APPLICATION FOR COUTERVAILING DUTIES ON CERTAIN HOLLOW STRUCTURAL SECTIONS FROM CHINA

Consultations under Article 13.1 of the WTO Agreement on Subsidies and Countervailing Measures

9 September 2011, Canberra

POSITION PAPER OF THE GOVERNMENT OF CHINA

A INTRODUCTION

1 The Government of China ("GOC") has been provided with a copy of *Application for Anti-Dumping Duties on Certain Hollow Structural Sections exported from People's Republic of China, Korea, Malaysia, Taiwan*[1] *and Thailand* and *Application for Countervailing Duties Certain Hollow Structural Sections exported from People's Republic of China* dated August 2011 ("the Application"). Under Article 5.5 of the Anti-Dumping Agreement, and Article 13.1 of the SCM Agreement, the GOC has the right to be notified and consulted in these matters before any initiation of an investigation takes place.

[1] Under the framework of WTO, the Region of Taiwan should be addressed as "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)", or simply as "Chinese Taipei".

2 The GOC is highly critical of the Application. The GOC does not believe that it can be said that the evidence provided in the application is accurate, adequate or sufficient in terms of either Article 5.3 of the Anti-Dumping Agreement or Article 11.3 of the SCM Agreement. There is actually little "evidence", and just a lot of assertion. The GOC appreciates that an investigation has the purpose of identifying facts which are sufficient to enable proper decisions ultimately to be made. However that does not mean that an investigation can be launched without a proper basis on the face of the application concerned from the outset.

3 In addition, the GOC notes that a decision was made in relation to the same product, from China, not more than 365 days ago. On 3 March 2011 the Minister revoked the anti-dumping measures previously in place in relation to HSS from certain Chinese exporters. That was only 6 months ago. Paragraph 7.1 of the *Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns* provides that *"investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application"*. The obligation placed on investigating authorities under that Paragraph is not only to take such *"special care"*, but also not to initiate an investigation unless circumstances have changed.

B SUMMARY OF MAIN POINTS

4 The main points the GOC wishes to make are these:

(a) In many respects the Application repeats, word for word, a previous application made by the applicant three years ago. This calls into question the level of care and consideration which has been used in preparing the Application, and therefore calls into question its sufficiency.

(b) The injury allegations in the Application ignore the fact that there have been previous investigations concerning hollow structural sections ("HSS"). Findings have been reached in those investigations about injury and preventing injury. It is inappropriate to stretch back to 2005/06 in an attempt to prove injury in recent times.

(c) Many incorrect statements are made in the Application, meaning that it is not accurate. These inaccuracies are not matters of opinion. They are evident on the face of the Application.

(d) There can be no reliance on findings made in other jurisdictions as a basis for a "particular market situation" finding in respect of HSS in this case. Those other findings are not of that nature. Australian

Customs has already decided that such a situation does not apply to the HSS industry in China.

(e) The allegations about many of the subsidies in the Application have little probative value. The applicant has done nothing itself to back up its claim that certain subsidies exist and have conferred benefits on HSS producers. In most case, no specific legal and factual bases in regard to financial contribution, specificity and conferred benefit of the alleged subsidy programs have been provided.

(f) The confidentiality claimed for certain parts of the Application is too extensive. This should be rectified.

C RE-RUN OF A THREE YEAR OLD APPLICATION

5 The GOC finds that the applicant has used the electronic version of its November 2008 application for the purposes of this August 2011 application. Despite the almost three year period of time that has lapsed since then, large blocks of text are exactly the same as what was said three years ago. The GOC queries whether the applicant considered its responses to many of the questions carefully enough, in light of new facts and circumstances, or whether it simply did not care about this at all.

6 For example, so far as the applicant is concerned, the evidence of what made the Australian industry *"highly innovative"* and *"highly competitive"* in November 2008 is exactly the same evidence that makes it highly competitive and innovative today (page 14 refers). The exact same text is used. Thus, is the reader to assume that no new innovations have emerged to justify the claim over the past three years? On page 15 the applicant says exactly the same thing about substitution of HSS by other products – that it is "marginal" - as it did in November 2008. The GOC questions whether it is indeed so, given that the applicant has merely copied what it said last time, word for word.

7 The GOC's concern as to whether the applicant has actually considered current day conditions or developments since its November 2008 application is heightened by the restatement and continued reliance on alleged "particular market situation" findings made by the Canadian and US investigating authorities in their own investigations. The GOC believes that the applicant fails to appreciate that these findings were made under different laws and policies; were arrived at in completely different ways to those mandated by Australian law; are not in fact "particular market situation" decisions at all; are outdated; and have been contradicted by Australian Customs in its decisions relating to the HSS industry itself and in other industries in China. Aspects of the US decisions have been overturned by more recent WTO Appellate Body authority, and the Canadian decisions are therefore similarly unsafe.

D INAPPROPRIATE INJURY ASSESSMENT PERIOD

8 The GOC is concerned to find that the applicant constantly mentions, and refers back to, the year 2005/06 for injury assessment purposes. This is contrived and illogical. It was six years ago. The applicant appears to ignore the history of HSS investigations to date, and the importance and relevance of the findings made in those investigations. This also ignores the usual three year period for injury investigations.

9 The Australian industry has previously applied for anti-dumping duties against all four of the nominated countries/region. In Report No 116, Australian Customs records the fact that the injury investigation period in this first investigation was from 1 July 2001 to 31 December 2005. Customs found no or negligible dumping margins in respect of exports of HSS by certain exporters from all four nominated countries or region. In the case of Korea, Malaysia, Chinese Taipei and Thailand, the volumes that were exported at dumped prices were negligible and the investigation was terminated as against all exporters from those countries or region. In the case of China, dumping in respect of some exporters was nil or negligible, and the investigation was terminated as against them. Dumping measures were imposed in respect of some Chinese exporters, in May 2007.

10 Those measures were reviewed and new variable factors were set by the Minister in November 2008.

11 In December 2008 the Australian industry lodged a new application in an attempt to establish that Malaysian exporters, and Chinese exporters not already subject to measures, were dumping and causing material injury. That application also sought countervailing measures against all Chinese exporters. On 23 August 2010 Customs terminated its investigation into that new application, on the basis that there was no or negligible injury to the Australian industry.

12 In relation to a further review of the measures which remained in place, the Minister announced in June 2010 that he had decided not to alter the variable factors. Instead he initiated another review. On 3 March 2011, the Minister decided to revoke those measures on the basis that there had been no injury.

13 The point of this "history lesson" – a history that Australian Customs will be very familiar with - is that the question of whether the Australian industry was being injured by imports was under constant review by both the applicant (in the decisions it made to apply, or not apply, for measures and for the review of measures) and by Australian Customs and the Minister, from 1 July 2001 to 31 December 2008. 1 July 2001 was the commencement of the injury period considered in the first investigation. 31 December 2008 was the last day of the

injury assessment period which was considered when the measures were revoked on the basis that there was no or negligible injury.

14 Measures were imposed against imports, and adjusted, to prevent injury caused by dumping as a result of consideration of the circumstances existing during that whole period. At the conclusion of these reviews and investigations Customs came to clear and unambiguous decisions that even if there remained any dumping by the exporters subject to measures, and even if there had been dumping by and subsidisation of other exporters, no or negligible injury was being caused to the Australian industry. The measures were revoked on that basis.

15 As a result it would seem that any injury assessment period could only commence from a more recent time. The best choice to make would be to commence from a date or period which is immediately after remedial measures were removed and/or it was decided that there was no injury being caused by either dumping or subsidisation, and to also follow the usual practice adopted by Australian Customs of selecting a three year period for injury analysis. In terms of the history of this matter and the information provided in the application, that would be 2008/2009, 2009/2010 and 2010/2011 years, which could be extended to a later date just before any initiation.

16 The submissions in paragraph 15 do not concede that an investigation can be initiated. They are simply meant to illustrate the GOC's point.

E INCORRECT STATEMENTS

17 The Application makes many claims which are wrong or misleading, based on the information in the application itself. The attitude seems to be that anything and everything will be alleged, and that it is up to Australian Customs to work out what is correct or incorrect.

18 On page 12 it is said that imports grew at a much faster rate than Australian industry sales after the first half of 2009. **This is wrong.** The chart on pages 15 and 16 indicates that both the applicant's volumes and the volumes of "dumped" imports declined. The rate of decline of "dumped" imports was greater than the rate of decline of the applicant's volumes. The volume of "other" imports increased at a high rate.

19 On page 21 it is said that following the global financial crisis there has been a surge in HSS imports from China, Korea, Malaysia, Chinese Taipei and Thailand. **This is wrong.** The chart on page 42 indicates that volumes of imports from the nominated countries/region have actually been reduced in every year since the GFC. The volumes are: 2008/09 (the financial year in

which the GFC took place) – 237,412; 2009/2010 – 224,698; and 2010/2011 – 183,884.

20 On page 26, it is said that HSS imports from the five nominated countries/region have continued to increase *"since 2005/06"*. The GOC has already indicated that it is inappropriate to refer back to 2005/06 for the purposes of assessing injury. Furthermore it is just not correct to say that imports have continued to increase, based on the statistics we have already referred to. They have not.

21 On page 32 reference is made to a decline in the applicant's sales volumes, which is said to be materially attributable to the increasing import volumes. **This is wrong.** If this is a reference to the import volumes of alleged dumped imports, then it can be seen that in each of the last three years, in chronological order, the applicant's indexed sales levels have been 55.18, 75.64 and 70.82. The indexed import volumes of the five nominated countries/region have been 157.4, 147.95 and 121.23.

22 On page 33, it is said that the growth in "dumped" import volumes continues unabated. **This is wrong.** It will be apparent from the statistics that the GOC has already referred to that there has not been an unabated growth in import volumes from the five nominated countries/region.

23 On page 76 it is said that material injury has continued since 2003/04. **This is wrong.** Material injury has not continued to be caused by "dumped" imports since 2003/04. Australian Customs has clearly made findings in its previous reports which establish that this has not been the case.

24 Also on page 76 it is said that material injury represents an ongoing imminent and foreseeable threat to the Australian HSS industry. **This is illogical.** It is not material injury that can constitute a threat of injury: it is dumped imports. For the record the GOC notes the unambiguous statement that the Application is not based in threat of material injury.

25 Also on page 76 it is said that HSS imports from the nominated countries/region increase at a much faster growth rate than the Australian industry's sales. **This is wrong.** HSS imports from the nominated countries/region have not been increasing at a much faster growth rate than the Australian industry's sales.

26 The relevant WTO Agreements require an application to be accurate and adequate, and to be supported by sufficient evidence. Obvious errors such as those we have pointed out demonstrate that the accusations made are not accurate. The inaccuracies are obvious and material. An investigation should not therefore be initiated on the basis of such an erroneous application. This is all the more critical given that manufacturing industries in Australia are presently performing poorly, for the well-documented reason of the strength of

the Australian currency and general economic conditions. The applicant should clearly explain what sets its situation apart from the difficult situation now faced by any other manufacturing industry in Australia.

F NO "PARTICULAR MARKET SITUATION" BASIS

27 The Application makes sweeping allegations that a "particular market situation" exists in the Chinese HSS market such that sales in that market are not suitable for the purposes of working out a normal value based on domestic selling prices. However, in its Report No 116, Customs determined that there was not such a particular market situation in the Chinese HSS market. In every investigation and review since then no finding of a particular market situation has been made against Chinese exporters. This issue has been dealt with and in the absence of evidence of new changes in circumstances there is no cause for it to be revisited.

28 The investigation period for the purpose of Report No 116 was calendar 2005. Since then China has continued to modernise its business practices, to improve its regulatory regimes and to liberalise its markets and its internal and external trade. It is inconceivable to us that factors would have emerged since then which would cause Customs to overturn its previous findings on this matter. The GOC assures Australian Customs that there are no such factors. The investigation of this issue which took place for the purposes of Report No 116 was comprehensive and the outcome was well-considered. The Application seeks to ignore this. Furthermore, in the HSS reviews since then, and in the recent aluminium extrusions case, no finding of "particular market situations" have been made. Chinese domestic selling prices and costs have been used for normal value purposes in all cases.

29 On page 43 of the Application it is claimed that the Australian industry has previously demonstrated that HSS sold in China is at artificially low prices due to government influence on prices for raw materials and other costs that render Chinese costs and selling prices unsuitable for normal value purposes. **This is wrong.** This has not been demonstrated. Report No 116 and the subsequent reviews officially contradict this claim.

30 On page 47 of the Application it is said that *"Investigation 116, however, was limited to a 'dumping' investigation only, and consideration was not afforded to countervailable subsidies that may have existed at the time"*. **This is wrong.** Report No 116 states that Customs engaged the services of an independent consulting firm to assist in identifying and understanding matters that might be relevant to the assessment of the market situation. One level of that analysis considered subsidies and taxation factors; state ownership factors; and regulation factors. The GOC thinks it is also disrespectful to Australian Customs for the applicant to suggest that Australian Customs in some way did

not do its job properly at that time. Australian Customs determined that there was no "particular market situation". It did that job, and the fact that there was not a countervailing investigation at the same time cannot detract from the way in which Australian Customs carried out its responsibility. The impact of alleged subsidies were considered, along with many other factors thought to be related to the question concerned.

31 The attempted reliance by the applicant on *"a number of investigations by other administrations"* for Australian Customs to reverse its settled position on the market situation applicable to HSS in China is misplaced and misguided. Australia has a different legal framework and a different appreciation of China's market economy. Australia has recognised China's full market economy status. Australia has never discriminated against China, in a final finding, that a so-called "particular market situation" exists. Australia has expressly found that such a situation does not exist, both in the HSS market itself and also in the aluminium extrusions market.

32 Apart from those things, the GOC has already pointed out to Australian Customs, and now does so again, that the CBSA finding was not made under the provision of its legislation which implements the market situation wording of Article 2.2 of the Anti-Dumping Agreement. The provision pursuant to which the CBSA discriminated against China in the HSS investigation to which the applicant refers is Section 20(1)(a)of the *Special Import Measures Act* ("SIMA"). That section sets out the manner of Canada's implementation of Article 15 of China's WTO Accession Protocol. Australia has agreed not to apply any such special rules against China, and does not do so. The provision of SIMA that implements the "particular market situation" aspect of Article 2.2 of the WTO Anti-Dumping Agreement is Section 15(c) of SIMA. The CBSA's decision regarding normal value determination was not made under that Section.

33 Accordingly we can see that the CBSA decision provides no support whatsoever for a "particular market situation" finding by Australian Customs in this matter. As for the US and EU investigations to which the applicant also refers, they were also based on discriminatory applications of rules in those jurisdictions having to do with interested party non-cooperation and non-market economy/EIT policies. Furthermore, aspects of the findings made in the US investigations have been struck down by the WTO's Appellate Body.

34 The applicant needs to support its claim that a particular market situation applies to the Chinese HSS market, but it does not do so. No reasonably contemporaneous details or evidence are provided in the Application. On pages 56 and 57 of the Application, vague allegations are made about State-owned enterprises, a range of subsidies, Chinese government policies and VAT refunds. Even if the CBSA decision could be said to be relevant - for example, in relation to facts which were properly established – the

investigation period for that decision was 1 July 2006 to 31 December 2007. That was four years ago. Because that period was so long ago, and because the applicant does nothing more than to repeat what was said without making any contemporaneous examination of present day relevance, the facts claimed in the Application are not reliable facts at all. For example on page 53 it is broadly alleged that GOC export taxes have contributed to a particular market situation. However the GOC cancelled the export duty of 15% in respect of an important input for HSS, namely hot rolled coil, on 1 December 2008, and no such duty has been in place since then.[2]

35 The *Money for Metal* publication to which the applicant refers is a US publication that was commissioned for the purpose of discrediting the GOC in cases such as this, and fails to meet any reasonable criteria of objectivity or independence. Even if parts of it were not contrived, and could be relied upon, it is dated July 2007. We cannot see much in that report which deals with anything that happened in China after 2006, which was five years ago.

36 Accordingly, the GOC submits to Australian Customs that the application fails any modest or reasonable standard of evidence in its claim that a "particular market situation" exists in the Chinese HSS market. In view of previous findings that there is not such a situation, one would expect something at least to be put forward that was new and therefore merited investigation. Otherwise the requirements of Article 5.2 of the Anti-Dumping Agreement clearly are not met. The applicant's case is a textbook example of simple assertion, unsubstantiated by relevant evidence. As a result Australian Customs does not have material before it which would be necessary to justify initiation of a "particular market situation".

37 Given that the applicant has not put forward its claimed normal values on the basis of Chinese domestic selling prices or costs, the evidence of dumping that Customs must reasonably require is also completely lacking. Article 5.2(iii) of the Anti-Dumping Agreement requires *"information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries/region of origin"*. So far as the GOC can tell, there is no such information in the Application. Without evidence of normal values, the modest requirements of form and substance as are stipulated in the Anti-Dumping Agreement have not been met. Initiation would lead to nothing more than a fishing exercise, in which Australian Customs would try to find the kind of information that the applicant has failed to reasonably provide in the first place. Australian Customs must conduct itself in an unbiased and objective way. It should not share or act upon the bias or suspicion of the applicant which is unsupported by at least some evidence.

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2 As notified by the *Public Notice of General Administration of Customs*, 2008 No. 84.

G MANY SUBSTANTIAL ELEMENTS OF CAUSATION HAVE BEEN OMITTED IN DISCUSSION OF "LINK BETWEEN INJURY AND DUMPED IMPORTS"

39 Some important elements in establishing causation of material injury have been omitted, such as contraction in demand in the exporting markets of the petitioner, and changes in competition between domestic producers in Australia.

40 Simple comparing of the two sets of data of import and injury do not suffice *prima facie* legal bases of causal link, further careful review of adequacy and accuracy are needed.

H INAPPROPRIATE SUBSIDY ALLEGATIONS

41 The applicant's subsidy allegations are imprecise and unprincipled. We have chosen these words carefully, and believe that a proper examination of what has been said in the application will lead Australian Customs to the same conclusions.

42 The allegations are imprecise because no primary research or analysis has been undertaken by the applicant itself of any subsidies which it might allege have been paid in a reasonably contemporaneous period to the present. In most case, no specific legal and factual bases in regard to financial contribution, specificity and conferred benefit of the alleged subsidy programs have been provided, contrary to WTO rules and Australian law. Furthermore there were not in fact 31 subsidies "identified" by the CBSA. In its verifications of selected exporters, the CBSA only "identified" nine subsidies. The other 22 were simply asserted to exist by the CBSA because it deemed the GOC not to have provided information in respect of them. The GOC strongly objects to the use by an applicant of assumptions made by other investigating authorities to initiate a case, where they are based on a *lack* of evidence. It simply does not make sense for an investigating authority to consider that it has been provided with enough evidence to initiate an investigation of a subsidy if the only "evidence" in relation to the subsidy was a finding not based on evidence in the first place.

43 The applicant's comments in relation to the subsidy programs "identified" in the Australian aluminium extrusions investigation are also suspect, for the same reason. Australian Customs did not actually find evidence of the payment of many of the 19 claimed "subsidies" to aluminium extruders. Instead, "non-cooperating" exporters were assumed to have received such subsidies based on the fact that no information was submitted by them. The GOC again states that it is not enough for an applicant to rely on findings of subsidies based on no evidence as prime facie evidence for the initiation of an investigation into those subsidies.

44 Lastly, in relation to the allegation that a subsidy exists in the form of the provision of goods by public bodies at less than adequate remuneration, the applicant has not grounded its allegation in the form of the tests enunciated by the WTO's Appellate Body in its DS379 Report. The GOC submits that it is not enough for an applicant to simply make accusations about State ownership and industrial policies in order to motivate Australian Customs to embark on a hugely disruptive investigation of the accusation concerned. No evidence of "meaningful control" is provided, nor is it apparent what "government function" it is said that Chinese State-invested enterprises perform or have had vested in them. The way the claim is presented in the application is therefore unprincipled.

45 Please note that the GOC's observations about the findings of subsidies in other cases as mentioned in this section are not concessions that such programs are subsidies, or existed at the relevant time, or conferred actionable benefits at the relevant time. They are simply meant to illustrate the GOC's point.

I CONFIDENTIALITY CLAIMED

46 The GOC submits that an unreasonable extent of confidentiality has been claimed by the applicant. Attachments such as OneSteel ATM's internal organisation chart (A-2.2) and another detailing its related companies (A-2.6) are claimed to be confidential. The GOC asks why these non-contentious and non-sensitive topics should be subject to confidentiality. These documents should be disclosed. In particular the related companies information should be released in light of the applicant's statement that *"a far greater proportion of all domestic sales off HSS by the Australian industry are to non-related parties of Australian industry than before..."*. This raises issues concerning the independence of sales, arms-length/transfer pricing, and competition between related and unrelated parties. The *"related distribution businesses"* are said to be OneSteel Steel & Tube, Metaland and Midalia Steel, but no corporate details are provided.

47 The GOC asks that Australian Customs query the applicant about the confidentiality claimed in relation to the HSS production process schematic (A-3.6). The Chinese side asks that this document be disclosed if appropriate.

48 The GOC does not understand why charts showing alleged price undercutting for three product ranges are non-confidential, but that additional charts showing alleged price undercutting for other product ranges are claimed to be confidential (A-9.2). If some are able to be disclosed, why not the others? These other charts should also be disclosed.

49 If any of the documents mentioned in paragraphs 3 to 5 above contain information which might fairly be classified as confidential, no attempt appears to have been made to provide non-confidential summaries. The GOC asks for such summaries to be provided.

J CONCLUSION

50 The Application, in the GOC's view, is little more than an unsubstantiated request for assistance. It attempts to cover a six year period, even though during that period the Australian industry was "protected" from dumping and was ultimately found not to be injured by dumping or by subsidisation from China. It is a rehashed version of an Application that was written over three years ago. It is riddled with errors. It contains no evidence of normal values of Chinese HSS. It repeats old and tired arguments about Chinese practices, economy and markets which have previously been denied by Australian Customs. It relies on discriminatory findings made by other countries/region against Chinese exporters, without applying any original thought; without identifying or considering reasonably contemporaneous data; and without proper regard for Australian law and administrative precedent.

51 The GOC submits that the Application cannot lead to the initiation of an investigation against our exporters, and requests that the Australian Customs not initiate such an investigation unless and until an Application is lodged which meets proper standards and unless and until Australian Customs can be satisfied that an initiation would be in compliance with Australia's obligations towards China as a fellow member of the WTO.