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By email

Dear Andrea

Investigation into alleged dumping and subsidisation of hollow structural sections exported from the People's Republic of China Preliminary affirmative determination and "provisional measures"

The Government of the People's Republic of China ("GOC") is currently in the process of gathering the information to answer the Government Questionnaire provided by Australian Customs and Border Protection Service ("Australian Customs") in line with the extended lodgement date of 5 December 2011.

We note that, as of 20 November 2011, 60 days will have passed since the initiation of this investigation. Article 7.3 of the *Agreement on Implementation of Article VI of the GATT 1994* ("the AD Agreement"), Article 17.3 of the *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement") and Section 269TD(1)(a) of the *Customs Act 1901* ("the Act") are all to the effect that three things need to be in place before provisional measures are imposed against the hollow structural section ("HSS") goods subject to the present investigation:

- a period of 60 days must have elapsed, since initiation of the investigation;
- a preliminary affirmative determination ("PAD") must have been made (of dumping and consequent injury); and
- such measures must be necessary to prevent injury being caused during the investigation.

The GOC now wishes to raise certain issues which go to the question of whether it would be appropriate for Australian Customs to arrive at a PAD against Chinese exporters at this time, and to impose provisional measures against them now or at all.

We thank you for your careful consideration of the following submissions.

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Contents

A Ability to make a PAD

1 Conditionality

Australian Customs (or, more properly, the CEO) is legally empowered to make a PAD in the circumstances provided for in Section 269TD(1)(a) of the Act and its related Sections. The making of a PAD involves the consideration of a number of factors. They are, essentially, the same factors which make up a final determination of dumping, material injury and causal link, albeit at a preliminary stage.

A PAD is not a convenient refuge for an investigating authority to create for itself. It should not be used to "defer" decisions, or to comfort the domestic industry in the case of prospective delays in the investigation. It is not a position to which an investigating authority can merely retreat, to avoid the political pressure which might otherwise be exerted on it by the domestic industry concerned. It is not just the expiration of 60 days which is the trigger for a PAD.

Real decisions need to be made, on substantive issues, to a higher degree of certainty than the decision to initiate. The power can only be exercised in line with the law which grants it, and not in an arbitrary, automatic or expedient way.

Section 269TD(1)(a) implements Australia's obligations under Article 7.3 of the AD Agreement and Article 17.3 of the SCM Agreement. These Articles establish conditions which must be met before an investigating authority decides to impose provisional measures. This can only occur where:

(a) an investigation has been initiated in accordance with the provisions of Article 5 of the AD Agreement and Article 11 of the SCM Agreement, a public notice has been given to that effect, and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry, or that a subsidy exists and that there is injury to a domestic industry caused by subsidised imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

Similarly Section 269TD(1)(a) itself requires:

> *At any time not earlier than 60 days after the date of initiation of an investigation as to whether there are sufficient grounds for the publication of a dumping duty notice, or a countervailing duty notice, in respect of goods the subject of an application under section 269TB, the CEO may, if he or she is satisfied:*
>
> *(a) that there appears to be sufficient grounds for the publication of such a notice; or*
>
> *(b) that it appears that there will be sufficient grounds for the publication of such a notice subsequent to the importation into Australia of such goods;*
>
> *make a determination (a* ***preliminary affirmative determination*** *) to that effect.*

2 Adequate opportunity

The GOC's is concerned to ensure that a PAD not be made without the receipt and verification of information provided by interested parties. This information includes the GOC's Government Questionnaire ("GQ") response, as well as responses to Exporter Questionnaires. Otherwise, in the GOC's submission, Australia will be in breach of its due process obligation under the AD and SCM Agreements.

Responding to the GQ for this investigation is a large and complex undertaking. In order to answer it, the GOC has sought and been granted an extension of the lodgement date until 5 December 2011.

In the GOC's opinion, *"adequate opportunities to submit information and make comments"* cannot be said to have been given if the time for an interested party to avail itself of that opportunity has been extended and the extended date has not yet passed. It would be counter-intuitive for Customs to come to a PAD without having received the information of the GOC, and of other parties, that has been requested.

Due consideration must be given to actual evidence - provided within the "opportunity time" allowed by Australian Customs - before a view can be formed as to the existence of the alleged countervailable subsidies, dumping, and injury.

Under Article 6.2 of the AD Agreement, a WTO Member is obligated to ensure that:

> *throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.*

This obligation, when read in tandem with Article 7.3, further supports the GOC's position in this regard.

3 Status of information

To make a PAD and impose provisional measures, an investigating authority must find:

(a) dumping and consequent material injury; or

(b) that a subsidy exists and that there is injury to a domestic industry caused by subsidised imports.

Verified or at least verifiable information is required for these conclusions to be arrived at, even in a preliminary sense.

The GOC refers to the comments it made about the Application during the consultation process. The GOC maintains that the Application was itself not accurate, adequate or sufficient within the meaning of Article 5.3 of the AD Agreement or Article 11.3 of the SCM Agreement, and that the applicant provided very little evidence in support of the assertions made. The GOC's submissions have been placed on the public record and there is no indication on the public record that they have been addressed by the applicant.

Even if the weak Application justified initiation, the GOC submits that the information in it cannot be used as a basis for a finding that dumping or countervailable subsidies exist and that injury is caused to the Australian industry as a result. Such a finding would not only be wrong, but would be against the fundamental doctrines of natural justice and of due process.

According to Section 269TC of the Act, an application need only show that there *"appear to be reasonable grounds"* for the publication of an anti-dumping or countervailing notice. The "appearance" of reasonable grounds for the publication of such notices put forward in the Application cannot be enough to satisfy Australian Customs that there actually are "sufficient" grounds for the publication of such a notice. Otherwise the investigation which follows initiation would be rendered meaningless.

4 Natural justice

A PAD is a *"decision under an enactment"* for the purposes of the *Administrative Decisions (Judicial Review) Act 1977*. Such decisions must be made in accordance with the principles of natural justice, and must be based on evidence.

Natural justice is comprised of two basic and flexible rules. They are the "hearing rule" and the "rule against bias".

(a) The hearing rule generally requires that a decision maker "act fairly"[1] in the making of the decision. The GOC submits that it could not be considered to be fair to make a PAD where opportunities for interested parties to defend their interests have been extended by Australian Customs, and the time for taking up that opportunity has not expired.

(b) The rule against bias provides that a decision maker cannot be personally biased, nor be seen to be biased, the making of the decision. The GOC does not suggest that Australian Customs or any of its decision makers are personally biased. Interested parties might however have cause for concern if a PAD were to be made before key

[1] *Kioa v West* (1985) 159 CLR 550

evidence had been received and tested.

Administrative decisions must be based on appropriate evidence. In this case we submit that such evidence must include the evidence of the very party or parties that the PAD would adversely affect, especially where it is the decision maker itself that has given that party or parties a fixed period of time to provide that evidence and the fixed period has not expired. Waiting to receive and assess that evidence is a basic tenet of due process in administrative decision making.

5 Legitimate expectation

The GOC submits that Australian Customs has created a legitimate expectation within the GOC that a PAD cannot be made until after Australian Customs has received and considered the information it has requested be provided to it. Australian Customs has provided the GOC with an extension of time to lodge its response to the GQ. We submit that, where the GOC is a willing and cooperative party in the investigation, a finding that subsidies exist, or about the "situation" or the "costs" in the market, cannot be made without the information from the GOC.

B Misconceptions about State-owned enterprises

The Application alleges that a raw material - steel – has been supplied by public bodies to HSS manufacturers for less then adequate remuneration.

The GOC notes the reasoning applied in, and the final outcomes of, the recent investigations concerning the alleged dumping and subsidisation of aluminium extrusions from China, in Report 148 (original investigation) and Report 175 (re-investigation). The GOC does not accept the outcomes of the investigation and reinvestigation into aluminium extrusions, either legally or factually.

To avoid similar errors being made in this investigation, the GOC wishes to address the analysis that was applied to the issue of "public bodies" in the aluminium extrusions investigation.

1 Australian Customs' reasoning regarding SOEs

The GOC is concerned about the context and direction of the questions in the GQ regarding the alleged *Program 20 - Hot Rolled Steel Provided by Government at Less than Fair Value* ("Program 20"). Program 20 is the equivalent "program" to Program 15 in the aluminium extrusions investigation.

As well as being found to be a countervailable subsidy in its own right, the "existence" of Program 15 in the aluminium extrusion investigation was one of the bases used by the Minister for the finding that the price of primary aluminium recorded by exporters did not *"reasonably reflect competitive market costs"* for the purposes of Regulation 180 of the *Customs Regulations 1926*. This, in turn, led to the substitution of a London Metals Exchange ("LME") price for primary aluminium when working out normal values for Chinese exporters.

This conclusion was arrived at in two stages.

First, Report 148 adopted the following reasoning to determine if SOEs were public bodies:

> *Some of the relevant factors to determining whether an enterprise is a public body*

> *includes such things as ownership, management structures and the functions and objectives performed by that enterprise. However, the level of government ownership alone may be sufficient to make such a finding if the government holds a majority share in an enterprise. In that case, other factors such as management structures and functions are less determinative.*[2]

Accordingly, it was decided that:

> *As no information was provided to Customs and Border protection that would indicate that any of these producers were minority state-holding enterprises, Customs and Border Protection has determined that all state-owned primary aluminium producing enterprises are either majority of wholly owned, and therefore, public bodies.*[3]

The reasoning in the Report in this regard was that majority State-holding was a single, determinative factor for establishing whether an SOE was a public body. By admission, Report 148 also provides that evidence relating to the level of State-holding of any specific Chinese manufacturer of primary aluminium (whether SOE or otherwise) was not required in order to reach the conclusion that it was a public body. That, it seems, could merely be assumed, thereby making it appropriate to characterise all producers of primary aluminium within China as public bodies apart from those that were specifically established not to be SOEs.

Soon after Report 148, the WTO Appellate Body issued its report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ("DS379"). In DS379, the Appellate Body held 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... 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 the government...*[4]

In the US Department of Commerce ("USDOC") investigation that led to DS379, USDOC had similarly based its classification of SOEs as public bodies on the State's level of shareholding.

In relation to this, the Appellate Body held:

> *The mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.*[5]

The Appellate Body opined:

> *...that investigating authorities have a duty to seek out relevant information and evaluate it in an objective manner. The reasoning of the authority must be coherent and internally*

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2 Report 148 at page 58
3 Report 148 at page 59
4 At paragraph 317
5 At paragraph 318

consistent, and the conclusion reached and the inferences drawn by the authority must be based on positive evidence.

Following review by the Trade Measures Review Officer, Australian Customs was directed by the Minister to reinvestigate its recommendations regarding Program 15, taking into account the findings of the WTO's Appellate Body in DS379. The outcome of this reinvestigation was reported in Report 175.

Report 175 accepted that *"mere formal links"* such as majority ownership by the GOC, was not enough to establish that an SOE was a public body. Instead, three indicators were identified that were said could show that SOEs were vested with authority to exercise governmental functions in the sense described by the Appellate Body. These were:

(a) the existence of a *"statute or other legal instrument"* which *"expressly vests authority in the entity concerned"*;

(b) *"evidence that an entity is, in fact, exercising governmental functions"*; and

(c) *"evidence that an entity exercises meaningful control over an entity and its conduct"*.

The GOC wishes to address the nature of the evidence relied upon by Australian Customs to maintain its original recommendations to the Minister using these "indicators", and the shortcomings of that evidence.

2 Statute or legal instrument expressly vesting authority in the entity concerned

Report 175 relied on the existence of four commercial contracts between the limited liability company Aluminum Corporation of China Limited ("Chalco") and its parent enterprise Aluminium Corporation of China ("Chinalco") as evidence of a *"legal instrument"* which expressly vested governmental authority in the entity concerned.

These contracts were:

(a) a *General Agreement on Mutual Provision of Production Supplies and Ancillary Services*;

(b) a *Provision of Engineering, Construction and Supervisory Services Agreement*;

(c) a *Mineral Supply Agreement*; and

(d) a *Comprehensive Social and Logistics Services Agreement*.

These agreements were claimed to vest Chinalco with *"government authority to impose state mandated pricing policy"* as explained below.

How two entities that have "mere formal links" to the GOC are capable of investing one another with government functions through the creation of a commercial contract to which the GOC is not a party was not explained.

The primary contract relied upon was the *Mutual Provision of Production Supplies and Ancillary Services*. No mention of the scope or purpose of this agreement is provided. What is focused on

in the Report is the pricing hierarchy to which transactions between the two entities under the agreement were subject. That is, the transactions would be subject to:

(i) *adoption of prices prescribed by the Chinese Government (state-prescribed price);*

(ii) *in the absence of a state-prescribed price, then adoption of a 'state-guidance price';*

(iii) *if there is neither a state-prescribed price, nor a state-guidance price, then adoption of the market price (being the price charged to and from independent third parties); and*

(iv) *if none of the above are available, then adoption of a contractual price (being reasonable costs incurred in providing the relevant services plus not more than 5% of such costs).*

The GOC provided Australian Customs with translated versions of China's *Pricing Law* and explained on multiple occasions that primary aluminium and aluminium extrusions are not subject to state-prescribed pricing, or state-guidance pricing. They are simply priced according to the market, as envisaged by clause (iii) in the above extract from the *Mutual Provision of Production Supplies and Ancillary Services*.

The pricing hierarchy envisaged under that agreement simply reflected the fact that, under Chinese law, the GOC has the scope to mandate prices on certain goods. The reflection of this reality in a contract such as the *Mutual Provision of Production Supplies and Ancillary Services* does not vest either of the parties with governmental authority. With respect, the proposition is absurd.

If primary aluminium produced and sold in China was subjected to state-prescribed prices (which it is not) then Chinalco and Chalco, being subject to that law, would have to observe that price. The fact that they acknowledge that they must follow the law does not vest government authority in them.[6]

The GOC also notes that Australian Customs explains, in Report 175, that:

> *...although the reinvestigation did not obtain direct evidence of the exercise of this pricing regime, it notes that the pricing hierarchy is prescriptive and CHALCO considers itself to be bound by it.*[7]

By Australian Customs own admission, there was no evidence of the exercise of this pricing regime in any case.

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[6] Does the mention of an obligation in an Australian employment contract that the employer will pay the Superannuation Guarantee Charge magically invest the employer and the employee with the authority of the Australian Government?

[7] Report 175 page 19

3 Evidence that an entity is, in fact, exercising governmental functions

In relation to this second indicator, Report 175 considered that the role of the State-Owned Assets Supervisory Administration Commission of the State Council ("SASAC") was evidence that SOEs exercised government functions.

As was stated in Report 175:

> *In support of this view, the reinvestigation considered a translated version of a Guiding Opinion of SASAC of the State Council about Promoting the Adjustment of State-owned Capital and the reorganization of State-owned Enterprises. At the outset, the reinvestigation acknowledges the comments of the Chinese Government to the original investigation in its response to the Government Questionnaire, namely that, the expression of such guiding opinions are not uncommon for monitoring agencies in most countries. The Chinese Government therefore considered the position of the Guiding Opinion as having the status of a research and discussion paper.*

This Guiding Opinion, which is not a legally binding document in any sense of the word, was published in 2005. Australian Customs' acceptance of the Guiding Opinion as something that could override the current, legal information provided by the GOC throughout the aluminium extrusions investigation process in relation to the role of SASAC cannot be sustained.

Once again, the GOC will explain the laws which bind SASAC and prevent it from exercising any governmental functions.

Article 7 of the *Interim Measures for the Supervision of and Administration of the Assets of State-Owned Enterprises* reads:

> *The People's Government at various levels shall strictly execute the laws and regulations on the administration of State-owned assets, shall stick to the separation of the government's function of administration of public affairs and the function as the contributor of state-owned assets, and stick to the separation of government bodies and enterprises the separation of ownership and management power.*

This means that the GOC is bound by law not to interfere in the commercial business of an SOE, through its ownership of the SOE. We further note that the Article has the effect of ensuring that there is a separation between government bodies and the enterprise itself, which would make the exercise of any governmental function by the SOE impossible.

The GOC's interest as an investor in SOEs is represented by SASAC. It is the responsibility of SASAC to operate as the investor on behalf of the GOC. In this role SASAC is prevented from exercising any governmental functions by the further operation of Article 7:

> *The State-owned assets supervision and administration bodies shall not exercise the government's function of administration of public affairs, and the other bodies and departments of government shall not perform the duties of the contributor of state-owned assets in enterprises.*

Furthermore, SASAC's role within the company is limited to that of a shareholder. Article 10

states:

> *The state-owned assets supervision and management bodies shall support the enterprise to independently carry out business operations according to law, and may not intervene with the production and business activities of the enterprise except for performing the contributor's duties.*

The GOC does not understand how an interpretation of an outdated research paper could be preferred over the actual laws of China. The law simply does not allow SASAC to exercise any government function. Nor does the GOC understand how the "in fact" indicator was established on the basis of a nonsensical reading of an outdated Guiding Opinion which was considered to be a Chinese "law", and without any facts at all.

4 Evidence that a government exercises meaningful control over an entity and its conduct

To provide evidence that the GOC exercised meaningful control over the SOEs which operated in the aluminium production industry, the following three documents were cited in Report 175:

(a) the *Interim-Measures for the Supervision and Administration of State-Owned Assets and Enterprises* ("the Interim Measures");

(b) the *Guidelines for Accelerating the Restructuring of the Aluminium Industry* ("the Guidelines"); and

(c) *Chalco's Form-20 F Return* ("Form 20")

The analysis provided in the Report as to the meaning and effect of each of these documents was shallow. It reads as if it were tailored with a view to sustaining the "existence" of Program 15. These documents do not provide any form of evidence of "meaningful control" in the sense of that term as coined by the Appellate Body in DS379. The shortcomings of this evidence will be discussed below.

Before doing so, the GOC would like to point out that the Report misunderstands the reference to *"evidence that a government exercise meaningful control"* in the Appellate Body's report in DS379.

The concept of evidence showing a government having meaningful control over an entity as being, in some circumstances, evidence that the entity is a public body was introduced in the Panel report in DS379 at paragraph 318. The relevant parts of paragraph 318 read as follows:

> *What matters is not whether an entity is vested with authority to exercise governmental functions, rather how that is achieved... It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. Thus, for example, the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. In some instances, however, where the evidence shows that the formal indicia*

> *of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit the inference that entity concerned is exercising governmental authority.*

What must be understood from the above passage is that evidence of government control of an entity is only relevant to consideration of whether that entity is a public body where an inference that the entity is vested with governmental authority can be drawn from that control. This evidence must show that the *"indicia of government control"* are manifold and there is evidence that such control has been *"exercised in a meaningful way"*. Even then, it is only in *"certain circumstances"* that it will be considered as evidence that an entity is a public body. However, Australian Customs appears to have seized upon the idea that *"control"*, in itself, is evidence that an entity is a public body.

Even if this was the Appellate Body's position - which on a proper reading of the Report it clearly was not - the evidence relied on in Report 175 falls far short of establishing that any such control existed.

In relation to the Interim-Measures, it must be understood that the text paraphrased in Report 175 is not the actual text of the Interim Measures. This was an extract from the SASAC website, rather then any legal document. Without resiling from the proposition that the information considered by Australian Customs was not the law of China, we wish to now address the concerns raised by Australian Customs about that information.

The reinvestigation finding was described as follows:

> *The reinvestigation acknowledges that the power to appoint and remove "top executives of enterprises", and evaluate their performance through legal procedures, is a power of owners of enterprises, it is the additional criteria applied by SASAC in executing this responsibility that amounts to conduct which may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions. Applied here the reinvestigation had regard to references suggesting the selection of corporate executives "in accordance with the requirements of socialist market economy system and modern enterprise system..." In particular, the express power vested in SASAC, to:*
>
> > *"(e) [draft] laws and administrative regulations of the management of the state-owned assets and draws up related rules; directs and supervises the management work of local state owned assets according to law",*
>
> *suggests that the level of the control over the entity is significant.*

Firstly, Australian Customs is correct in saying the power to hire and fire executives and evaluate their performance is the power of owners of an enterprise. This power is exercised by SASAC only insofar as the GOC's equity holding will allow, and must be exercised in line with the restrictions of Article 7 and 10 of the Interim Measures, as extracted above. This means that these powers cannot be used to carry out any governmental function. It is unclear what Australian Customs means when it refers to *"the additional criteria applied by SASAC"* as being evidence of an entity exercising some governmental function in *"some circumstances"*. No additional criteria are highlighted, nor are these circumstances explained.

In relation to the ability to *"[draft] laws"* the reinvestigation overlooked the evidence previously provided by the GOC and by a SASAC official. The GOC refers to the *Submission of the Government of China Concerning "Market Situation Finding" Under Preliminary Affirmative Decision Report 148.* This document recounts testimony which was provided by the GOC and SASAC during the Government Verification. In particular, the GOC would like to draw attention to the following paragraphs:

> *(14) It was put to the SASAC official that one of SASAC's responsibilities was to draft laws and administrative regulations. The SASAC representative denied this. He pointed out that SASAC is not a legislative body and has no such authority. It can propose laws to the State Council, but cannot pass them. He elaborated on this, saying that SASAC is, in essence, the investor in a company. It can sometimes provide regulatory advice or explanations to an SOE but it would be doing so as a shareholder.*
>
> *(15) The SASAC official made it clear that an authority (such as SASAC) cannot be both a policy maker and a shareholder, and that in the context of profit making and compliance with laws, SOEs are not different to any other company, including foreign invested enterprises ("FIEs")*[9].

Australian Customs has referred to a non-law and drawn conclusions from it which are not borne out by the direct evidence provided. There is the "drafting" of laws in the sense of what a legislature does. There is also the "drafting" of laws in the sense that an interested body may write and submit proposed legal reforms to a legislature. As a body that deals closely with SOEs SASAC can of course propose that they should be regulated in a particular way.[9]

Australian Customs has preferred its interpretation of a non-legal document over an actual Chinese law. Even then reliance must also be placed on some chimerical, undefined "additional criteria" to bolster the conclusion that there may in certain, undefined cases be evidence of government function. In the GOC's view none of this is positive evidence of governmental control and is certainly not evidence to show that SOEs are vested with governmental authority.

The *Guidelines for Accelerating the Restructuring of the Aluminium Industry*, as has previously been explained by the GOC, are a broad analysis of the performance of the aluminium sector in respect of commitments made by the Chinese Government concerning the reduction of waste and pollution from industrial operations. In relation to these, the reinvestigation seems to have been concerned about the following paragraph:

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

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[8] Pages 25 and 26

[9] By way of comparative example, the Australian Workers Union can propose policy in relation to Australian anti-dumping matters. This does not mean that the AWU drafts laws in the legal sense. It simply means, if the government of the day is of a mind to listen, that the AWU may have some impact on the development of the government's anti-dumping laws and policy by submitting its views.

avoid financial risk.

The sentiment expressed in Report 175 was this:

> *The reinvestigation considers the directions highly prescriptive and designed to achieve compliance by primary aluminium producers and suppliers, with the consequence of a withdrawal of support for non-compliance.*"[9]

The GOC is at a loss to understand how this could possibly evidence "meaningful" government control which could amount to an SOE being seen to have been vested with governmental authority. The point of the policy explained by the Guidelines is that aluminium producers must comply with environmental standards. If the GOC could simply command aluminium producers to comply with these standards then it would not have to create disincentives where they were breached. This is the point of all "highly prescriptive" rules and indeed the point of most laws of every government in the world.

Although the GOC believes that the first point is criticism enough, the reinvestigation also failed to realise that the Guidelines relate to both SOEs and non-SOEs.

Requiring certain environmental standards to be met by aluminium producers in general is not evidence of governmental control of SOEs. If it were, every manufacturer in Australia could be argued to be a public body on the same basis. This outcome is not supported in law or logic and must be discarded.

The year of the *2.4.C. Form-20 F* is unclear from Report 175. It is further unclear what the Form 20 relates to and in what context the comments relied upon in the Report were made. However what is clear from the text of Report 175 is that the comments were broadly drawn statements of opinion. They were not drafted for the purpose of addressing an anti-dumping or countervailing investigation. They were not made in the realisation that they would be construed adversely in a trade-related legal analysis of the role of SOEs in the aluminium industry in China.

As a matter of fact, the term "SOE" is not mentioned in the text uplifted in Report 175. Nor is there any indication of the alleged but ill-defined control being a result of an investment of governmental authority within SOEs. Indeed, even within the text of Report 175, there is no explanation of how this form provides any relevant evidence at all.

What is clear to the GOC is that all inferences made in the Form 20 have been addressed by the provision of evidence by the GOC and aluminium exporters and importers throughout the investigation. It is unthinkable that the direct evidence provided would be relegated in importance behind some broadly drawn comments, unsupported by fact or data, taken from a remote document which did not address the context or purposes of the investigation.

The GOC submits that the Form 20 is not relevant to the investigation. It is incapable of showing the "control" envisaged by the Appellate Body in DS379 and cannot be used as evidence that SOEs are public bodies.

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[9] At page 23

5 Application of this "evidence" to all producers of primary aluminium

Based on the "evidence" recounted above, Australian Customs again declared in the reinvestigation that all producers of primary aluminium were public bodies. The reasoning for this was that Chalco and Chinalco had "direct or indirect interests" in the form of equity in some 31 companies in the aluminium industry.

Such reasoning is faulty on a number of levels.

First, if majority ownership is a "mere formal link" between the GOC and SOEs, how is it that any equity holding (majority or otherwise, direct or indirect) of a subsidiary of an SOE be seen as evidence of any investing of government authority in that subsidiary? At the most, the "evidence" relied on by Australian Customs could be used to show a vesting of authority in Chinalco (although, as discussed above, there was no such vesting). It defies logic that any hypothetical investment of government authority in Chinalco could spread to its related companies through a "mere formal link".

Report 175 contains no evidence as to what role these 31 companies played in the aluminium industry. It cannot be assumed that each one supplied primary aluminium for the making of aluminium extrusions. And, even if government authority could be passed on through shareholdings, the "investing" of government authority on this basis in 31 companies cannot be used to characterise the whole industry, of approximately 107[11] aluminium producers, as being so invested with government authority.

Throughout the entirety of the aluminium extrusion investigation, no evidence was produced to show that Program 15 actually existed. Australian Customs did, however, have copies of the laws provided by the GOC which showed that there were no pricing controls on primary aluminium.

The GOC cannot see any law or logic by which the reinvestigation could have validly considered all producers of primary aluminium to be public bodies.

6 Conclusion

The GOC maintains that the reasoning in Report 175 was deeply flawed. To ignore the volumes of evidence and testimony provided by the GOC in favour of such flimsy "evidence" and such illogical "reasoning" was grossly insulting to the GOC. This was highly damaging to the GOC given the level of importance placed by Australian Customs on Program 15 in many aspects of the final outcome in the investigation concerning aluminium extrusions.

The GOC would once again reiterate that Program 15 does not exist. As we have discussed above, the "evidence" referred to is simply incapable of showing that such a program exists. The fact that primary aluminium was cheaper domestically in China when compared to the LME during the period of investigation is not a result of any subsidy. It is a result of active competition between low-cost and high volume producers in the Chinese domestic market.

The same is true for the alleged Program 20 in this present HSS investigation. There is no evidence to show that such a program exists because, to be completely and utterly clear, the

11 During 2008.

"program" does not exist.

The GOC will closely monitor the conduct of this HSS investigation. It asks that Australian Customs give proper weight to the evidence provided by the GOC, and not open itself to accusations that unspecified non-legal factors had some role in the decisions made. Non-facts and inexplicable reasoning can only lead to unsafe conclusions.

C Globally competitive HRC pricing in China

The GOC was mystified when it was concluded that the prices of primary aluminium in China did not reflect competitive market costs, and applied Regulation 180(2)(b) in the aluminium extrusions investigation.

Regulation 180(2) provides as follows:

> *If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.*

The GOC is confident that Australian Customs will find that that the record of Chinese HSS exporters are kept in accordance with the general accounting principles of China. The GOC further considers that there are no grounds on which it could be found that the cost of HRC reported in those records do not reasonably reflect competitive market costs.

To pre-empt any similar finding in this HSS investigation, whether at this preliminary stage or finally, the GOC has conducted its own research of market prices of the main raw material in HSS, namely hot-rolled coil ("HRC").[12] This cannot be a precise undertaking, because "steel" and "HRC" is not a homogenous product like primary aluminium. There are many types, sizes, chemical compositions, hardness/tempers, and production differences. The quality of raw materials vary, as do end uses.

For its analysis, the GOC settled on comparing the prices of coil as sold domestically in different countries or as available in a certain import region (East Asia).

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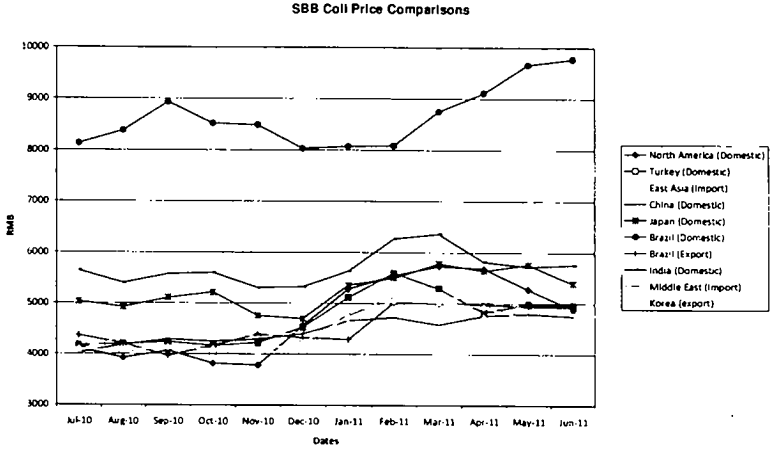
[12] The submission of this information is not intended to detract from the GOC's primary submission, which is that HRC prices constitute reasonably competitive market costs because of the operation of the competitive Chinese market for HRC, and not because they are the same as costs in other competitive markets.

This is a better analysis then any "LME" price analysis, because LME does not reflect country market differences - it equalises them and therefore is not a valid benchmark at all. A country by country analysis reflects the actual conditions in several different markets, as opposed to showing the muted and generalised conditions of each market through one global "proxy".[13]



As shown by the chart, the domestic price of Chinese HRC has at all times been at a similar level to the price in other country markets. On the basis of this data Chinese HRC was cheaper than HRC available in other markets only at points of time in February and March 2011, and only by an insignificant margin. The domestic cost of HRC in China reflected – in fact was more than - the domestic cost of HRC in Korea, India, Japan, North America and other places at various times in the POI.

The inference that can be drawn from the data at hand is that the cost of HRC in China was in line with costs in other markets during the POI. The cost of HRC recorded in the accounts of HSS producers has at all times throughout the investigation period reasonably reflected competitive market costs (if, indeed, this is how Regulation 180(2)(b)(ii) of the Customs Regulations needs to be interpreted).[14]

If Australian Customs maintains that Chinese HRC prices did not reflect competitive market costs – a conclusion the GOC rejects – then, in any event, the substitution of a different competitive market cost could only alter Chinese HSS costs by reducing them, over the full year. This is because the same or lower costs applied in other country markets during the POI.

[13] Source: *Steel Business Briefing* - http://www.steelbb.com/

[14] See footnote 12

The same reasoning applies to any intention on Australian Customs' part to find that a Program 20" subsidy exists. The GOC maintains there is no such Program, and no grounds to construct such a subsidy. But if Australian Customs denies this, and determines that there is such a subsidy, there can be no "benefit" based on the external benchmarks that Australian Customs might consider adopting.

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These are extremely important and sensitive matters.

The GOC regrets the sometimes harsh tone adopted in this communication.

Australian Customs must appreciate that the GOC has at all times been cooperative in facilitating these investigations, and truthful in answering the questions which have been put to it.

The GOC will continue in the same manner in the future.

The GOC requests that Australian Customs reciprocate the respect and cooperation of the GOC, and listens to the GOC's genuine concerns.

In closing, we respectfully reiterate that:

- Australian Customs cannot legally come to a PAD without having received and reviewed the information to be provided by the GOC in, at least, the GQ.
- Program 20 does not exist.
- SOEs are not public bodies. There was no positive evidence for that conclusion in Report 175.
- Should there be an outcome in this HSS investigation which replicates that of the aluminium extrusions investigation, the GOC cannot fail to react.
- The cost of HRC in the Chinese domestic market during the POI was at all times a competitive market cost.
- Provisional or final measures that adopt costs other than Chinese HRC costs, or assume subsidy "benefits" from the provision of HRC to HSS manufacturers in China, cannot be contemplated.

Yours sincerely

Daniel Moulis
Principal

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