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By email

Dear Director

## **Alleged dumping and subsidisation of steel shelving units Comments of the Government of China on SEF No 335**

We are instructed to make the following comments on behalf of the Government of the People's Republic of China ("the GOC") in relation to the views expressed by the Anti-Dumping Commission ("the Commission") in the abovementioned Statement of Essential Facts ("the SEF").

At the outset, the GOC advises that it welcomes the Commission's proposal to terminate the investigation on the basis that the goods under consideration were exported from China with negligible margins of dumping or of countervailable subsidisation and, where the margins for the exported goods were not negligible, on the basis that those exports did not cause material injury to the Australian industry producing like goods. The GOC urges the Commission to do so immediately, in accordance with sub-sections 269TDA(1)(b), (2)(b), (13), and (14) of the *Customs Act 1901* respectively.

The GOC's support relates only to the proposed outcome. The GOC maintains its view, as expressed in its letter to the Commission dated 13 December 2016, that the investigation should not have been initiated given the clear deficiencies in the Application lodged by the Australian industry applicant concerned, and that the decision to initiate the investigation should be pronounced void *ab initio*. Nonetheless the GOC remains deeply disappointed with a number of aspects of the findings and of the approach adopted in the SEF in relation to the alleged dumping and subsidisation.

- 1 The GOC expresses its strong and continued objection to the opinion referred to in this and previous investigations that "Chinese iron and steel industries" is a "market" affected by a particular market situation. This formulation of what in the Commission's view can constitute a particular market situation has no basis in law. The question under the Australian legislation is whether "*the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price*". The "market" in this context is the market in which the sales of the like goods take place. Thus, a market situation assessment must be made with respect to the market for the goods under consideration. The goods under consideration in this investigation are steel shelving units. This is a market in which buyers and sellers of steel shelving units and of products that are competitive with steel shelving units engage with each other, based on the conditions of supply, demand and innovation that exist in that market. Steel shelving units do not compete with the upstream products from which they are made. It is a linguistic distortion of the legal description of suitability under the *Customs Act 1901*, and of a "*particular market situation*" under the Anti-Dumping Agreement, to say that a market covers all products that are made from a particular material and the industries that make the material and that make everything that is made from the material. The GOC again requests that the Commission cease this incorrect interpretation and discriminatory practice.

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- 2 The GOC is also concerned to find that the SEF alleges that the Chinese steel shelving units producers' costs of raw materials are distorted, and do not reasonably reflect competitive market costs associated with the production of the goods. The SEF appears to adopt this view as some kind of a default position for the "Chinese iron and steel industry". If there are grounds for denying the use of the producers' actual costs in a constructed normal value – a practice that the GOC rejects, as reiterated in 3 below - that would still need to be established in each investigation on the basis of positive evidence *in that investigation* as relevant to the time period *of that investigation* and the specific type of products and costs *in that investigation*. The Commission cannot continue to rule out the use of the producers' costs on the basis that the Commission's predecessor held such views before, or that the Commission previously prepared a report dealing with the entire "Chinese steel and aluminium industries". These reliances do not amount to positive evidence in this investigation. This development in Australian anti-dumping policy with respect to Chinese exporters has not gone unnoticed. The GOC considers that the policy causes the Commission to ignore the facts of any particular case. To behave in that way is to ignore the law and the requirements of proper decision making, and is unfair and discriminatory against Chinese exporters of steel (and aluminium) products.
- 3 The continued use of a foreign "*benchmark for cost replacement*" approach in working out a constructed normal value is also a disappointment to the GOC. The GOC submits that where Chinese exporters' costs are their actual GAAP compliant costs, they must be used in normal value construction. In that regard the GOC is aware of the textual differences between the WTO *Anti-Dumping Agreement* and the relevant Australian regulations. The GOC urges its Australian counterpart, in conducting such trade remedy investigations as a WTO member, to interpret and implement its regulations in a manner which is WTO compliant. Moreover, the GOC notes that Section 269TAC(2)(c) of the *Customs Act 1901* clearly requires that the normal value must be based on "*such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export*" [underlining supplied]. The Australian regulations are necessarily subordinate to this provision in the Act. The GOC therefore submits that the legal position could not be clearer – either in terms of the Australian legislation, or in light of the latest findings of the WTO Appellate Body in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*. In its report, the Appellate Body pronounced that:
- the cost of production to be calculated for the purpose of determining normal value must be a cost in the country of origin;<sup>1</sup>
  - even though the source of the information regarding the cost does not necessarily need to be from "inside the country of origin", whatever cost information is adopted, from wherever it is sourced, must nonetheless be for the purpose of determining a cost of production in the country of origin;<sup>2</sup> and
  - that the European Union erred by selecting an export price as a surrogate raw material cost, because it clearly did not represent the cost of the relevant raw material in Argentina.<sup>3</sup>
- A foreign "benchmark" cost is not the "actual" cost and does not represent a cost "in the country of export". A foreign benchmark cost does not accommodate the conditions or the "competitive" nature of the cost that must be used in the constructed normal value.
- 4 In relation to the findings concerning the allegations that State-invested enterprises ("SIEs") provided raw materials at "*less than adequate remuneration*", the GOC notes that the SEF again attempts to make a basket finding that all SIEs supplying the relevant raw materials are

<sup>1</sup> See WT/DS437/AB/R, para 6.23, 6.24.

<sup>2</sup> *ibid*, at para 6.70, 6.73

<sup>3</sup> *ibid*, at para 6.81

“public bodies”. The basis for this appears to be that such a view was formed in previous cases, and that recently, in cases concerning steel reinforcing bar and rod in coil, “*it was considered reasonable to conclude that SIEs that produce and supply raw materials to manufacturers of rebar and rod in coils are public bodies*”. We respectfully refer the Commission to the GOC’s comments about the “public body” accusations made against Chinese SIEs in its response to the Government Questionnaire for *this* investigation. The Commission is also requested to refer to the GOC’s comments dated 1 September 2016 in the steel reinforcing bar and rod in coil investigations on the same topic. The GOC asks the Commission to heed and accept the views of the Anti-Dumping Review Panel, as well as the up-to-date and relevant WTO authorities, on this topic. In every review in which this topic has been considered by the ADPR, it has found that the Chinese SIEs concerned should not have been considered by the Commission to have been “public bodies. In the WTO, the principle that public bodies must possess or be vested with government authority is constantly reaffirmed. The plain truth of the matter is that Chinese SIEs do not possess government authority, nor is that authority vested in them.

5 In considering whether the alleged steel subsidy is “specific” the SEF states:

*Given that HRC and Galvanised steel are key inputs in the manufacture of downstream products (including of steel shelving units) it is clear that only enterprises engaged in the manufacture of these products would benefit from the provision of the input by the GOC at less than adequate remuneration.*

With respect, this does no more than to point out that steel shelving units – as the name suggests - are made of HRC and galvanised steel. HRC, CRC and galvanised steel are the basic steel raw materials for numerous products and for applications which are “steel” based. By pointing out that steel is used in products which are made from steel the Commission does not establish any “specificity” as required in the context of countervailing investigation. The steel raw material in question can be purchased as a raw material by a large range of industries and individuals, domestically and overseas. Even if such raw materials have been sold at “*less than adequate remuneration*” – a proposition the GOC strongly disagrees with – the alleged subsidy is conferred upon *anyone* who purchases steel, whether in the construction industry, the automobile industry, the electronic appliances industry, the steel industry, or in this case, the furniture industry. The labelling of the vast range of buyers and customers of HRC and galvanised steel across many different industries as being “downstream” of the producers of HRC and galvanised steel does not make those buyers and customers a “specific” group of enterprises or industries.

Our client supports the proposed outcome of this investigation and will appreciate its termination. At the same time it asks the Commission to review the specific issues that are raised in this submission and to reform its practices against Chinese exporters in future investigations, if not in this one as well.

Yours sincerely



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