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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 Chinese Government Questionnaire

Thank you for your letter dated 21 October which gave the Government of China ("the GOC") a further one week extension for its Government Questionnaire ("GQ") response.

In our letters dated 11 and 20 October 2011 in this matter the GOC indicated that it would be commenting on and raising some concerns about some of the questions in the GQ.

The GOC has always cooperated with Australian Customs and Border Protection Service ("Australian Customs") in its conduct of anti-dumping matters. This will continue into the future. The cooperation must be based on law and mutual respect. The inquiries undertaken must be fairly within the scope of the investigation. Each side must have reasonable expectations of what can and should be achieved, in both a general sense and in the context of the time available. Questions asked must be relevant to the objectives sought to be achieved.

These investigations do not take place in a vacuum. They are regulated by WTO law and domestic law. For example, the GOC does not consider that any investigating authority could declare an interested party as being non-cooperative, if such a declaration was based on an inability to meet informational requirements which were impossibly broad or were not fairly related to the inquiry. The requirements need to be fashioned by the law, by surrounding circumstances, and by previous conclusions reached by Australian Customs and the Minister.

That is why the WTO Anti-Dumping Agreement and the Subsidies and Countervailing Measures Agreement, together and variously,

- contain definitions, rules and concepts to *delineate what is required to be proven* to establish, or to rebut, any particular proposition.
- speak in terms of the provision by interested parties of *necessary* information;

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- allow interested parties to present *relevant* information;
- require investigating authorities to take due account of *difficulties in supplying information* experienced by interested parties;
- outline that final determinations must refer to the *relevant* information on matters of fact and law;
- requires information not to be disregarded, even if it is not ideal in all respects, provided the party submitting the information has acted *to the best of its ability*; and
- sets out a process for a party submitting information to have it accepted by justifying why it should not be rejected.

Upon reviewing the GQ, the GOC has discovered that some of the questions are too broadly drawn; relate to data outside the published investigation period; or otherwise lack relevance to this investigation.¹ This questionnaire is more onerous than those which have been presented to the GOC in Australian anti-dumping or countervailing investigations before now.

Investigating authorities are obliged to undertake objective examinations, based on positive evidence; to evaluate facts in an unbiased way, and to apply the law to those facts in conformity with the relevant WTO agreements. Interested parties must also be availed of the due process rights and decision-making protections which are mandated under domestic laws.

We appreciate that Australian Customs is cognisant of these constraints and disciplines but under present political conditions it is worthwhile to remind all interested parties of them.

Against this background, the GOC has the following comments in relation to the information sought in the GQ.

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A Comments about the scope, detail, period and relevance of certain questions

- 1 The GOC considers that questions B5, B10, C2.6; C2.9(r)(iii); and C3.1-9 are not relevant in so far as they might relate to places that have no or insignificant HSS/HRC production. To this degree, it is submitted that these questions do not have a legitimate information gathering function.
- 2 Question B8 asks for details of exports of HSS to Australia, broken down *by company*, for the five year period from 1 July 2006 to 30 June 2011. The GOC is unaware as to why it is being asked to provide commercially confidential information relating to the business

¹ The concerns raised by the GOC are without prejudice to any other concerns it might have and do not commit the GQ to answering any question in the GQ not mentioned in this letter

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of individual exporters. It is considered that a company breakdown is not relevant to the investigation, when total values will give information which may be needed for any injury assessment during the injury POI.²

- 3 Question C2.3(d) asks for every Chinese law about "each type of corporate and business structure", extending to "decrees, rules, promulgations, edicts, opinions, measures, regulations and directives". This question is unspecific and all the information provided would not be relevant. It seems to request a translated copy of every Chinese law at every level of government that mentions any form of corporate or business structure. Read in this way, it would present an incredibly onerous task for any WTO Member. It presents an even more onerous for a Member such as China, given its large size and provincial and local government systems. The GOC advises that it would intend to provide key documents of this nature, consistent with previous practice.
- 4 Question C2.8 requires translated copies of the 11th and 12th five-year plans for all levels of the GOC. There is nothing that specifically relates this question to HSS. The GOC feels that it is unreasonable for it to have to provide these general policy documents, from all levels of government, whether or not they have anything to do with the subject matter of this investigation.

B Comments concerning relevant period for "particular market situation" questions

- 5 A number of questions which go to the question of "particular market situation" extend outside the one year period of investigation ("POI") for dumping margin assessment. A "particular market situation" allegation relates only to normal value assessment. Therefore, the GOC would have thought that it is neither necessary nor permissible to ask questions pertaining to circumstances existing outside that POI. As such, those requests for information are not relevant to the purpose to which they are ostensibly directed. In so far as the questions in Part C3 require information to be furnished from July 2006 to June 2011, including translated laws and other materials, the GOC considers that this information would fall outside the investigation period and therefore would not be relevant.

C Comments concerning certain questions about subsidies

- 6 Question D1.6(b) lists subsidy programs the benefit of which would be expended in the year of grant.³ However, the GOC has been asked to provide 10 years' worth of information (1 July 2001 to 30 June 2011) in respect of all of those alleged programs.
- 7 The GOC has previously advised that certain of the alleged subsidy programs have been abolished. In this regard we refer to Program 3 "Provincial Scientific Development Plan Fund"; Program 4 "Export Brand Development Fund"; and Program 9 "Training Program for Rural Surplus Labour Force Transfer Employment". The GOC made submissions to Australian Customs regarding the abandonment of these programs in the

² In relation to the injury POI, please refer to the GOC's comments on 5 below.

³ We make this statement in line with Australian Customs' own policies.

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recent investigation concerning aluminium extrusions.⁴

- 8 Questions D1.10 to D1.13 are not directed towards HSS producers. Rather, it seems that they are directed at every company, in any industry, that has received a benefit from any of the 20 subsidies that are to be investigated. Details for types of industries, all companies and all applicants are requested. The GOC submits that this requires a level of detail that is very extensive and is unnecessary for the purposes of the current investigation.

D Comments concerning period of injury assessment

- 9 With respect, the GOC wishes to again⁵ indicate that it disagrees with the selection of a five year period for injury analysis, when:
- (a) the period recommended by the WTO Committee on Anti-Dumping Practices is three years prior to the application being made;⁶
 - (b) the usual period adopted in these investigations is three years; and
 - (c) in this particular case, calendar year 2008 was the last year of a period previously investigated by Australian Customs, and in that year it was concluded that no injury was caused by HSS imports.

E Comments concerning questions about SASAC and State-invested enterprises

- 10 The GOC wishes to re-address the question of what a "State-Owned Enterprise" is, and the perceptions that flow from that understanding. The GOC considers that some of the difficulty it has in answering many of the questions that the GQ asks in relation to SOEs arises from the fact that it has not yet been accepted that "SOE" is a broad, inelegant and imprecise term. In China's market economy setting it is improper to label all "entities with State investment" as SOEs. Entities with State investment fall within four categories:
- (a) enterprises wholly owned by the State;
 - (b) companies which are wholly State owned;
 - (c) companies which are majority owned by the State; and
 - (d) enterprises with State investment.

- 11 The GQ, in effect, treats all entities with State investment as being the same. There is no regard for the GOC's different levels of asset holding or of its shareholding relationship

⁴ See eg *Circular for the Abolishment of the Special Fund for Developing Trade through Science and Technology*, which was Attachment 237 submitted in that investigation.

⁵ The GOC addressed this issue in its Position Paper lodged with Customs for the purposes of consultations under Article 13.1 of the Subsidies and Countervailing Measures Agreement.

⁶ Paragraph 1(c) of the Committee's recommendation, arrived at in its meeting of 4-5 May 2000, is that "the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation".

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with these entities. The GOC questions seem to be based on the premise that these entities form part of the GOC itself. The GOC wishes to emphasise that the GOC's involvement in commercial enterprises in which it has an ownership interest is simply that of a shareholder. As it is stated in the *Law on the State-Owned Assets of Enterprises 2008*, SASAC "shall perform the contributor's functions for State-invested enterprises". Even then, any special function it might have as a "contributor" (ie shareholder or equity contributor) is dependent upon the level of shareholding. For example, the law acknowledges that SASAC may appoint and remove the chairman of the board of directors of a wholly State-owned company. This is unsurprising, in that any 100% shareholder could be expected to have that power in the normal exercise of its shareholder's rights. Also the law makes clear that this is to be done by SASAC in performing its contributor's functions, ie in its role as shareholder and not because of the exercise of government functions.

- 12 Where the State is one of a number of shareholders in an enterprise (ie, where it is a State invested enterprise but not wholly owned by the State), SASAC can only nominate candidates for the position of directors and supervisors to the shareholders meeting of a company. This limited nomination right applies whether the State's interest is "controlling" or "non-controlling", in a numerical sense, and does not supplant the normal nomination rights of shareholders under law.
- 13 In summary, the *Law on the State-Owned Assets of Enterprises 2008* is declaratory of the State's rights as a shareholder in State invested enterprises. The GOC has no power over a wholly State-owned enterprise that is different to the power of a 100% shareholder in any company. It does not have decisive powers to interfere with the affairs of a non-majority State-owned enterprise. A mere State-invested enterprise does not have any reporting obligation to SASAC on its major corporate management issues.
- 14 The legal limits of SASAC's role are spelled out in the relevant laws which relate to the State's position as a *shareholder* of such companies. Consistent with the rule of law in China and with China's WTO obligations, those laws are valid, effective and transparent.
- 15 More specifically, the GOC has these concerns about specific questions:
 - (a) Question D2.21(f) seeks information regarding the operations of SASAC in relation to SOEs in the Chinese steel sector over the last 10 years. The GOC feels that information going so far back in time falls outside the reasonable bounds of the investigation, and is so long before the investigation period, that it cannot be considered relevant.
 - (b) The second Question D2.21(f) requests the GOC to list out all "other tasks" assigned by the State Council to SASAC over a five year period. It seems that this is regardless of whether the tasks are related to the steel industry or not. The GOC feels that this is also too broad.
 - (c) Questions D2.25, D2.26, D2.27 and D2.28 require the furnishing of a large amount of information in relation to SOEs operating within the HSS and HRC industries. While the GOC will attempt to answer these questions to the best of its ability, there are some questions for which the GOC is not the repository of the information sought, and it should not be obliged to obtain it.

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- 16 As we have said, State-invested enterprises are commercial enterprises. They have differing levels of State shareholding. Shareholders in Western companies, or governments of the domiciles of such companies, could not get some of the information from their own companies of the type the GQ requests the GOC to obtain. The GOC does not have all of this information at its disposal. In that context the GOC considers that at least the following questions cannot be answered by it and should not be asked of it.
- (a) D2 25(a) - particular in so far as it relates to the ownership of all entities "including subsidiaries and parent companies and the ownership of these entities... [and] the function and roles of each associated entity..."
 - (b) D2 25(e).
 - (c) D2 26(c).
 - (d) D2 26(s).
 - (e) D2 26(v).
 - (f) D2 27(a).
 - (g) D2 27(b).
 - (h) D2 27(j) and (m) - in so far as they relate to the identification of any employees who may be "affiliated" with the GOC (and noting that these questions are in fact the same).
 - (i) D2 27(r).
 - (j) D2 28(g); and
 - (k) C3 11 - this is better asked of the listed "SOE" steel mills listed within the text of that question.

F China's full market economy status

- 17 Lastly, the GOC would like to remind all concerned that the Chinese economy is a market economy. This has been accepted, after due consideration, by the Australian Government. Paragraph 2 of the *Memorandum of Understanding Between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement Between Australia and the People's Republic of China* ("the MOU") provides that

...Australia acknowledges China as an equal WTO trading partner by recognising China's full market economy status...

- 18 The broad questions asked in the GQ, in some important respects, are strongly at odds with Australia's recognition of China's market economy status. The GOC asks to be treated as fairly as any other market economy country. The GOC submits that the Australian Government was satisfied about the operation of markets and the rule of law

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in China in a general sense when it entered into the MOU. Many of the questions that have been asked in the GQ, particular those relating to the laws of China, appear to contradict that level of satisfaction. The GOC hopes that Australian Customs will moderate its inquiries in this and future cases, as it learns more about China's business and legal system.

The GOC does not necessarily ask Australian Customs to respond to this letter, or to revise specific questions, at this stage. However the GOC does wish to give notice that it will respond to the GQ in the manner which is relevant and appropriate to this investigation. The GOC would not accept that a failure to answer inappropriate or irrelevant questions could be grounds for suggesting that it has not complied with the reasonable requirements of this investigation, or has not provided necessary information, or has not acted to the best of its ability.

Yours sincerely



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Principal