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20 July 2016

The Commissioner
Anti-Dumping Commission
Industry House
10 Binara Street
Canberra
Australian Capital Territory 2600

Attention: Mr S Sharma
Manager

By email

Dear Mr Sharma

Government of China
Alleged subsidisation of rod-in-coil and steel reinforcing bar
Recent claims made by the Australian industry

We write on behalf of our client the Government of the People's Republic of China ("the GOC") concerning two documents – a *Record of Meeting* and accompanying *Briefing – Canberra, 5 July 2016* – that have only recently been placed on the public record of investigations 322 and 331.[1]

The GOC is concerned at the misinformation and the distortions that are conveyed by the document that was presented by the Australian industry applicant at the meeting that is revealed to have taken place on 5 July 2016. That the applicant refers to the document as a "briefing" is particularly disturbing. A "briefing" is typically an occasion or a communique that presents accurate information and which conveys directions to assist the subject of the briefing to correctly understand a set of circumstances, and to instruct the subject as to how the circumstances are to be addressed. The "briefing" document does none of these things. It does not present accurate information at all, and it would be inconceivable for the Commission to conduct itself in the misguided and unprincipled manner that the applicant appears to suggest.

It is to these matters that this submission is directed.

1 Public body

The proposition that continues to be put by the applicant – that State-invested enterprises are public bodies – continues to be both tiresome and incorrect. The applicant refers to "indicia" set out in DS379 as "tests", without considering whether the indicia lead to the conclusion that any particular State-invested enterprise engaged in the supply of inputs for the production of rod-in-coil or rebar is such a body. This, it seems, is to be jingoistically assumed, in case after case against Chinese exporters, without proper analysis, and without a proper understanding of what the WTO Appellate

[1] EPR 322, Doc No 036; EPR 331, Doc No 043.

ABN 56 231 964 609

Body has clearly stated in DS379[2] and in the two cases which have more lately dealt with the same topic, namely DS436[3] and DS437.[4] It is noted that the applicant's submissions ignore DS436 and DS437 in every application it makes and at every available opportunity.

The reason the applicant does not refer to these authorities is self-evident when one considers what the Appellate Body said in those reports. The considerations that an investigating authority must undertake in determining whether an enterprise might be considered to be a "public body" were made absolutely clear by those authorities. The Appellate Body has stressed that the indicia that it referred to in DS397 are only descriptive of the kind of evidence that can be considered in deciding whether the legal test is satisfied. This does not supplant the test itself. The "substantive legal question" – which is whether the entity concerned possesses, exercises or is vested with governmental authority - must still be addressed:[5]

> *4.37. As noted above, the Appellate Body has explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means "an entity that possesses, exercises or is vested with governmental authority". The* substantive legal question *to be answered is therefore whether one or more of these characteristics exist in a particular case. This substantive standard should not be confused with the* evidentiary standard *required to establish that an entity is a public body within the meaning of the SCM Agreement. Although the Panel quoted extensively from the Appellate Body report in* US – Anti-Dumping and Countervailing Duties (China)*, it appears to have blurred the distinction drawn by the Appellate Body in that report between the existence of control by a government over an entity, on the one hand, and "meaningful control", on the other hand. Thus, the Panel did not analyse, in our view, the question of whether the GOI in fact exercised control over the NMDC and its conduct. Nor did the Panel assess whether the USDOC had properly established that the NMDC "possesses, exercises or is vested with governmental authority", and is therefore a public body.*

This –and the same things as are said in DS437 – are the latest pronouncements and clarifications that have been made by the WTO Appellate Body on the test for the identification of a *"public body"* in terms of Article 1.1(a)(1) of the *Subsidies and Countervailing Measures Agreement* ("the SCM Agreement").

The GOC asks the Commission to stop, pause, and think about this test. The applicant continues to present the Commission with misguided reliance on the "indicia" set out in DS379 as being the "test". But the indicia are not the test. To conclude that an entity is a "public body", an investigating authority must find that the entity possesses, exercises or is vested with governmental authority. The applicant wants the Commission to simply repeat a "factual" analysis that first saw the light of day in 2012, in Report No 177. The GOC objected to that analysis at that time, and continues to do so. Now, in 2016, in the context of more recent facts and legal clarifications, it should be even more obvious to the Commission that it does not qualify as a proper analysis on the question of whether any particular State-invested enterprise is a "public body" or not.

The GOC defies the Australian industry to point to one scintilla of evidence that shows that a Chinese steel enterprise possesses, exercises or is vested with governmental authority. It must be entirely plain to the Commission, and must be accepted by the Commission, that they do not have any governmental authority at all.

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[2] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R, 11 March 2011)

[3] *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (WT/DS436/AB/R, 8 December 2014)

[4] *United States – Countervailing Measures on Certain Products from China* (WT/DS437/AB/R, 18 December 2014)

[5] WT/DS436/AB/R, page 123.

The "briefing" document that the applicant presented to the Commission states, in part:

> *Possible outcomes…*
>
> • *State Invested Enterprises = Public bodies (strong precedents in support)*
>
> • *Private companies (Non-SIEs)*
>
> *? Public bodies? (apply the indicia in DS379); or*
>
> *? Private bodies? (apply subsection 269T(1) and the indicia in DS379)*

The "strong precedents in support" are nothing of the sort. We presume that these so-called "strong precedents" are merely the repeatedly wrong findings of the Commission in previous investigations. Indeed, a higher level of precedent in relation to the question of whether Chinese State-invested enterprises operating in any of the industries investigated are public bodies – whether iron, steel or aluminium - is provided by the Anti-Dumping Review Panel, which has consistently found that such enterprises are *not* public bodies.[6]

The applicant's submission that SIEs "equal" public bodies is misleading in the extreme.

2 Entrustment and direction

The applicant's "briefing" document makes allegations about private bodies that are unclear in their content and direction. All that is said is:

> • *Private companies (Non-SIEs)*
>
> *? Public bodies? (apply the indicia in DS379); or*
>
> *? Private bodies? (apply subsection 269T(1) and the indicia in DS379)*

It is assumed that the reference to *"Private bodies"* is in some way related to that part of the heading on that page of the document which states *"Private body… directed to perform governmental function"*. This is not at all sufficient to enable interested parties to understand what is being put by the applicant.

The only allegation about *"entrustment and direction"* that is made in the text of the applications lodged with the Commission by the applicant is one that relates to Chinese banks.

There is no evidentiary foundation nor any argumentation from the applicant for a claim that private bodies in the "iron and steel industry" in China are in some way entrusted or directed by the GOC to provide goods to rod-in-coil or rebar manufacturers at less than adequate remuneration. For the record, the GOC denies that this is the case. Moreover, it would be a manifest error of procedure and a breach of the GOCs procedural rights for the Commission to consider any new or changed basis for the applicant's subsidy allegations.

[6] *Certain aluminium extrusions* (April 2011) - TMRO ruled that SIEs not proven to be public bodies. *Hollow structural sections* (December 2012) - TMRO ruled that SIEs not proven to be public bodies. *Aluminium road wheels* (December 2012) - TMRO ruled that SIEs not proven to be public bodies. *Coated steel* (November 2013) - ADRP ruled that SIEs not proven to be public bodies.

3 Alleged "pass-through" of benefit

The applicant's "briefing" document asserts:

> *Pass-through is deemed to have occurred between related parties under Article 10 of the SCM Agreement.*

In this regard we note that Article 10 and its footnote 36 provide as follows:

> *Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.*
>
> _____
>
> *36 The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.*

We see nothing in these provisions to the effect asserted by the applicant. The applicant refers to DS257[7] in the document presented to the Commission at the meeting as authority for this proposition. However on our reading of that report the Appellate Body made it very clear that it was not deciding matters concerning sales between related parties, saying:[8]

> *127. The United States notes that it "does not appeal the Panel's finding that, where the subsidy is received by independent harvesters, i.e., entities that do not produce [softwood lumber] product[s] under investigation and operate at arm's length, a pass through analysis would be required to determine if the subsidy received by the independent harvesters was indirectly bestowed on production of softwood lumber". Thus, the situation where tenured timber harvesters do not process logs into softwood lumber and sell at arm's length all the logs they harvest to unrelated sawmills is not before us in this appeal. We also note that Canada does not argue that a pass-through analysis is required in the absence of arm's length transactions between tenured timber harvesters, sawmills and remanufacturers. Hence, the situation where vertically integrated enterprises, not operating at arm's length, harvest timber under stumpage contracts, produce softwood lumber and remanufacture lumber, is also not before us.*
>
> *128. The United States requests us to reverse the Panel's finding, in paragraph 7.99 of the Panel Report, that a pass-through analysis is required with respect to sales of logs or lumber by tenured harvester/sawmills to sawmills or re-manufacturers. This appeal thus concerns the situations where: (i) a tenured timber harvester owns a sawmill and processes some of the logs it harvests into softwood lumber, but at the same time sells at arm's length some of the logs it harvests to unrelated sawmills for processing into lumber; and (ii) a tenured timber harvester processes logs it harvests into lumber, and sells at arm's length some, or all, of the lumber it produces to lumber remanufacturers*

As can be seen by paragraph 128, both of the situations that the appeal concerned involved sales at arm's length. The applicant's claim – that in DS257 *"pass through was presumed between business entities being the tenureholding timber harvesters and sawmills used in that case to produce lumber,*

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[7] *United States – Final Countervailing Duty Determination with respect to Softwood Lumber from Canada* (WT/DS257/AB/R, 19 January 2004).

[8] *Ibid.*, pages 50 and 51.

before being sold to unrelated lumber remanufacturers" - is disingenuous in the extreme. The Appellate Body did not presume this at all. It made it clear that the question was not before it.

The GOC's position is that there is nothing about the words *"directly or indirectly"* in the footnote to Article 10 of the SCM Agreement that expresses, implies or suggests that related parties operating in accordance with commercial principles are not entitled to be treated in the same way as unrelated parties operating in accordance with commercial principles in a subsidy benefit determination. The applicant has attempted to give a meaning to both Article 10 and to the Appellate Body report in DS257 which is not to be found in either.

Lastly on this point, it has been suggested to the GOC that the Commission may be considering the "concept" that a State-invested enterprise producing rod in coil or rebar from basic raw materials (iron ore, coke and coking coal) in a fully integrated steelmaking process could nonetheless give itself a financial contribution by way of the production of steel billet as part of that process. In other words, what has been suggested is that a subsidy may be found to exist:

- without any *"financial contribution by… any public body"* (Article 1.1(a)(1) of the SCM Agreement refers);
- without *"a [public body] providing [steel billet]"* (Article 1.1(a)(1)(iii) of the SCM Agreement refers);
- without a price, or a payment, or any relevant transaction to determine whether *"the provision [of the steel billet] is made for less than adequate remuneration"* (Article 14(d) of the SCM Agreement refers).

A subsidy cannot exist in the circumstances we have described. A company cannot give itself a subsidy. The GOC would consider a contrary finding by the Commission to be an egregious breach of China's WTO rights.

4 Benchmarks

We now turn to the matters set out on the page of the briefing document under the heading *"Coking coal and metallurgical coke benchmarks"*. The only matter that the GOC is in a position to respond to is that which relates to the question of whether *"benchmark prices [are] influenced or affected by Chinese subsidised prices?"*. The other matters cannot be addressed by the GOC because they have not been detailed by the applicant, or have been redacted for confidentiality reasons.

We expect that the applicant has yet again suggested to the Commission that any benchmark price for the purposes of determining the adequacy of remuneration of an alleged provision of goods by a public body in China should be as distant from the Chinese market and as remote from the Chinese market and as more expensive than the Chinese market as possible.

Quite apart from the proposition that there are no public bodies that could have provided financial contributions as alleged by the applicant, may we remind the Commission that the approach being suggested by the applicant is entirely unprincipled. In DS257, the Appellate Body ruled as follows:[9]

> *119. In conclusion, for the reasons stated above, we reverse the Panel's finding, in paragraph 7.64 of the Panel Report, with respect to the interpretation of Article 14(d) of the SCM Agreement and find, instead, that an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private*

[9] *Ibid.*, page 48.

> *prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.*
>
> *120. We emphasize, however, that when an investigating authority proceeds in this manner, it is obliged, pursuant to Article 14(d), to ensure that the alternative benchmark it uses relates or refers to, or is connected with, prevailing market conditions in the country of provision, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale), with a view to determining, ultimately, whether the goods at issue were provided by the government for less than adequate remuneration*. [our underlining]

In making this submission, the GOC is not condoning the overall contention that out-of-country benchmarks may be applied against Chinese exporters in this case or are required as a matter of law at all. Nonetheless the Appellate Body has at least mandated that there must be a relationship or a connection in the benchmark adopted with the prevailing market conditions in the country of provision of the financial contribution. The applicant chooses to ignore this.

The GOC protests the Commission's recent practice of using extreme price indices for steel as a proxy for Chinese prices, a practice which has now extended to the use of prices adopted from parts of the world as remote from China as Latin America.[10] With respect, the concept that China has no markets for steel products is nonsensical. That other countries in North and South East Asia can purchase steel inputs for products exported to Australia at prices less than the benchmarks that the Commission foists on Chinese exporters, and not be accused of having costs that do not reasonably reflect competitive market costs or are at less than adequate remuneration, is plainly discriminatory.

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Should you require any clarifications please do not hesitate to contact us.

Yours sincerely

Charles Zhan
Associate

[10] *Report No 301 – Alleged dumping of steel rod in coils exported from the People's Republic of China* (29 March 2016); *Report No 300 - Alleged dumping of steel reinforcing bar exported from the People's Republic of China* (March 2016); *Statement of Essential Facts No 316 and Preliminary Affirmative Determination No 316 – Alleged dumping and subsidisation of Grinding Balls Exported From the People's Republic of China* (21 April 2016).