy of the information provided. Such primary information includes questionnaire responses from interested parties; laws, regulations and other official documents; relevant WTO documents, such as notifications; Customs and statistical data; and other relevant data such as exchange rates, interest rates and prices. MBIE uses verification visits and the review of evidence available to substantiate information provided by interested parties, and to assess its reliability. Information from other sources, including secondary information can be used to assist in confirming findings in relation to cooperating manufacturers. Where MBIE is not satisfied as to the accuracy of the information provided by an interested party, or where information is not available, other primary information can be used, or secondary information can be used as "facts available."

A3.3. The use of "facts available" is limited to instances where information is not available because an interested party refuses access to, or otherwise does not provide the necessary information within a reasonable period or significantly impedes the investigation. In such circumstances, the amount of the subsidy is determined having regard to all available information that MBIE considers to be reliable.

A3.4. In considering "facts available" MBIE can take into account secondary information, such as the application (in relation to subsidisation); information from previous MBIE investigations; information from investigations undertaken by counterpart authorities in other jurisdictions; and information from reports and publications covering matters related to the subject matter of the investigation. In using secondary information, MBIE undertakes a process of reasoning and evaluation of which "facts available" constitute reasonable replacements for missing information and can be considered reliable. In this context, MBIE notes that secondary information that is not based on positive evidence but relies on inferences and assumptions may not be considered to be reliable.

Current Reconsideration

A3.5. In the current reconsideration, MBIE has used information from the GOC and the cooperating manufacturer and other directly obtained information as the primary basis for its determinations on the existence and level of subsidies received, and has satisfied itself as to the accuracy of that information through verification or substantiation on the basis of information available to MBIE.

A3.6. Where information is not available because a party has not provided information requested, and where that information is required in order to make a determination of the existence and extent of a subsidy, MBIE can have recourse to secondary sources of information to replace the missing information. MBIE can also use secondary information to confirm primary information.

A3.7. MBIE has set out in section 4.2 above the sources of primary and secondary information that it has used in this investigation.

Legal Basis

A3.8. The foundation of MBIE's approach is the relevant provisions of the Act and the SCM Agreement, assisted by the interpretation of the SCM Agreement provided in WTO jurisprudence.

A3.9. Article 12.5 of the SCM Agreement states:

> *Except in circumstances provided for in Article 12.7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.*

A3.10. Article 12.7 states:

> *In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or*

> *significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.*

A3.11. Section 7(5) of the Act reflects Article 12.7 and provides as follows:

> *Where the chief executive is satisfied that sufficient information has not been furnished or is not available to enable the amount of the subsidy to be ascertained for the purposes of this Act, the amount of the subsidy shall be such amount as is determined by the chief executive having regard to all available information that the chief executive considers to be reliable.*

A3.12. Article 12.11 of the SCM Agreement provides:

> *The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and shall provide any assistance practicable.*

A3.13. Although the SCM Agreement does not provide any further elaboration of the requirements of Article 12.7, the AD Agreement does include an Annex II, "Best Information Available in Terms of Paragraph 8 of Article 6" and it has been noted by the Appellate Body, "Thus, while Annex II to the Anti-Dumping Agreement does not form part of the SCM Agreement, it has been found by the Appellate Body to be relevant context for the interpretation of Article 12.7, which is almost identically worded to Article 6.8 of the AD Agreement."[74]

A3.14. Annex II to the AD Agreement provides as follows:

> ***Best Information Available in Terms of paragraph 8 of Article 6***
> *1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.*
> *2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an*

[74] *US — Carbon Steel (India)*, WT/DS436/AB/R, paragraph 4.423.

unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

WTO Jurisprudence

A3.15. WTO Members have considerable discretion in defining their own procedures in relation to implementing their WTO obligations. The Panel in *Mexico – Olive Oil* stated:

> *We also note that other provisions in the SCM Agreement leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the Agreement the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide*.[75]

A3.16. With regard to Article 12.5 of the SCM Agreement, there is little directly applicable jurisprudence. In *US — Carbon Steel (India)*, the Appellate Body noted that Article 12.5 included the qualification, "Except in circumstances provided for in paragraph 7", and noted that it would not be possible for an investigating authority to "satisfy themselves as to the accuracy of information" in circumstances where an interested party or member refuses access to or otherwise does not provide information.[76]

A3.17. In considering whether and when to apply "facts available" an investigating authority needs to give consideration to the reasons why information might not have been supplied. In *US — Carbon Steel (India)*, the Appellate Body, at paragraph 4.422, stated:

> *We also consider that Articles 12.4 and 12.11 shed light on the meaning of Article 12.7. This is because these provisions recognize some potential reasons why the "necessary information" referred to in Article 12.7 may not be provided, namely, confidentiality and resource constraints. This is implicit in the requirement for investigating authorities to protect confidentiality and to provide any assistance practicable, in particular to small companies, in the provision of information. In our view, the context provided by these provisions suggests that the manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of "facts available" under Article 12.7. In particular, Article 12.11 requires an investigating authority to take "due account of any difficulties experienced by interested parties", which includes interested parties that have not provided the "necessary information" referred to in Article 12.7. The kinds of "difficulties", or lack thereof, experienced by interested parties to be taken into account by an investigating authority in having recourse to Article 12.7 could relate, inter alia, to the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond, including in relation to the essential facts under consideration as provided in Article 12.8. Whether and how such procedural circumstances should be taken into account by an investigating*

[75] *Mexico – Olive Oil*, WT/DS341/R, paragraph 7.26, footnote 63.

[76] *US — Carbon Steel (India)*, WT/DS436/AB/R, footnote 1077 to paragraph 4.418.

> *authority, and any appropriate inferences that may be drawn, will necessarily depend on the particularities of a given investigation. We recall, however, that determinations under Article 12.7 must be made on the basis of "facts" that reasonably replace the "necessary information" that is missing, and thus cannot be made on the basis of procedural circumstances alone.*

A3.18. As the outcome to its discussion of Article 12.7 in regard to the information to be considered and the basis for its evaluation, the Appellate Body in DS436 found that Article 12.7 requires an investigating authority to use "facts available" that reasonably replace the missing "necessary information", with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case.[77] The discussion noted that Article 12.7 limits the use of "facts available" to instances where access to information is refused or is otherwise not provided, which means that the use of "facts available" is to mitigate the absence of particular information that is necessary for a determination to be made by the investigating authority.[78]

A3.19. The "facts available" in Article 12.7 refers to pieces of information that can be used as evidence and that are on the written record of the investigating authority. As determinations made under Article 12.7 are to be made on the basis of "facts available", they cannot be made on the basis of non-factual assumptions or speculation, and should be based on positive evidence.[79] As noted in Annex II to the AD Agreement, "special circumspection" is required in using secondary information. The task of ascertaining which "facts available" reasonably replace the missing "necessary information" under Article 12.7 calls for a process of reasoning and evaluation.[80] Further on, the Appellate Body notes, "Rather, as we explain above, we would expect that a process of reasoning and evaluation in respect of the "facts available" on the record flows from the legal standard for Article 12.7, although the degree and nature of the reasoning and evaluation required will depend on the circumstances of a particular case. Where there are several "facts available" from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison."[81] In responding to arguments from India, the Appellate Body went on to note, "For instance, a comparative approach to the evaluation required would not be feasible where there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination." [82]

---

[77] Ibid, paragraph 4.435.
[78] Ibid, paragraph 4.416.
[79] Ibid, paragraph 4.417, including footnote 1075.
[80] Ibid, paragraph 4.418.
[81] Ibid, paragraph 4.431.
[82] Ibid, paragraph 4.434.

Other Jurisdictions

A3.20. The approaches followed by other jurisdictions are summarised below. In general, these approaches are based on the provisions of the AD Agreement and the SCM Agreement, including Annex II of the AD Agreement. The US approach is explicit in stating that it will use AFA in the face of non-cooperation, while the EU approach is more nuanced in that the Regulation notes that the result of the investigation may be less favourable to the party than if it had cooperated, and interested parties are to be made aware of the consequences of non-cooperation. It should be noted that the rules followed by the jurisdictions noted below have been applied to both dumping and subsidy investigations.

A3.21. MBIE notes that some other jurisdictions, including those which define China as a non-market economy,[83] have concluded that the GOC has such a degree of control that it distorts production and markets, and in particular the steel industry, such that prices are distorted, and that State-owned bodies as well as privately-owned banks and producers act as an arm of the government.[84] MBIE's approach is based on taking each case in its evidential merits and following the applicable legislative and treaty provisions.

Australia

A3.22. Section 269TAACA of the Customs Act 1901 provides that if the ADC Commissioner is satisfied that an interested party has not given the Commissioner information considered to be relevant to the investigation within a reasonable period, or has significantly impeded the investigation, then, in determining whether a countervailable subsidy has been received in respect of particular goods, or in determining the amount of a countervailable subsidy in respect of particular goods, the Commissioner or the Minister may act on the basis of all the facts available and may make such assumptions as considered reasonable.

Canada

A3.23. In Canada, section 30.4(2) of the Special Import Measures Act (SIMA) provides for the level of subsidy to be determined on the basis of ministerial specification where sufficient information has not been provided and where no manner of determining an amount of subsidy has been prescribed or sufficient information has not been provided or is not otherwise available to enable the determination of the amount of subsidy in the prescribed manner, the amount of subsidy shall be determined in such manner as the Minister may specify.

EU

A3.24. The relevant EU legislation, Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016, at Article 28, Non-Cooperation, reflects Annex II of the AD

[83] For example, the USA, in the Tariff Act of 1930, Sec. 1677 (18); Canada, in Special Import Measures Regulations (SOR/84-927), at 17.1.

[84] For example, the EU in EC *Organic Coated Steel*.

Agreement, and provides, that in cases in which any interested party refuses access to, or otherwise does not provide necessary information within the time limits, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, that information shall be disregarded and use may be made of the facts available. Interested parties shall be made aware of the consequences of non-cooperation. If determinations, including those regarding the amount of countervailable subsidies, are based on facts available, including the information supplied in the complaint, it shall, where practicable and with due regard to the time limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation. Such information may include relevant data pertaining to the world market or other representative markets, where appropriate. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result of the investigation may be less favourable to the party than if it had cooperated.

USA

A3.25. The relevant US law is section 776 of the Tariff Act of 1930 regarding determinations on the basis of the facts available. Under this provision, USDOC shall apply "facts otherwise available" if necessary information is not on the record or an interested party withholds information that has been requested, fails to provide information within the deadlines established, or in the form and manner requested by USDOC, significantly impedes a proceeding, or provides information that cannot be verified. USDOC may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. Further, an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. When selecting an AFA rate from among the possible sources of information, USDOC practice is to ensure that the rate is sufficiently adverse as to induce respondents to provide the Department with complete and accurate information in a timely manner. The USDOC practice also ensures that the party does not obtain a more favourable result by failing to cooperate than if it had cooperated fully.

A3.26. Section 776 also provides that, when USDOC relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review concerning the subject merchandise *[note that this definition does not include information from other jurisdictions]*. It is USDOC's practice to consider information to be corroborated if it has probative value. In analysing whether information has probative value, it is USDOC's practice to examine the reliability and relevance of the information to be used. However, USDOC need not prove that the selected facts available are the best alternative information.

A3.27. Finally, under section 776(d) of the Tariff Act, USDOC may use any countervailable subsidy rate applied for the same or similar programme in a CVD proceeding involving the same country, or, if there is no same or similar program, use a CVD rate for a subsidy programme from a proceeding that the administering authority considers reasonable to use, including the highest of such rates. Additionally, when selecting an AFA rate, the Department is not required for purposes of 776(c), or any other purpose, to estimate what the countervailable subsidy rate would have been if the interested party had cooperated or to demonstrate that the countervailable subsidy rate reflects an "alleged commercial reality" of the interested party.

Using Information from Other Jurisdictions

A3.28. In considering information from investigations undertaken by other jurisdictions, MBIE accepts that they can provide a valid source of secondary information when information is not available because an interested party refuses access to, or otherwise does not provide the necessary information within a reasonable period or significantly impedes the investigation. Information from such secondary sources can also provide a basis for confirming or otherwise the reliability of primary information obtained by MBIE. The extent to which such "facts available" can replace missing information requires a process of reasoning and evaluation which takes account of the circumstances of the particular case. These circumstances can include the nature of the product concerned, whether the investigation covered the same manufacturers, and whether the same or similar programmes were involved, and the extent that the information from other jurisdictions is considered to be reliable and relevant.

A3.29. However, MBIE does not consider that this means that there is any requirement on it to go beyond an assessment of evidence, and to accept interpretations of relevant law and WTO jurisprudence that New Zealand does not share on the basis of a reasoned and adequate analysis of the situation as it relates to the investigation concerned. This reflects the fact that other jurisdictions operate under different legal frameworks and contexts, and that the investigations concerned are likely to involve different products and different interested parties. In addition, in considering the reliability of secondary information from other jurisdictions, MBIE must assess the extent to which findings, and interpretations, are based on reliable information and positive evidence, and not on the basis of non-factual assumptions or speculation. Where such findings or interpretations are based on "facts available" or AFA (in the case of the USA), MBIE takes into account the process and context of any failure by interested parties to provide information which has led to the use of "facts available" or AFA.

A3.30. In considering the reliability of the information available to it, MBIE recognises the need for care in that non-cooperation from interested parties should not be rewarded or encouraged. MBIE notes that in DS436 the Panel and the Appellate Body found (for different reasons) that the US rules on the use of adverse inferences in the case of non-cooperation were not inconsistent 'as such' with the SCM Agreement, but the Panel found that in a significant number of instances the application of the rules was not consistent with the SCM Agreement. This suggests that there can be issues about the reliability of

findings which use facts available and AFA in situations where it is claimed that parties are not cooperating.

A3.31. In this context, it is relevant to note that verification relates to factual information, for example, a producer has received loans from Bank A, in the amount of B at an interest rate of C, or a producer has purchased X tonnes of HRC at price Y from Supplier Z. In such cases verification may also confirm that Bank A and Supplier Z are fully or partly owned by the State. However, verification does not cover assumptions and interpretations, which need to be independently assessed by MBIE.

A3.32. MBIE notes that in other jurisdictions assumptions of countervailability have been applied because of the lack of questionnaire responses acceptable to the investigating authority, [85] without any apparent resort or reference to supplementary or secondary sources of information outside of countervailing duty proceedings (and the US legislation does not allow such sources to be used as secondary information). Under this type of practice, there is a risk that applicants could simply compile a list of programmes identified in other proceedings or from other sources, with the expectation that some or all of the exporting country manufacturers will not cooperate so that facts available and AFA will be applied, and that the "facts available" will be those contained in the application. The outcome is that programmes will be considered countervailable and levels of subsidy determined with little or no relationship to the facts of the particular case at hand. This includes, for example, assumptions that a manufacturer receives a geographically-based subsidy if there is no evidence provided by the GOC or the company that it does not operate in the area to which a programme applies, and even if other information could confirm non-applicability.

A3.33. In a reasonably significant number of cases involving the USA, substantial levels of subsidy have been found based on AFA, even where no investigated manufacturer has been found to have received benefits from the programme. The subsidy levels so determined are based on the highest possible rates according to a hierarchy of criteria, leading, in some cases, to very high levels of duty that are clearly not related to any realistic assessment of the actual existence and level of subsidy. In these circumstances, the subsidy levels determined do not provide a reliable basis for reaching conclusions on the subsidy levels that might be relevant secondary information for MBIE investigations.

A3.34. The conclusion to be drawn is that findings by investigating authorities in other jurisdictions on the basis of facts available or AFA may, in some cases, not be a sufficiently reliable basis for concluding the existence of a subsidy programme without some degree of

[85] "In a CVD proceeding, the Department requires information from both the government of the country whose merchandise is under investigation and the foreign producers and exporters. When the government fails to provide requested information concerning alleged subsidy programs, it is the Department's practice to find that a financial contribution exists under the alleged program and that the program is specific under AFA." USDOC *Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Certain Corrosion-Resistant Steel from the People's Republic of China*, C-570-027, 2 November 2015.

confirmation from supplementary sources. MBIE is aware of the need to ensure that just as non-cooperation should not be rewarded, equally the indiscriminate listing of alleged programmes by applicants should not be accepted on its own as a reliable basis for determining the existence of subsidies.

A3.35. Nevertheless, where a "facts available" situation applies, and when information from investigations undertaken in other jurisdictions is based on an actual investigation of relevant manufacturers, that information can be assessed, as secondary information in the absence of primary information, along with other information available to MBIE, in order to establish whether there is reliable information that will permit a conclusion regarding the existence of any subsidy and the determination of the amount of any subsidy.

Issues around the "international consensus"

A3.36. Both NZ Steel and the High Court referred to the "international consensus" that Chinese steel producers are subsidised by public bodies, and suggested that this provides grounds for New Zealand to apply that "consensus" in investigations undertaken by MBIE.

A3.37. This raises two issues for MBIE. First, there is an obligation on investigating authorities to be objective and unbiased, and to undertake investigations on the basis of the information relevant to the investigation before them. Secondly, in order to evaluate the evidence from other jurisdictions, it is important to have an understanding of where the "consensus" has come from, as an explanation of the perspective that some jurisdictions bring to bear when investigating Chinese subsidies can assist that evaluation.

Objective Investigations

A3.38. Findings by the WTO Appellate Body and panels provide guidance on <u>how</u> investigating authorities are to undertake the public body analysis (the following bullet points are all quotations from Appellate Body or panel reports):

- A determination that an entity is a public body must, in each case, be determined on its own merits, and requires a proper evaluation of the core characteristics and functions of the entity concerned, its relationship with the government in the narrow sense [DS 379 AB para 317], and the legal and economic environment prevailing in the country in which the entity operates. [DS436 AB para 4.43]
- Evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. [DS436 AB para 4.29]
- Investigating authorities shall undertake a careful evaluation of the entity in question and 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. [DS379 AB para 319]
- Investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner, and the reasoning of the authority must be coherent and internally consistent, and the conclusions reached and the inferences drawn by the authority must be based on positive evidence. [DS379 AB para 344]

- In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member. DS379 AB para 297]
- 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. [DS379 AB para 319]
- The determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense. That assessment must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority. [DS379 AB para 345]
- As we have pointed out, determining whether an entity is a public or private body may be a complex exercise, particularly where the same entity exhibits some characteristics that suggest it is a public body, and other characteristics that suggest that it is a private body. [DS379 AB para 345]
- In our view, merely incorporating by reference findings from other determinations into another determination will normally not suffice as a reasoned and adequate explanation. Nonetheless, where there is a close temporal and substantive overlap between two investigations, such cross reference may, exceptionally, suffice. [DS379 AB para 354]
- In addition to these broad parameters that must be part of a public body determination consistent with Article 1.1(a)(1), there are various other types of information and evidence that may be relevant in assessing whether a particular entity is a public body. We see no basis to prejudge the relative weight or value of various types of relevant evidence in this regard. Rather, we consider that the applicable legal standard requires a holistic assessment by an investigating authority of the evidence before it. [DS437 21.5 Panel para 7.30]
- Further, we do not consider that the factual circumstances and case-specific determinations in prior disputes reflect rigid legal requirements that must be applied in other circumstances involving different analytical approaches. In a public body analysis, an investigating authority must give due consideration to all relevant facts regarding the characteristics and functions of an entity as appropriate in the particular circumstances of the case. [DS437 21.5 Panel para 7.32]

A3.39. MBIE's conclusion is that the existence of an "international consensus" is not a sufficient basis on its own for reaching a conclusion about any aspect of an investigation, including a public body determination or the determination of the existence and level of any particular subsidy. This is because to do so would be contrary to the obligation on an investigating authority to take each case on its merits and in the light of the facts and participants pertaining to that case. Earlier in this Annex, MBIE sets out the bases for considering information in an investigation, including information from other jurisdictions, and noted in

particular, that MBIE does not consider that there is any requirement on it to go beyond an assessment of evidence, and to accept interpretations of relevant law and WTO jurisprudence that New Zealand does not share on the basis of a reasoned and adequate analysis of the situation as it relates to the investigation concerned.

Origins of the "Consensus"

A3.40. As noted above, it is important to have an understanding of where the "consensus" has come from, since that provides a basis for understanding the conclusions reached by the various investigating authorities.

A3.41. MBIE has noted that some other jurisdictions, including those which define China as a non-market economy (such as the USA and Canada),[86] have concluded that the GOC has such a degree of control that it distorts production and markets, and in particular the steel industry, such that prices are distorted, and that State-owned bodies as well as privately-owned banks and producers act as an arm of the government.[87] A number of jurisdictions have also relied on analyses relating to the the consideration of whether prices in a market are distorted by government intervention undertaken in the context of dumping investigations.

A3.42. MBIE considers that the perspectives brought to bear by these other jurisdictions should be considered in relation to the history of the treatment accorded to non-market economies in the context of Article VI of GATT 1994, and need to take account of the different aproach taken by New Zealand.

GATT Article VI

A3.43. Interpretative Note 2 to Article VI(1) of GATT (1947) provides:

> *It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.*

A3.44. On the basis of this provision, importing countries established normal values, and levels of subsidisation, on the basis of prices in surrogate countries.

China's Protocol of Accession to the WTO

A3.45. The 2001 Protocol of Accession of China to the WTO included section 15, dealing with price comparability in determining subsidies and dumping which provided that, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d) of the SCM Agreement relevant

[86] For example, the USA, in the Tariff Act of 1930, Sec. 1677 (18); Canada, in Special Import Measures Regulations (SOR/84-927), at 17.1.

[87] For example, the EU in EC *Organic Coated Steel*.

provisions of the SCM Agreement shall apply, but if there are special difficulties in that application, importing members may then use methodologies for identifying and measuring the subsidy benefit which may take into account the possibility that prevailing terms and conditions in China might not always be available as appropriate benchmarks. In applying such methodologies, where practicable, importing WTO Members should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China. These provisions would not apply once China had established, under the national law of the importing country, that it is a market economy, or could establish that market economy conditions prevailed in a particular industry or sector. These provisions expired after 15 years, i.e. at the end of 2016.

Non-Market Economies

A3.46. As noted above, a number of countries still define China as a non-market economy, or have previously defined China as a non-market economy and have been putting in place alternative approaches to effectively allow that situation to continue in relation to trade remedy investigations. While these measures are largely related to dumping investigations, they are indicative of the context within which trade remedy investigations are undertaken.

A3.47. Australia is in a similar situation as New Zealand in regard to its recognition that China is a market economy country, but in dumping investigations has applied the "particular market situation", and has generally found that prices and input costs are distorted in China because of government intervention in the market. The analysis to support these findings has been applied to subsidy investigations as contributing to the conclusion that input providers are public bodies.

A3.48. Canada defines China as a prescribed country for the purposes of section 20 of SIMA, which allows for normal values to be established on the basis of surrogate country values, where there is sufficient reason to believe that domestic prices in China are not substantially the same as they would be if they were detemined in a competitive market.

A3.49. In the EU, there was a presumption (rebuttable on a case-by-case basis) that Chinese exporters did not operate within a market economy and that, accordingly, Chinese imports should be assessed using the non-market economy methodology. In December 2017 the EU amended its Regulation addressing the dumping of imports to take account of developments with respect to certain countries, including China, in setting out the basis for establishing normal values, i.e. the expiry of section 15 of the Protocol of Accession. In particular, new Article 2(6a) of the Regulation was inserted to cover the situation where it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions. In such cases the normal value is to be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks in an appropriate representative country, undistorted international prices or benchmarks, or domestic costs to the extent that it is established that they are not distorted.

A3.50. Significant distortions are said to occur when reported prices or costs are not the result of free market forces because they are affected by substantial government intervention. In assessing distortion regard is to be had to:

- the extent to which the market is served by enterprises which operate under the ownership or control or policy supervision or guidance of the authorities of the exporting country
- State presence in firms which allows the State to interfere with respect to prices of costs
- public policies or measures which discriminate in favour of domestic suppliers or otherwise influence free market forces
- shortcomings in the application or enforcement of bankruptcy, corporate or property laws
- distorted wage costs, and
- access to finance granted by financial institutions which implement public policy objectives or otherwise do not act independently of the State.

A3.51. The new regulations require the Commission to produce, make public and regularly update a report describing the market circumstances in a country or sector, which can be placed on the investigation file. The EC Staff Report is the relevant report in respect to China.

A3.52. The USDOC considers China to be a non-market economy (NME) country. In accordance with section 771(18)(C)(i) of the Trade Act of 1930, any determination that a foreign country is an NME country shall remain in effect until revoked by USDOC. On this basis USDOC continues to treat China as an NME country. In proceedings involving NME countries, USDOC has a rebuttable presumption that all companies within China are subject to government control, and that a single weighted-average dumping margin (China-wide entity rate) is applicable to all exporters under review unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.[88]

New Zealand Position

A3.53. There is no specific provision in the Act relating to the treatment of non-market economies, in either a dumping or subsidy investigation, nor is there any provision which explicitly enables the use of prices from surrogate countries as a basis for normal values in a dumping investigation.

A3.54. As outlined in *Guide to International Anti-Dumping Practice*,[89] earlier versions of New Zealand's legislation, up to 1994, included specific provisions for the establishment of normal values and subsidy amounts in situations where the Government of the country of

[88] Reiterated recently in the Federal Register Notice for *Certain Crystalline Silicon Photovoltaic Products From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, at https://www.federalregister.gov/documents/2019/03/06/2019-04046/certain-crystalline-silicon-photovoltaic-products-from-the-peoples-republic-of-china-preliminary.

[89] 2013, Kluwer Law International, pp 483-4,

export had a monopoly or substantial monopoly of the trade of the country and determined or substantially influenced the domestic price of goods in that country. In such cases normal values and subsidy amounts could be ascertained on the basis of prices of like goods in a surrogate country, and under these provisions New Zealand did use surrogate country prices in a number of cases involving China.

A3.55. When the Act was amended in 1994 the provisions relating to non-market economies were omitted. With regard to dumping investigations, it was considered that in situations where the government of a country did not have a complete or substantially complete monopoly of its trade and the State did not fix all domestic prices, it would not be possible to apply the provisions of the Interpretative Note and conclude that prices in such a country could not be used as the basis for determining normal values. It was proposed that with regards to investigations involving China, account would be taken of the situation applying in the case of each industry and each exporter.

A3.56. The Trade and Economic Cooperation Framework Agreement between New Zealand and China, signed in May 2004, noted that New Zealand recognised that China had established a market economy system, and New Zealand would not apply section 15 of the Protocol of Accession.

A3.57. The consequence is that New Zealand treats China as a market economy and does not make assumptions about the degree and extent of government control over particular industries or manufacturers.

Conclusion

A3.58. The "international consensus" is largely made up by those countries which have legislatively defined China as a non-market economy and applied the provisions of Article 15 of China's Protocol of Accession to the WTO. The approach of these countries has been to assume, when conducting subsidy investigations, that the extent of government control of companies and industries is such that banks and input suppliers are public bodies, and even that the control extends to private companies.

A3.59. MBIE's approach, as the New Zealand investigating authority, is to apply the Act and the SCM Agreement in accordance with the guidance provided by relevant Appellate Body and panel findings, and on the basis of the situation applying to the investigation before it. The existence of any "international consensus" cannot provide grounds for adopting any conclusion that does not follow this approach.

ANNEX 4: COMMENTS RECEIVED ON THE EFC REPORT

Comments on the EFC Report were received from:

A. CCOIC
B. NZ Steel

A. CCOIC

A4.1. The CCOIC provided a brief comment, noting that should the Minister decide to impose countervailing measures, then the CCOIC should receive a new disclosure, before the adoption of the measures, of the essential facts and conclusions which form the basis for any such decision.

MBIE Comment

A4.2. MBIE notes that in the event that any final determination is likely to differ from the conclusions reached in the EFC Report, it would be obliged to inform interested parties accordingly, and provide an opportunity for those parties to defend their interests. If necessary, this can be achieved through the release of a Supplementary EFC Report.

B. NZ Steel

B1 Introduction

A4.3. In its submissions on the EFC Report NZ Steel noted that it had not had enough time to respond to the report, and reserved its rights as to the adequacy of the consultation procedure and to any further issues that it has not had time to properly consider and reduce to writing.

A4.4. NZ Steel considers that although MBIE has engaged in the further process ordered by the High Court it is unwilling to reconsider its ultimate decision about the nature and extent of subsidisation in the Chinese steel market.

A4.5. NZ Steel considers that MBIE's analysis and conclusions are inaccurate and inadequate in several material respects and do not provide a fair or reasonable basis for a Ministerial decision. NZ Steel claims that MBIE has shown a misplaced reliance on New Zealand's recognition of China as a market economy, which NZ Steel believes has contributed to MBIE's continued view that there is no evidence of Chinese subsidisation of the steel industry by public bodies.

A4.6. NZ Steel also claims that the EFC Report is not reasonable in its use of information, and MBIE has marshalled information around certain matters that support its conclusions but has incorrectly dismissed or in some cases omitted entirely, consideration of relevant counter evidence. NZ Steel also suggests that the EFC Report contains inaccuracies and mischaracterisation.

MBIE Comment

A4.7. As an initial general comment, MBIE notes that in the course of the reconsideration it has looked at the information available to it and has evaluated and put weight on the information that MBIE considers to be reliable. MBIE has concluded that overall, and including programmes not covered by the reconsideration, there is some subsidisation of galvanised steel coil exported to New Zealand, but the evidence does not support a finding of the kinds of subsidy or the level of subsidisation alleged by NZ Steel.

A4.8. MBIE disagrees that the 10 working day period for submissions was too short for NZ Steel to provide a response. The approach agreed with NZ Steel and the GOC was that there would be a period of at least 10 working days to allow interested parties to make submissions on the EFC Report. NZ Steel is already familiar with most of the material covered in the reconsideration, and did not seek any extension of the time limit for submissions. The period of 10 working days has been the standard for providing comments on EFC Reports since the requirement was introduced in 1995.

A4.9. MBIE's conclusions are based on its careful examination of the information available to it, in the light of the matters raised by the High Court.

A4.10. New Zealand's recognition of China as a market economy has not directed MBIE's analysis of subsidy programmes in China. However, MBIE considers that the definition of China as a non-market economy in the legislation of some other countries may have significantly influenced their subsidy investigations involving China. This matter was covered in Annex 3 of the EFC Report, and is also addressed in section B5 below.

A4.11. MBIE has reviewed all of the information available to it on the basis agreed with NZ Steel and the GOC prior to the initiation of this reconsideration. Where NZ Steel has identified in its submission areas of concern to it, including claims that information is incorrect or mischaracterised, MBIE has addressed those claims in this Annex, and where necessary and appropriate has made corrections or clarifications which are outlined in this Annex and will be reflected in the Final Report.

B2 Need to rely on facts available

A4.12. NZ Steel considers it important for MBIE to confirm that it has not obtained detailed responses from manufacturers except for the original Zong Cheng response. NZ Steel notes that the information provided by the GOC is not specific to the manufacturers involved in the investigation. MBIE is therefore reliant on facts available, which should be acknowledged, and should make it clear the implications it has chosen to draw from non-cooperation by interested parties. NZ Steel notes that four of the manufacturers are owned by the GOC, directly or through SASAC.

MBIE Comment

A4.13. MBIE agrees that in the absence of information from interested parties it needs to rely on facts available to it. MBIE referred to the responses or lack of them from Chinese manufacturers in sections 3.4 and 4.2.3 of the EFC Report. As was noted in paragraph 183 of the EFC Report, another explanation for the failure to provide information could be to

avoid providing evidence of subsidisation, but the information available to MBIE did not support that explanation.

A4.14. MBIE's approach relating to the availability of information and the assessment of information was set out in section 1.4 of the EFC Report, while Annex 3 of the EFC Report sets out in more detail the basis on which MBIE uses information in its investigations. MBIE has applied section 7(5) of the Act, as it was satisfied that sufficient infromation had not been furnished or was not available to enable the amount of the subsidy to be ascertained for the purposes of the Act. The amount of the subsidy is the amount determined by MBIE, having regard to all available information it considered to be reliable.

A4.15. The summaries of the essential facts and conclusions relating to each of the three subsidy programmes that were the subject of the reconsideration identify the information used, including the facts available in each case. MBIE does not consider that it is obliged to draw adverse inferences when information has not been provided. Rather it seeks to fill the gaps from other information available.

B3 MBIE's obligations in carrying out the investigation

A4.16. NZ Steel notes that in view of the reliance on facts available, MBIE's obligations as an investigator are especially important, and refers to MBIE's obligations under Article 12.7 of the SCM Agreement and section 7(5) of the Act, and also Article 12.5 of the SCM Agreement relating to the verification of the accuracy of the information provided.

A4.17. NZ Steel considers that in the EFC Report MBIE failed to present fair, accurate, relevant and reliable information, in particular in relation to evidence of Chinese HRC producers possessing, exercising or being vested with government functions.

A4.18. NZ Steel notes a number of obligations that it has drawn from WTO Panel and Appellate Body reports, and suggests that the matters it raises in the submission show that MBIE has not met these obligations.

MBIE Comment

A4.19. MBIE agrees with NZ Steel's description of its investigative obligations, and has met these obligations. As noted by NZ Steel, the starting point is section 7(5) of the Act,quoted at paragraph 29 of the EFC Report, and Article 12.7 of the SCM Agreement, quoted at paragraph 30. Section 7(5) provides that where information has not been provided or is not available the amount of the subsidy shall be the amount determined by the Secretary having regard to all available information that the Secretary considers to be reliable. Article 12.7 of the SCM Agreement provides that in circumstances where information is not provided, determinations <u>may</u> be made on the basis of facts available [emphasis added]. Thus under the Act, the obligation is to use reliable information in determining the amount of the subsidy, while the SCM Agreement permits the use of facts available in making determinations, when information has not been provided.

A4.20. With regard to the references to WTO Appellate Body and Panel reports identified by NZ Steel, MBIE notes that the EFC Report in Annex 2 at paragraph A2.9, and in Annex 3, at paragraph A3.38 it identified relevant WTO Appellate Body and panel findings that provide

guidance on how investigating authorities are to undertake the public body analysis, which overlap with most of the NZ Steel references.[90]

A4.21. In paragraph 28 of the EFC Report MBIE noted that the foundation of its approach to the assessment of information is the relevant provisions of the Act and the SCM Agreement, assisted by the interpretation of the SCM Agreement provided in WTO jurisprudence, and in paragraphs 186-189, MBIE noted the status of WTO dispute findings. In this context it should also be noted that the parties have appealed aspects of the Panel's findings relating to the public body determination in DS437 (21.5).

A4.22. In the EFC Report's Annex 2, in relation to public body, and Annex 3, in relation to the treatment of information, MBIE set out in some detail the relevant guidance provided by WTO dispute findings, and has applied that guidance in its consideration of the subsidy programmes addressed in the EFC Report.[91]

B4 The situation in China is more complex than MBIE acknowledges

A4.23. NZ Steel expresses concern at what it describes as MBIE's lack of detailed investigation into the operation and workings of the relevant Chinese entities. It considers that MBIE has painted a simplistic picture of banking reform which suggests a linear move from State control to a situation where banks operate on a commercial basis. NZ Steel considers that a true picture of the banking sector in China would involve a large degree of complexity where reform has moved hand in hand with an effort by the GOC to retain control. NZ Steel recalls the evidence of Professor Lardy, and suggests that MBIE has not engaged deeply with this evidence, and has focused on recent reforms of the banking sector without considering the broader context of those reforms.

A4.24. NZ Steel provides extensive references to a book *The Political Economy of Banking Governance in China*, by Xuming Yang, and cites extracts from the book relating to the extent of ongoing CPC external and internal controls. NZ Steel considers that MBIE's investigation of the relevant laws, regulations and plans must be placed in their proper context, since by themselves they do not tell the complete story.

A4.25. NZ Steel suggests that this is also the case in regard to SIEs, where MBIE has focused on the words of plans and directions and SASAC regulations without examining the critical contextual evidence of how these are implemented in practice. NZ Steel refers to the "consensus view" that in relation in particular to the provision of HRC at LTAR, the

---

[90] MBIE did not refer to DS479 *Russia – Commercial Vehicles*, which relates to anti-dumping measures, where the discussion by the Appellate Body in paragraph 5.102 of its report was in the context of the particular provisions of the AD Agreement relating to dispute settlement (Article 17.6), which do not appear in the SCM Agreement, and was referring to the obligations of a panel in that context.

[91] MBIE notes that NZ Steel has incorrectly attributed the quotation in its paragraph 10(d) to the Panel in DS379, when it should have been the Article 21.5 Panel in DS437 (the text quoted in 10(d) is a continuation of the text in 10(b)), and the correct document citation for that report which is referenced in paragraphs 10(a), (b) and (d) is "WT/DS437/RW". Also, the correct reference for *Russia – Commercial Vehicles* is WT/DS479/AB/R.

direction of developments in China is opposite to that put forward by MBIE. Reference is made to ADC *HSS* 419 and to its quotations from the EC Staff Report, as providing evidence that the GOC has changed direction in relation to SIEs. NZ Steel also refers to its submission of 12 April 2019 as providing further information in support of its position, and cannot find any evidence that MBIE has responded to competing plausible explanations of evidence.

A4.26. NZ Steel states that what matters for the question of meaningful control is not just a question of laws but of how they are implemented. NZ Steel suggests that the complexity of the inter-relationships involved is seen in the fact that the same lawyer has "purported" to represent the CCOIC as well as the GOC.

MBIE Comments

A4.27. MBIE accepts that the Chinese banking sector is complex, but notes that what it has been required to do in the reconsideration is to establish whether or not banks in China meet the public body test of whether they possess, exercise or are vested with governmental authority. MBIE has concluded, on the basis of its analysis of the available information, that in the case of policy banks this test is met, but it has not been met in the case of SOCBs.

A4.28. In the EFC Report, at section 5.3.2.5, MBIE set out a summary of the views of Professor Lardy and Mr Gospage in relation to Chinese banks, and the various submissions made by NZ Steel, including its submission of 12 April 2019. Comments on these views and submissions were provided in paragraphs 387-392 of the EFC Report, including references to other relevant parts of the EFC Report, and to MBIE's research summarised in section 5.3.1.4.

A4.29. MBIE has addressed the positive evidence available from the relevant laws, regulations and plans and from the GOC and Chinese manufacturers and banks. In relation to the role of the CPC and other contextual information, it has considered the opinions advanced by Professor Lardy, the material included in the EC Staff Report, and the USDOC views as stated in USDOC *Corrosion-Resistant Steel*. MBIE does not consider that this material rebuts the positive evidence available to it. In its submission NZ Steel suggested that MBIE could have referred to a large body of further evidence, and quotes from an April 2017 publication in relation to the extent of the CPC's role in banking sector reform. MBIE notes that an Amazon search (on 4 June 2019) of "China banking reform" returned 78 results for books relating to this subject, which suggests that it may be possible to find support for a range of propositions relating to the reform of the Chinese banking sector, but also confirms that reform of the Chinese banking sector is a real subject.

A4.30. With regard to SIEs, MBIE has examined both the positive evidence available to it and the contextual evidence relating to plans and directions and SASAC regulations. MBIE notes that the Australian report referred to by NZ Steel was issued well after the original determination in *Galvanised Steel Coil* in July 2017, and relied heavily on the EC Staff Report. The EC Staff Report was addressed in the EFC Report at Chapter 4 (paragraphs 201-207), Chapter 5 (paragraphs 345-354) and Chapter 7 (paragraphs 607-614). MBIE also addressed the NZ Steel submission of 12 April 2019 at paragraph 650 of the EFC Report. MBIE's conclusions were that the EC Staff Report did not provide a basis for concluding

that there was evidence that SOCBs possess, exercise or are vested with governmental authority, and did not provide compelling evidence that prices for HRC in China are distorted or are directed by GOC interventions such that SIEs providing HRC possess, exercise or are vested with governmental authority.

A4.31. NZ Steel has claimed that the complexity of the inter-relationship between government and industry is seen in the fact that the same lawyer has "purported" to represent the CCOIC, "ostensibly" a private industry body, as well as the GOC. MBIE is satisfied that Allbright Law does not "purport" to represent the CCOIC, it does represent the CCOIC. MBIE was provided with a copy of the Power of Attorney granted by the CCOIC to Allbright Law in relation to the original investigation. In the original investigation, Allbright Law forwarded the GOC questionnaire response to MBIE, as it did for the GOC RFI response in this reconsideration. MBIE does not consider that this has any sinister connotations of GOC control, as implied by NZ Steel.

B5 China market economy, policy position

A4.32. NZ Steel suggests that its comments on the complexity of the situation in China is not inconsistent with New Zealand recognising China as a market economy, and notes that recognition, or not, of China as a market economy is referred to "at various points" in the EFC Report.

A4.33. NZ Steel suggests that New Zealand's recognition of China as a market economy cannot and should not constrain its approach to considering the information available, including information from other jurisdictions. NZ Steel claims that New Zealand's recognition of China as a market economy took place in the context of negotiating a free trade agreement, and was never intended to affect New Zealand's application of the Act.

A4.34. NZ Steel also notes that distorted prices and subsidisation can still occur even in advanced and relatively pure market economies. NZ Steel considers that the evidence supports a substantial amount of governmental control in China, and the issue is whether the extent and nature of that control amounts to meaningful control so that the entities are public bodies.

A4.35. NZ Steel observes that neither the Act nor the SCM Agreement provide for MBIE to make a public body distinction on whether the Member cited is considered a market economy or not. NZ Steel suggests that if Parliament had intended the Act to be administered to take account of the FTA-related China market economy matter then changes would have been made to address that topic. NZ Steel notes that changes to the Act were made to accommodate the removal of the ability to impose anti-dumping duties under CER and to lift the *de minimis* margin in respect to Singapore under the NZ-Singapore CEP. NZ Steel goes on to highlight statements by the New Zealand Government which indicated that New Zealand's trade remedy legislation applied to all countries on an equal basis and did not discriminate against China based on the concept that it was a non-market economy, which meant that the formal recognition had no effect on New Zealand's trade remedy legislation and practice. It was emphasised that New Zealand did not make use of the sections of

China's Protocol of Accession to the WTO that allowed for additional provisions to be applied to China in trade remedies investigations.

MBIE Comment

A4.36. MBIE agrees that the status of China as a market economy does not constrain its investigations.

A4.37. New Zealand's position with regard to the treatment of non-market economies was set out in paragraphs A3.53 to A3.57 of the EFC Report. The point of the section of Annex 3 to the EFC Report from paragraph A3.40 to paragraph A3.57 was to identify why some other countries appear to apply a different perspective to investigations involving China than does New Zealand, in that their legislation requires them to take a particular stance.

A4.38. The key point is that in trade remedy investigations since 1995 New Zealand has not treated China as a country covered by the Interpretative Note to Article VI(1) of the GATT, and in fact has no legislative basis to do so, since the 1994 amendment to the Act deliberately omitted the previous provisions relating to state trading countries. This means that in respect to trade remedy investigations the formal recognition of the position in 2004 did not require any change in New Zealand's approach to investigations involving China, as confirmed by the New Zealand Government statements referred to by NZ Steel.

B6 Lack of engagement with the evidence

A4.39. NZ Steel notes its view that one of the significant failings of the EFC Report is the lack of real engagement with the primary evidence provided by the GOC and manufacturers and the secondary evidence from overseas jurisdictions, and expert evidence and other information provided by NZ Steel. NZ Steel considers that MBIE "failed to critically review and question" information provided by the GOC, and was "superficial and unpersuasive" in the way in which it dismissed any evidence that was in conflict with its conclusion that no subsidisation can be demonstrated.

A4.40. NZ Steel suggests that MBIE will not find that there is any distortion in the market unless and until it is conclusively proved to be the case, and cites MBIE's discussion of land-use rights in EC *Hot-Rolled Flat Products*. NZ Steel also notes that MBIE has dismissed each overseas investigation separately rather than take a holistic approach and weigh all evidence together, and makes a specific reference to MBIE's conclusions regarding Canadian investigations.

A4.41. NZ Steel claims that MBIE did not engage with the implications of its findings in relation to the "central bank" loan to Baosteel or its findings in relation to a manufacturer in the *Hollow Steel Sections* investigation, and returns to its concerns over the representation of the CCOIC and the GOC by the same lawyer and what such an occurrence says about the financial system in China, and the GOC's involvement in the steel industry.

MBIE Comment

A4.42. MBIE considers that the EFC Report provides a clear record of its engagement with all of the information available to it for the reconsideration. In considering the information available, MBIE has focused on factual matters, such as the text of the various laws,

directives and plans, in the context of the information available with regard to the particular programmes and manufacturers that are the subject of the reconsideration. In reviewing this information, MBIE has examined the primary and secondary information and has had regard to all available information that MBIE considered to be reliable in reaching its conclusions regarding subsidisation. In particular, it has applied the information available to the question of whether Chinese entities possess, exercise or are vested with governmental authority, and in its consideration of this test has taken into account the guidance provided by WTO dispute findings.

A4.43. With regard to NZ Steel's comments relating to market distortion in the land-use rights prices, MBIE is satisfied that on the basis of its examination of the information available, including the EU investigations, it has reached a correct conclusion concerning the alleged provision of land-use rights at less than adequate remuneration. The summary of MBIE's examination was set out in Chapter 5 of the EFC Report.

A4.44. NZ Steel also takes exception to MBIE's approach of examining each overseas investigation separately rather than taking a holistic approach and weighing all of the evidence together. MBIE agrees that at a superfical level there is an attraction to the argument that because a number of jurisdictions have reached similar conclusions regarding the status of SOCBs and SIEs there is a degree of consensus that deserves consideration. However, MBIE considers that it does need to examine each of the overseas investigations separately, since they do involve different manufacturers, with different periods of investigation, and the bases for conclusions reached by the overseas authorities in each case need to be examined. MBIE does have regard to the totality of the information available in reaching this conclusions, and in particular the findings of other jurisdictions, but does not consider that it should accept those findings without examining the basis on which they were made. With regard to MBIE's conclusions on the Canadian cases quoted by NZ Steel, the summary of each case was set out in paragraphs 458-463 of the EFC Report, and MBIE notes that in one case there was no investigation at all of land-use rights, while in the other case there was no evidence of the basis for determining that there was a subsidy and the level of benefit concerned. In these circumstances MBIE considered that they did not provide a reliable basis on which to conclude that a subsidy was being provided.

A4.45. MBIE's examination and conclusions regarding the "central bank" loan to Baosteel were addressed in the EFC Report at paragraphs 314-316, 378 and 389 (addressing points raised by Professor Lardy), 394, 401 and 405. MBIE's conclusion was that there was a subsidy and established the level of that subsidy. This was based on information available to MBIE from Baosteel's accounts.

A4.46. Information relating to a manufacturer in the *Hollow Steel Sections* investigation cannot be applied to the current reconsideration in isolation from the relevant information. In the *Hollow Steel Sections* investigation there was no evidence that the particular situation relating to the manufacturer concerned was also applicable to the other manufacturers in that investigation, nor is there information that it applied to the manufacturers in the current reconsideration.

B6.1 The circumstances of this case – insofar as public body analysis

A4.47. NZ Steel recalls that MBIE has made extensive mention of the need to take account of the particular circumstances of the case. NZ Steel suggests that MBIE has failed to acknowledge that the particular circumstances of the *Galvanised Steel Coil* case are not dissimilar to the reference cases and in many respects are identical. NZ Steel prepared a table to illustrate its view, and in that context notes the summary of conclusions from the Executive Summary of the EFC Report to illustrate its view that it is difficult to consider that the factual circumstances it listed in its table were fairly represented by the EFC Report summary quoted.

A4.48. NZ Steel then goes on to identify particular aspects of the summary which it considers are misleading:

- NZ Steel quotes from the summary "Most of the overseas investigations are dated" and "different periods of time", and suggests that these omit to inform the reader that the date circumstance is not relevant. NZ Steel provides a Case Timetable of Australian cases (ADC HSS 177 and ADC HSS 419) relating to the examination of the provision of HRC at LTAR by public bodies.
- NZ Steel quotes from the summary "…do not take account of more recent developments in Chinese law and planning," and suggests that MBIE has not identified the recent developments that can be said to be relevant to particular decisions or how the developments may have affected the reasoning in those decisions.
- NZ Steel quotes from the summary "partial analysis of regulations," and suggests that MBIE has omitted to state that the analysis of regulations by other authorities was sufficient for them to be satisfied that Chinese SIEs providing CHR *presumably HRC]* at LTAR are public bodies, and NZ Steel claims that MBIE's charge of partial analysis is incorrect.
- NZ Steel quotes from the summary "Most of the overseas investigations are related to different products," and agrees that while that is correct with regard to the finished product, it is not relevant to an assessment of public bodies, since the finished products use HRC and the final use is an irrelevant consideration.
- NZ Steel quotes from the summary "different Chinese manufacturers," and suggests that this is irrelevant insofar as the determination of HRC at LTAR public body determination is concerned, because the relevant instruments, such as SASAC, do not differentiate in steel-making stages by manufacturer. NZ Steel suggests that this is an MBIE proposition not offered by the GOC or CCOIC and does not appear in the analysis or reports of other jurisdictions.
- NZ Steel quotes from the summary "widely differing findings on levels of subsidy" and suggests that this misleads and omits to acknowledge that "level of subsidy" analysis arises from Article 14 of the SCM Agreement, and the level of subsidy found does not compromise the finding that there is a subsidy provided by a public body.

MBIE Comment

A4.49. MBIE notes that there are risks in both compiling and reading on its own a summary of complex material.

A4.50. MBIE outlined the relevant investigations undertaken by overseas authorities in paragraphs 191-211 of the EFC Report, in which it identified the period of investigation, the manufacturers concerned, and commented on the product concerned compared with galvanised steel coil. The analysis of the individual programmes in Chapter 5 (section 5.3.2), Chapter 6 (section 6.3.2) and Chapter 7 (section 7.3.2), set out in detail MBIE's analysis of the findings by the other jurisdictions, and in sections 5.3.3.2, 6.3.3.2 and 7.3.3.2, commented on the matters raised by the High Court with regard to the findings of other jurisdictions.

A4.51. NZ Steel then quotes the summary from the Executive Summary to the EFC Report as the basis for its claim that MBIE has not fairly represented the factual circumstances of the overseas investigations. MBIE considers that this is not a reasonable proposition, and MBIE has not been misleading. As noted in the paragraph above, the EFC Report included detailed descriptions and analyses of the findings of other authorities and it would be senseless to repeat all of this in the Executive Summary or to provide cross references to all of the relevant sections of the EFC Report.

A4.52. With regard to the key points raised:

- On the date of overseas investigations, the EFC Report noted that the investigations involving dated information included ADC *HSS* 177 in relation to SIEs providing inputs, and consequently ADRP 63 which relied in part on ADC *HSS* 177 in relation to SIEs providing inputs, and EC *Organic Coated Steel* in relation to both banks and SIEs providing inputs. The High Court also made reference to the dated nature of the information in EC *Organic Coated Steel*.[92]
- The Case Timetable provided by NZ Steel is intended to demonstrate that the ADC position regarding SIEs as public bodies did not change between ADC *HSS* 177 with a POI of 2010-11 and ADC *HSS* 419 with a POI of 2016-17. MBIE's examination of the matters considered by the ADC in ADC *HSS* 177, the reinvestigation in ADC *HSS* 203, and ADRP 63, was set out in section 7.3.2.1 of the EFC Report. MBIE also notes that as indicated in paragraph A4.30 above the final report for ADC *HSS* 419 relied heavily on the EC Staff Report as the basis for its conclusion that SIEs providing HRC were public bodies (Non-confidential Appendix C – Public Bodies), and MBIE does not consider that the EC Staff Report provides a reliable basis on which to conclude that input providers are public bodies (paragraphs 607-609 and 613-614 of the EFC Report).

[92] *New Zealand Steel Limited v Minister of Commerce and Consumer Affairs*, [2018] NZHC 2454, paragraphs 195 and 202.

- The "more recent developments" in Chinese law and planning referred to in the Executive Summary were described and discussed in section 5.3.1.4 of the EFC Report in relation to both the banking and steel sectors, and section 7.3.1.4 in relation to the steel sector.
- MBIE's reference to "partial analysis of regulations" in the Executive Summary related to the ADC's analysis in ADC *Steel Reinforcing Bar* 322, as described in paragraph 590 of the EFC Report (but see paragraph A4.58 below), and CBSA *Concrete Reinforcing Bar*, as described in paragraph 602 of the EFC Report.
- With regard to the statement regarding different products, MBIE refers to its comments at paragraph A4.49 above. MBIE agrees that even if the products are different the issues around the provision of inputs at LTAR may be common, especially in relation to HRC, and this is why it undertook detailed analyses of the investigations undertaken by other authorities, as set out in section 7.3.2 of the EFC Report.
- Similar considerations apply in relation to the Executive Summary's reference to "different Chinese manufacturers" in relation to the provision of inputs at LTAR, but the additional point being made is that information that is relevant to a manufacturer in one investigation cannot be applied to a different investigation involving a different product without good cause – the reference in the summary was not limited to matters relating to the provision of inputs.
- With regard to "widely differing findings on levels of subsidy" MBIE notes that not all levels of subsidy are based on analysis under Article 14 of the SCM Agreement. For example, for non-cooperating exporters the USDOC establishes AFA rates on the basis of its findings from other producers or other investigations,[93] which may themselves be based on the use of AFA, resulting in a subsidy rate of 21.63 per cent[94] in USDOC *Corrosion-Resistant Steel* (the AFA rate in USDOC *Cut-to-Length Plate* was also based on this finding); and the rate in CBSA *Concrete Reinforcing Bar* of 0.41 per cent was based on the average of subsidy levels found for the cooperating exporter, which did not include input provision at LTAR. In the Australian cases, in ADC *Galvanised Steel* 193 the subsidy level for integrated producers was 0 per cent, while the maximum for another cooperating (but non-integrated) exporter was 5.2 per cent (which may have included some subsidy amounts for other programmes). ADC *Steel Reinforcing Bar* 322 related to the provision of billet and not HRC. The subsidy rates established in EC *Organic Coated Steel* for cooperating exporters were 23.02 per cent and 27.63 per cent.

[93] A description of the US law governing the determination of subsidy levels when using AFA was set out in paragraph A3.27 of the EFC Report.

[94] This rate was based on the amount established for a cooperating exporter using that exporter's purchase information and sales data to compare with an external benchmark, but the public body determination, the determination that the subsidy was specific, and the selection of the benchmark used for establishing the level of subsidy, were all based on use of AFA.

A4.53. There is no justification for NZ Steel's claim that through the Executive Summary to the EFC Report MBIE did not fairly represent the factual circumstances and misled readers.

B6.2 Australia – incomplete and incorrect information in EFC

A4.54. NZ Steel considers that MBIE did not take a reasonable position in not accepting Australia's view that Chinese SIEs are public bodies. In particular, NZ Steel considered that MBIE:

- Failed to take proper account of Australia's recognition of China as a market economy.
- Discounted ADC *Galvanised Steel* 193 (with a reference to a non-existent section of the EFC Report), by suggesting it was dated when it was supported by current ADC *HSS* findings.
- Discounted ADC *Reinforcing Steel Bar* 322 by incorrectly asserting that certain SASAC regulations were not taken into account.
- Discounted ADRP 63 by focusing largely on alternative explanations for the GOC non-response and not including reference to the High Court's suggestion that cooperation may have disclosed subsidies.
- Failed to discuss ADC 419, which had a POI abutting that of the current investigation.
- Omitted to acknowledge relevant aspects of the CER arrangement with Australia regarding the alignment of trans-Tasman business rules under the "Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law".
- Omitted to make it clear that the Australian position that Chinese SIEs are public bodies has been of long and continuous standing, including during the period covered by the current reconsideration.
- Omitted making positive inferences from the Australian position on Chinese SIEs being public bodies having been subjected to and survived a merits review by the ADRP and judicial review by the Australian Federal Court, and that China had not raised the Australian findings in the WTO.

A4.55. NZ Steel considers that MBIE's analysis of Australia's interpretation of WTO rulings was not clear, and considers that MBIE's description of how issues progressed in relation to DS436 was not fair.

MBIE Comment

A4.56. The EFC Report at paragraph A3.47 noted "Australia is in a similar situation as New Zealand in regard to its recognition that China is a market economy country" and went on to outline the Australian approach to using its analysis of price distortion from dumping investigations to support its conclusions in subsidy investigations that input providers are public bodies. MBIE does not consider that it can be said that it "fails to take proper account of Australia considering China a market economy."

A4.57. With regard to the incorrect reference to a part of the EFC Report, MBIE notes that in fact the incorrect reference was to section 4.3.3 (see paragraph 589 of the EFC Report) and the

reference should have been to section 5.3.1.4. MBIE will ensure that the Final Report includes correct cross-references. MBIE's assessment of ADC *Galvanised Steel* 193 was detailed in section 7.3.2.1 of the EFC Report.

A4.58. With regard to ADC *Steel Reinforcing Bar* 322, MBIE agrees that in its Final Report the ADC did refer to Article 7 of the SASAC Interim Regulations (in Appendix 5 – Submissions following the SEF). The ADC did not consider that this provision conflicted with its finding that SIEs are public bodies, and quoted from the Panel report in DS436 in support of its view. However, this aspect of the Panel's findings[95] was overturned by the Appellate Body.[96] MBIE notes that paragraph 580 of the EFC Report did refer to the ADC's position regarding the provisions of Article 7, but will ensure that the Final Report for this reconsideration clearly reflects the ADC findings on this matter. However, the situation also set out in paragraph 590 of the EFC Report remains valid, in that the ADC was incomplete in its elaboration of the main obligations on SASACs, since it omitted the obligation referred to in Article 14(5) of the Interim Regulations.

A4.59. MBIE's description of ADRP 63 was set out in paragraphs 584-587 of the EFC Report with comments in paragraph 592. The focus on the GOC non-response reflected the weight which the ADRP attached to this consideration in reaching its conclusion. In particular, the ADRP thought that if the situation had changed since ADC *HSS* 177, the GOC would have provided information to support that proposition, and it was this point that MBIE addressed in its comments. The High Court's comments in relation to one possible reason for non-response being the disclosure of subsidies related to the availability of information to MBIE. In the context of this reconsideration, MBIE addressed the provision of information by the GOC in section 4.2.2 of the EFC Report, and also noted, at paragraph A3.17, WTO dispute findings relevant to reasons why information might not have been supplied.

A4.60. MBIE has commented elsewhere on ADC *HSS* 419 and its relevance (see paragraph A4.52).

A4.61. MBIE has previously addressed the "Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law" in the Initiation Report for the investigation of *Steel Reinforcing Bar* in August 2017. As noted in paragraphs 12 and 13 of that Initiation Report, Pacific Steel's application had suggested that the Memorandum of Understanding meant that there was an expectation that the administration of business rules, including anti-dumping and countervailing rules, should generally be consistent, and that New Zealand should follow Australia in taking account of the findings in other jurisdictions. MBIE noted that the Memorandum of Understanding had no legal weight in terms of the policy and practices New Zealand uses in trade remedy cases, and does not require or imply that New Zealand or Australian trade remedy officials should follow or adhere to or take guidance from the

[95] *US — Carbon Steel (India)*, WT/DS436/R, paragraph 7.88.

[96] *US — Carbon Steel (India)*, WT/DS436/AB/R, especially paragraphs 4.36-4.43, including footnote 596.

other in relation to the administration of business law. MBIE would not be taking the Memorandum of Understanding into account in making its assessment under section 10(1) of the Act (regarding the initiation of an investigation). With regard to the current reconsideration, MBIE continues to take the position that the Memorandum of Understanding does not apply to the administration of trade remedy legislation.

A4.62. MBIE's discussion of Australian investigations and their findings relating to SIEs as public bodies was detailed in section 7.3.2.1 of the EFC Report. The fact that these findings cover a long and continuous period does not mean that the individual findings should not be subject to scrutiny. MBIE's scrutiny has included the ADRP merits reviews. The Australian Federal Court decision referred to by NZ Steel confirmed the ADC's (then Customs) process and conclusions, but noted 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." [97] The failure of China to challenge the Australian findings through WTO dispute settlement does not signify that there is nothing to challenge – there are many considerations involved in undertaking such a course of action.

A4.63. The references in paragraph 522 of the EFC Report relate to the original investigation. A more detailed outline of MBIE's concerns regarding the ADC's interpretation of WTO dispute findings was set out at paragraph 580 of the EFC Report and referred to in paragraphs 591 and 675. MBIE clearly set out the test for a public body throughout the EFC Report, but notes that meaningful control is not a "sufficient criterion" for an entity to be a public body – something more may be required to establish that an entity in fact exercises governmental authority in the performance of governmental functions. This is in accordance with the views of the Appellate Body in DS379, which stated:

> *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 in fact exercises such authority in the performance of governmental functions.* [98]

A4.64. MBIE also notes the clarification provided by the Appellate Body in DS436 when it refers to the Panel's quotation of the passage above, but states:

> *However, the Panel erred in its substantive interpretation of Article 1.1(a)(1) by construing the term "public body" to mean any entity that is "meaningfully controlled" by a government. Consequently, the Panel erred in its application of Article 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the GOI's ability to control the NMDC as*

[97] *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885, paragraph 73.

[98] *US – Anti-Dumping and Countervailing Duties (China)*, DS379/AB/R, paragraph 318 (emphasis added).

> *determinative for purposes of establishing whether the NMDC constitutes a public body.*[99]

A4.65. With regard to the matters raised concerning the evolution of Panel and Appellate Body findings in DS436, MBIE notes that the comments made by the ADC in ADC *Steel Reinforcing Bar* 322,[100] and attributed to the Dispute Settlement Body, were quotes from the Panel Report and were directly related to the issue on which the Appellate Body overturned the Panel's findings, because something more than the matters referred to in the ADC's comments is required for a public body determination. MBIE is satisfied that its understanding of the matters arising from DS436 is informed and correct.

B6.3 Mischaracterisation: USDOC Corrosion Resistant Steel – Public Bodies, AFA

A4.66. NZ Steel claims that MBIE has mischaracterised the USDOC finding in USDOC *Corrosion-Resistant Steel*, and suggests that MBIE claimed that the USDOC solely used AFA in determining public body status in that investigation.

MBIE Comment

A4.67. MBIE's description of the USDOC investigation was set out at paragraph 616 and footnote 53 of the EFC Report. The Preliminary Findings[101] referred to in the footnote set out the bases for the application of AFA in relation to the assessment of subsidy programmes applicable to Yieh Phui (the cooperating exporter), including whether input producers are public bodies (pages 16-17 of the Preliminary Findings), whether the input subsidy was specific (page 18), and whether there were input industry distortions affecting the determination of the benchmark price (pages 18-20). The use of AFA is further noted in the discussion of the programmes determined to be countervailable, with the provision of inputs at LTAR discussed at pages 32-34. The analysis did use the prices paid for inputs by Yieh Phui to compare with the benchmark price and Yieh Phui's actual sales as the denominator for calculating the level of subsidy. These findings were maintained in the Final Determination.[102]

A4.68. MBIE did not say in the EFC Report that the USDOC determination was based "solely" on AFA, and did point out that prices and sales from the cooperating exporter were used for establishing the actual benefit level. Nevertheless, the finding of subsidy and its level was based on the use of AFA and that is not a mischaracterisation, and it does support MBIE's conclusion that for this, and other reasons, noted in paragraph 621 of the EFC Report, the investigation did not provide a reliable basis on which to conclude that input suppliers are public bodies.

---

[99] *US — Carbon Steel (India)*, DS436/AB/R paragraph 4.36 (original emphasis).

[100] ADC *Steel Reinforcing Bar* 322, Final Report, Appendix 6, pages 89-90.

[101] *Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China*, C-570-027, 2 November 2015.

[102] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China*, C-570-027, 24 May 2016.

B6.4 Inaccuracy: China CCOIC information

A4.69. NZ Steel claims that the EFC Report fails to identify that some of the information provided to MBIE by the CCOIC was inaccurate and misleading, as pointed out by NZ Steel in its submission of 12 April.

MBIE Comment

A4.70. MBIE understands NZ Steel's concerns to relate to the CCOIC comments on specificity and non-SOE producers of HRC. NZ Steel's comments on the CCOIC submissions were summarised in paragraphs 639-642 of the EFC Report, with MBIE's comments set out in paragraph 650. In particular, in relation to the extent of HRC production by non-SOE producers, MBIE notes that its summary of the GOC RFC response providing figures from the NBS was set out in paragraph 162 and footnotes 11 and 12 of the EFC Report. With regard to specificity, MBIE notes that because of its conclusion that there is no subsidy programme for the provision of inputs at LTAR the issue has not been addressed.

B6.5 Incomplete: Binding nature of plans

A4.71. NZ Steel considers that the binding nature of plans is important because it goes to conclusions regarding control of steel-making SIEs. NZ Steel suggests that MBIE has failed to respond directly to the evidence provided by NZ Steel in its submission of 12 April 2019, and the questions raised by the reference to Order 35 as being not "repealed" and "enacted"; and the more recent EC evidence that suggests that plans are binding. In its submission of 12 April 2019, NZ Steel referred to the EC Staff Report as providing evidence that the 13th Five-year Steel Plan and other plans are binding, and also referred to the discussion note on the Steel Industry Adjustment Policy issued in March 2015.

MBIE Comment

A4.72. MBIE does not consider that the evidence provided by NZ Steel is sufficient to allow a conclusion that plans are binding to the extent that they demonstrate that the GOC applies meaningful control over SIEs such that they are, in fact, performing governmental functions on the basis of governmental authority. MBIE's examination has included the documents referred to by NZ Steel, with the EFC Staff Report addressed in section 7.3.2.3 of the EFC Report in relation to inputs, while the March 2015 Steel Industry Adjustment Policy appears to have been overtaken by the 2016 Opinion of State Council for the Steel Industry to Resolve Excess Capacity (see paragraph 308 of the EFC Report) and the 13th Five-year Steel Plan issued in 2016 (see paragraph 309 of the EFC Report). MBIE notes the claims by the GOC that Five-year Plans are aspirational documents and are not laws. MBIE also notes that the EFC Staff Report has a general section on plans and in its section on the steel sector includes references to the implementation of plans at the provincial level involving "facilitation" and "encouraging." To the extent that these activities involve financial support in the form of grants or tax incentives provided by central or local government (in the narrow sense), they can be addressed as subsidies in the relevant context, but would not, without other evidence, provide a basis for concluding that input providers are public bodies.

A4.73. MBIE's assessment of whether producers of HRC sold to producers of galvanised steel coil are public bodies is based on whether the information available justifies a conclusion that such producers possess, exercise or are vested with governmental authority, and whether the producers in fact exercised such authority in the performance of governmental functions. This examination has involved consideration of relevant laws, directives and plans, as well as other relevant information relating to the Chinese market for HRC, and information from investigations undertaken by foreign authorities. MBIE's conclusion from this examination is that producers of HRC sold to galvanised steel producers do not meet the test for a public body.

B7 Failure to undertake adequate independent investigation

A4.74. NZ Steel has identified a number of respects in which it considers that MBIE has failed to undertake an adequate and independent investigation.

B7.1 Acceptance of GOC response largely at face value

A4.75. NZ Steel claims that the GOC evidence has largely been accepted at face value but the conflicting evidence of Professor Lardy and Mr Gospage has not been responded to. In particular, NZ Steel notes that in its meeting of 19 March 2019 with the CCOIC MBIE did not raise questions regarding the conflicting evidence of Professor Lardy or Mr Gospage nor did it ask searching questions requiring investigation and consideration.

A4.76. NZ Steel notes the summary of the GOC response set out in the EFC Report but suggests that critical thought and action needed to be applied, and that MBIE should verify the accuracy of the information provided, but there was no analytical discussion of evidence whether supporting or conflicting with such statements.

MBIE Comment

A4.77. MBIE has considered and addressed the matters raised by Professor Lardy and Mr Gospage in its assessment of the information available in relation to the three subsidy areas covered by the reconsideration (see sections 5.3.2.5, 6.3.2.5, and 7.3.2.5 of the EFC Report). The presentation by the CCOIC at the meeting of 19 March 2019 reflected the matters raised in the GOC response to the RFI. MBIE's examination and analysis of the information available has addressed the matters raised by the parties, and has not accepted anything at face value.

B7.2 Inaccuracy: Limited GOC co-operation, and GOC information

A4.78. NZ Steel considers that MBIE has mischaracterised the GOC cooperation and information, since the GOC did not respond to a question regarding mergers in the steel industry, while some of the information provided was misleading. NZ Steel refers to its submissions of 13 February 2019 and 12 April 2019 in this regard.

MBIE Comment

A4.79. The GOC's response to the general questions on page 6 of the RFI did not contain a specific reference to mergers, but the attachments included the 13th Five-year Plan. In its basic principles section, the Plan noted the use of mergers and acquisitions as a means to

deepen the coordinated development of the regional layout of the steel industry. Other areas where mergers and acquisitions were referenced in the Plan related to the disposal of zombie enterprises, while one of the key tasks identified in the Plan was the promotion of mergers and restructuring, in accordance with the principles of market-oriented operation, with the objective of forming a number of world-class super-large steel enterprise groups.

A4.80. Appendix 1 to the GOC's RFI response reflects the GOC's view of the evidence available to or used by various investigating authorities, but has not determined MBIE's considerations.

B7.3 Incomplete: China HRC SIEs = minority share

A4.81. NZ Steel notes that the data provided by the GOC from the NBS showing the extent of SOE and non-SOE production was taken at face value, which does not reconcile with the evidence submitted by NZ Steel in its submission to MBIE's *HSS* investigation on 2 July 2018.

MBIE Comment

A4.82. MBIE has noted the information provided by the GOC from the NBS, with the RFI response being summarised in paragraph 162 of the EFC Report and referred to in paragraph 555. MBIE does accept official data, and in footnotes 11 and 12 to paragraph 162 of the EFC Report set out the basis for the figures provided. In paragraph 651 of the EFC Report, MBIE noted that in its *Hollow Steel Sections* investigation the HRC suppliers involved included major steel producers as well as private companies. In particular, one of the cooperating manufacturers in that investigation provided information on its extensive purchases of HRC, which supported the NBS information.

A4.83. The extent of State ownership in any particular area is assessed in relation to addressing the test for a public body of whether producers possess, exercise or are vested with governmental authority, and whether the producers in fact exercise such authority in the performance of governmental functions. MBIE notes that the extent of State ownership is one factor in considering the nature and impact of government control when making a public body determination.

B7.4 Incomplete: taking insufficient account of evidence re consensus

A4.84. NZ Steel claims that MBIE incorrectly failed to identify that the "consensus" is more extensive than four WTO Members referred to by the High Court, and claims that MBIE knew that India supported the consensus and that Egypt and Turkey had examined, to some degree, Chinese steel public bodies. NZ Steel noted that MBIE had been provided with information in relation to the *HSS* investigation, that because of personal links MBIE should have been able to make inquiries with the Egyptian trade remedies body, and inquiries could have been made by New Zealand's Embassy in Turkey for relevant information.

MBIE Comment

A4.85. MBIE's consideration of the findings of foreign jurisdiction related to those identified by the High Court. MBIE's comments on the "consensus" were included in Annex 3 to the EFC Report at paragraphs A3.36-A3.59.

A4.86. As NZ Steel knows, MBIE is aware that the Indian authority imposed countervailing duties on certain hot-rolled and cold-rolled stainless steel products from China in July 2017, and is currently investigating welded stainless steel pipes and tubes from China. The Egyptian authority investigated the alleged subsidisation of steel bars and rods from China but did not apply any measures because there was no causal link with injury to the domestic industry.[103] Turkey notified an investigation of seamless tubes and pipes but the application was withdrawn and no duties have been imposed.[104] These investigations were referred to in MBIE's *Hollow Steel Sections* Final Report. As noted in that report, the Indian authority's conclusions were based on best facts available, including information provided by the domestic industry in its petition, WTO notifications, determinations earlier made by the Indian authority, various determinations made by other investigating authorities and information filed by the domestic industry during the course of the investigations.

A4.87. With regard to the suggestions made by NZ Steel on how contact should have been made with the Egyptian and Turkish authorities, MBIE notes that as a general rule its research into the investigations undertaken by overseas jurisdictions and their policies and processes is based on published information. This ensures that there are no concerns regarding the use of confidential information or the independence of MBIE as an investigating authority.

B8 Comments on specific sections

A4.88. NZ Steel has raised a number of issues with specific aspects of the analysis contained in the EFC Report.

B8.1 Integrated steel producers

A4.89. NZ Steel does not agree with MBIE's conclusion that integrated steel producers do not receive a financial contribution from a government or any public body through the provision of input materials at LTAR. NZ Steel claims that the ability of these companies to produce the materials and supply them to others at LTAR should be relevant. The supply of input materials to itself by an integrated producer is not, according to NZ Steel, a decisive answer to whether or not that supply is subsidised.

A4.90. NZ Steel points out that three of the manufacturers are not integrated producers and most of their purchases are from State-owned manufacturers, and the HRC purchased from

[103] WTO document G/SCM/N/334/EGY, Semi-annual Report of Countervailing Duty Actions, 1 January-30 June 2018.

[104] WTO document G/SCM/N/313/TUR, Semi-annual Report of Countervailing Duty Actions, 1 July-31 December 2016.

these producers at LTAR should be considered to be a subsidy. NZ Steel states that this should include Zong Cheng, which MBIE has noted purchased mostly from government-owned owned companies. These sources included a company with the name redacted, which NZ Steel takes to be one of the integrated producers involved in the investigation. NZ Steel sees no reason why that information should be redacted.

MBIE Comment

A4.91. The position applying in Australian investigations was described in section 7.3.2.1 of the EFC Report, and MBIE's position relating to the integrated steel producers and the exclusion of self-supplied input materials from consideration of the provision of such materials at LTAR, was set out in paragraphs 593-595 of the EFC Report. MBIE sees no need to change this position.

A4.92. The question of whether integrated producers are subsidised through other programmes is not relevant to the consideration of programmes relating to the supply of HRC and CRC at LTAR. Those other programmes are to be addressed on their own merits.

A4.93. MBIE's practice is to redact information identifying suppliers and customers from publicly-available reports, on the grounds that it is commercially-sensitive information.

B8.2 Inaccuracy: Angang is de facto in receipt of HRC at LTAR subsidy, paragraph 648

A4.94. NZ Steel claims that MBIE "impugns" NZ Steel's claim that Angang is de facto in receipt of HRC at LTAR in Australia's Dumping Commodity register due to the need not to double-count a CVD margin on top of a like AD margin. NZ Steel suggests that MBIE should have made inquiries with the ADC to confirm NZ Steel's information, including a confidential table prepared by the ADC.

MBIE Comment

A4.95. MBIE's comments at paragraph 648 of the EFC Report were related to NZ Steel's comments in its submission of 1 March 2019. MBIE sees no reason to change its position that there was no subsidy level found for the integrated producers which would need to be taken into account to ensure there was no double-counting with anti-dumping duties. The ADC, in its Final Report in ADC *Galvanised Steel* 193, at page 49, stated:

> *ACBPS determined that fully integrated exporters did not purchase any HRC from SIEs. As such ACBPS calculated a zero amount of a subsidy under this program for ANSTEEL and TAGAL.*

A4.96. MBIE again notes that as a general rule its research into the investigations undertaken by overseas jurisdictions and their policies and processes is based on published information. This ensures that there are no concerns regarding the use of confidential information or the independence of MBIE as an investigating authority. It would not be appropriate for MBIE to seek confidential information from another authority, and would certainly not respond positively to any such request made of it by another authority.

B8.3 Zong Cheng HRC pricing

A4.97. NZ Steel claims that MBIE failed to engage with evidence that prices in the Chinese steel market may be distorted. MBIE compared Zong Cheng's HRC pricing with prices from SteelBenchmarker China and World prices, with the latter being heavily based on Chinese prices. NZ Steel suggests that MBIE should have considered the possibility that the Chinese HRC market operates on subsidised economics, and the possibility of market distortion is a valid and necessary aspect of the public body analysis.

MBIE Comment

A4.98. MBIE's analysis is whether there is a countervailable programme concerning the supply of inputs by a government or any public body at LTAR. In particular, the analysis has addressed the question of whether steel producers providing inputs to producers of galvanised steel coil are public bodies in terms of the test of whether they possess, exercise or are vested with governmental authority, and has also assessed whether these producers are in fact exercising such authority in the performance of governmental functions. In undertaking these assessments MBIE has been guided by findings of WTO dispute bodies, including those identified in Annex 2 at paragraph A2.4, and in Annex 3 at paragraph A3.38. MBIE has concluded that steel producers selling inputs to galvanised steel producers are not public bodies.

A4.99. The question of whether prices in the Chinese market are distorted arises if and when it is determined that there is a financial contribution by a public body. The calculation of the amount of the subsidy in terms of the benefit to the recipient, as provided for in Article 14 of the SCM Agreement, and in the case of the provision of goods by a government or any public body, is to be determined in accordance with the requirement set out in Article 14(d) that the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good in question in the country of provision (including price, quantity, availability, marketability, transportation and other conditions of purchase or sale).

A4.100. The analysis of the prices paid by Zong Cheng, referred to in section 7.3.1.2 of the EFC Report, was in the context of assessing its claim that the price paid reflected the market price of the goods and no reductions were received. The SteelBenchmarker World prices are export prices, so reflect prices available on the international market.

B8.4 Shougang primary information and subsidy quantum – policy loans and land

A4.101. NZ Steel claims that MBIE's reliance on information directly obtained from the GOC or Zong Cheng, and consequential dismissal of other contrary information from secondary sources, is misconceived and unreasonable. In support of its arguments, NZ Steel notes that:

- EC *Hot-Rolled Flat Products* overlapped the *Galvanised Steel Coil* investigation and was therefore temporally relevant.
- Shougang did not cooperate in either the 2017 investigation or the 2019 reconsideration.

- No information relating to Shougang was received from the GOC or CCOIC, MBIE did not visit Shougang or Chinese banks, and had no first hand Shougang information.
- Shougang did cooperate in the EC investigation, and EC officials visited Shougang and other Shougang group sites, the GOC and several State-owned banks.

A4.102. NZ Steel suggests that in these circumstances it was difficult to see how MBIE's dearth of information about Shougang in relation to policy loans, Chinese banking and land-use rights could be elevated as primary information over secondary information from the EU.

MBIE Comment

A4.103. MBIE did not "elevate" the dearth of information relating to Shougang as primary information over secondary information from the EU. The determination of whether or not banks or SIEs providing inputs are public bodies is not based on who their clients are and differentiated results cannot be applied on that basis. Rather, the focus is on whether they meet the test of possessing, exercising or being vested with governmental authority, and MBIE found that they did not, for the reasons set out in sections 5.3.3 and 7.3.3 of the EFC Report.

A4.104. In relation to land-use rights, MBIE's conclusions were based on information from the GOC and Zong Cheng and from its own research, and took into account information from other jurisdictions. In particular, the investigation EC *Hot-Rolled Flat Products* covered the Shougang Group which includes the manufacturer covered in the reconsideration. These matters were set out in section 6.3.2.3 of the EFC Report, and confirm that EC information was helpful to MBIE in reaching its conclusions relating to the Shougang company concerned.

B8.5 Like goods: timber price connectivity

A4.105. NZ Steel considers that MBIE was incorrect to assert that its example of steel and timber framing was an example of substitutability, and claims that a plain reading of the 2017 Final Report does not allow such an interpretation. NZ Steel states that substitutability refers to whether products are substitutable for one another, and price connectivity refers to whether product A is price connected to product B, which are two different concepts. NZ Steel suggests that NZ Steel, its expert Dr Scholz and the High Court all understood MBIE to be asserting timber-steel price connectivity.

MBIE Comment

A4.106. MBIE accepts that in paragraph A1.86 of the EFC Report (Annex 1 to the EFC Report incorporated Annex Two of the original Final Report) it would have been better not to have referred to price-connectivity between steel and other products, since the point being made related to substitutability, as set out in paragraph A1.85. As noted in paragraph A1.132 of the EFC Report, MBIE accepted that there was some price connectivity between galvanised coil of varying widths, but did not consider that price connectivity in itself was adequate to determine the scope of the goods under investigation.

A4.107. MBIE notes that the definition of like goods/subject goods has little relevance to the issues arising in relation to the subsidy programmes considered in this reconsideration.