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Ms J Reid
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commercial-international

By email

Dear Ms Reid

Investigation concerning aluminium road wheels from China Submission in response to Statement of Essential Facts No. 181

We refer to Statement of Essential Facts 181 ("the SEF") published by the Australian Customs and Border Protection Service ("Australian Customs") on 27 April 2012.

We have been instructed by the Government of China ("GOC") to make the following submission.

The GOC objects to the findings that a "particular market situation" exists in the Chinese aluminium industry and that there exists a program (the so-called "Program 1") for the provision of aluminium and/or aluminium alloy ("aluminium") by State invested enterprises ("SIEs") for less than adequate remuneration.

The GOC would be severely concerned by any decision to impose anti-dumping and countervailing measures on Chinese exporters of aluminium road wheels ("ARW") on the basis of these flawed findings.

Australian Customs is requested to fully and carefully consider the matters raised by this submission before proceeding any further.

A Particular market situation finding

The GOC objects to the finding that there is a "particular market situation" in the Chinese ARW market. In Appendix A of the SEF, it is concluded:

Customs and Border Protection preliminarily determines that the price of ARWs in China is likely to have been influenced by:

- *directly (sic.), lower input costs; and*

- *more generally, changes in the determinants of supply in both the ARWs and upstream industries.*

Customs and Border Protection considers that the resultant impact on ARW prices has been brought about in a significant part by the GOC influence within the aluminium industry. It is considered that this influence has resulted in significantly different ARW prices to what would have been the case if the relevant markets operated without significant GOC intervention.

...[A]vailable information and Customs and Border Protection's analysis indicates that these influences are likely to have had a material impact on the domestic price of ARWs in the investigation period, such that prices of ARWS in that market are no longer suitable for determining normal value under s.269TAC(1).

This outcome was based on an analysis of the impact of "broad overarching macroeconomic plans that outline aims and objectives for the Chinese aluminium industry" and more specific "implementing measures that go towards actively executing the aims and objectives of these policies and plans" on the "Chinese aluminium industry" as a whole. Upon finding that such plans do in fact influence the Chinese aluminium industry, the SEF then considers their impacts on the "determinants of supply of ARW".

It is the claimed influence of these policies on supplies and prices of aluminium that the SEF appears to consider is the "distorting" factor which contributes to the perceived unsuitability of prices of ARWs in the Chinese domestic market for normal value purposes under Section 269TAC(2)(a)(ii) of the *Customs Act* 1901 ("the Act").

1 Test applied to establish the existence of a particular market situation

Australian Customs' assessment of a particular market situation must conform to Australia's international obligations, specifically those that it has assumed within the WTO framework.

To the contrary, however, the SEF does not apply a proper or recognised test to establish the existence of a situation in which sales of aluminium in the period of investigation ("POI") did not permit a determination of normal value within the meaning of Article 2.2 and a proper comparison within the meaning of Article 2.4 of the WTO Anti-Dumping Agreement ("the AD Agreement"). Nor does it conform with the requirements of Section 269TAC(2)(a)(ii) of the Act, which is asserted to be the Australian legal provision which implements the rights of WTO Members in relation to a "particular market situation" under the AD Agreement.

It is unclear exactly what test has been applied to establish that a particular market situation exists. As noted above Australian Customs seems to believe it is sufficient to establish that prices of ARWs in the Chinese market are "different" to what they would have been without GOC influence. Australian Customs claims that it has found such a "difference", and that the "difference" was "significant[]". No finding is made as to what the price for ARWs would be without GOC influence. Without such a finding it would appear that the primary factor which Australian Customs suggests will be relied upon to find that a particular market situation existed during the POI is that prices of ARWs in the Chinese market were not the same as they would have been without GOC regulation of its domestic market.

This is irrelevant to a determination of normal value in the economy of a WTO Member in a

dumping investigation. Prices in every economy will be influenced by the actions of the government that regulates that economy. One need look no further than to Australia's Mineral Resources Rent Tax and its Carbon Emissions Trading Scheme to see clear examples of government policies that have a direct and substantial effect on the prices of goods. According to the logic of the SEF, a particular market situation could be said to exist in Australia's markets for minerals and carbon-intensive products.

The GOC submits that the assessment in the SEF is based on factors which are irrelevant to the existence of a particular market situation. At all times aluminium and ARW prices in China have been determined in accordance with supply and demand in their respective competitive markets.

2 Economic analysis used to establish a particular market situation

The economic assumptions and/or constructions applied to the assessment of a particular market situation as explained by the SEF are variously unscientific, unconventional, and unrealistic. The GOC is both concerned and surprised by the views expressed in the SEF about the operation of market fundamentals.

Primarily, the GOC does not believe the analyses presented can be said to reflect the actual circumstances in the Chinese aluminium industry. Those analyses appear to be based on a degree of economic theory and an unverified understanding of GOC documents, but there is no confirmation that this theory either reflects the experience of Chinese aluminium producers or demonstrates any impacts of GOC policy on the inputs of ARW.

For example, the SEF considers that structural adjustments, technological and operating efficiency saving measures, and various taxes, tariffs and rebates relating to aluminium and ARWs, and "subsidisation", were "likely" to have had a material impact on the domestic price of ARWs. There is no consideration as to what this impact may have been, even in the simplest of terms. The SEF seems happy to imagine that ARW prices are in some way distorted and - without further explanation or precision - to then proceed to make a finding on the existence of a particular market situation.

The GOC's review of the particular market situation finding in the SEF reveals a number of critical failures in the narrative offered to support it. For example, one of the two macroeconomic "policies" identified by Australian Customs is incorrectly characterised as such. The GOC has explained, consistently throughout the previous aluminium extrusions investigation as well as in its pre-PAD submission and GO and SGQ responses in this current investigation, that the *Guidelines for Accelerating the Restructuring of the Aluminium Industry* ("the Guidelines") is not a legally binding document. It is simply a research paper which considers the operation of the aluminium industry in light of the GOC's emissions reduction commitments under the United Nations Framework Convention on Climate Change. The SEF ignores these explanations, and instead determines that this document has some overarching macroeconomic influence. It is a matter of serious concern that this outdated and informal document continues to be elevated to such a level of importance, against the contrary explanations that have been consistently advanced by the GOC.

The GOC further notes that in other investigations Australian Customs has expressly avoided the use of hypothetical notions about the effect of "broad macroeconomic policies" as a basis for making a particular market situation finding. In Report 116, for example, Australian Customs

explains:

the NDRC Steel Policy represents Chinese government objectives for the broader steel industry, and Customs is unaware of the success or degree of policy implementation and cannot possibly assess the actual influence, if any, on HSS prices¹

In the SEF, several documents and laws that are claimed to contribute to the particular market situation are identified, and Australian Customs has again been unable to assess their actual influence on ARW prices.² Despite sharing the same inability as referred to in the extract from Report No 116 which is set out above, on this occasion Australian Customs has arrived at the opposite conclusion - that there was a particular market situation.

The particular market situation analysis in the SEF does not demonstrate an appreciation of the impact of policy implementation, whether such policies have in fact been adhered to and to what degree, or of the influence of policies on ARW prices. With respect, the GOC finds the economic reasoning to be half-understood at best, and unsupportable at worst. The SEF makes a vague judgement that a WTO Member having policies for its development thereby creates a situation which can in some way deprive its markets of their operation and effect in setting prices, leading to punitive measures against its exports.

Australian Customs has not articulated what it believes to have been the impact of these policies on the prices of ARWs in the domestic Chinese market, other than rendering them unsuitable for determining normal values under Section 269TAC(1). Through the identification of "directly lower input costs" and "changes to the determinants of supply", the SEF appears to be implying that prices of ARWs are lower than they would have been but for the "influences" of GOC policy. Not only would this route to a particular market situation finding be insufficient, it is not even stated within the SEF.

The SEF does not identify a single distorting factor or feature of the aluminium industry that can be said to create distortions which render ARW prices as being unsuitable for normal value purposes. With regard to the price of aluminium, the SEF states that:

the equilibrium price (the price at which the quantity demanded equals the quantity supplied) will be different to the price before the shift in supply.

The scenario explained in the SEF is one where, through increased efficiency, aluminium could be purchased at a lower cost. The GOC's market regulation does not prevent prices from rising or falling in response to supply and demand, and therefore those prices cannot be claimed to be "artificially low". The costs of inputs for ARW purchased within China are derived from commercial mechanisms that are well developed, in markets that are highly competitive. The GOC does not accept that an analysis of the type adopted in the SEF can lead to a valid conclusion that Chinese ARW prices are unsuitable for determining normal values under Section 269TAC(1).

¹ Certain Hollow Structural Sections Exported from the People's Republic of China, the Republic of Korea, Malaysia, Taiwan and Thailand Report 116, December 2006 at page 70

² As will be explained below, the GOC has serious concerns about the level of understanding of these documents within Australian Customs.

3 Reversal of previous finding of no particular market situation

The GOC is nonplussed by the turnaround in Australian Customs' attitude towards the suitability of Chinese prices of downstream aluminium products for normal value purposes. In this regard we refer to China's market for another aluminium product – aluminium extrusions. Like ARWs, aluminium is a major raw material input for aluminium extrusions. In 2010, at the end of its similar investigation into aluminium extrusions, Customs issued a report declaring its position in relation to the question of whether a particular market situation existed in the Chinese aluminium extrusions market.

Customs decided that there was no such particular market situation.

The GOC is not aware of the "new" or "different" factors which exist or existed in the case of ARWs which could cause Australian Customs to reverse its previous position. The POI in the aluminium extrusions investigation was FY2009, a time of severe instability in world markets due to the effects of the global financial crisis. World governments – including the GOC – took a very active approach towards the stimulation of their economies and industries in order to facilitate a recovery from those adverse financial conditions. How can it be found that there are actually greater "distorting" influences presently - two years later - in a period of smoother economic conditions, of even greater liberalisation and of further market development in China?

In Section 1.3 of the SEF, this contradiction is attempted to be explained away by the following statement:

In [the aluminium extrusions] investigation, Customs and Border Protection considered that market situation 'factors' were therefore limited (or isolated) to the market for the raw material for the investigated product, rather than the market for aluminium extrusions itself.

With respect, this is a hollow excuse. Nothing in the SEF indicates that particular market situation factors affect the ARW market to a greater extent than they affected the aluminium extrusions market two years ago.

B Program 1

The SEF expresses the conclusion that SIEs operating within China provided aluminium to ARW producers at less than adequate remuneration, and that this was a countervailable subsidy.

This conclusion turns on two findings. The first is the identification of SIEs as public bodies. The second is the determination of the adequacy of remuneration for aluminium produced by SIEs.

1 The finding that SIEs are public bodies

The GOC once again states that there is no program to provide a subsidy to China's ARW producers by the provision of aluminium at less than adequate remuneration. SIEs operating in the aluminium industry in China are not public bodies, nor do they provide, nor are they authorised or delegated to provide, aluminium to ARW producers for less than adequate remuneration.

The GOC has the same macro-economic interest in the proper operation of its markets as any WTO Member. In fact its interest may be even more pronounced than that of other WTO

Members, given its own sense of social and international responsibility, its concern for the welfare of its large population, and the pressure placed on it by the international community in relation to environmental regulation and sustainability

However the GOC has no interest or concern about the prices of aluminium; does not fix, set, guide or limit any prices for aluminium; and does not intervene in price determination by ARW producers or in the bargaining between sellers and buyers which set those prices.

The GOC has previously addressed how Australian Customs approaches the question of establishing that an entity is a public body within the meaning of Article 1.1(a)(1) of the WTO Subsidies and Countervailing Measures Agreement ("the SCM Agreement"), and Australian Customs' interpretation and application of the WTO Appellate Body findings in the so-called *Double Remedy case* (DS379).³ The GOC notes that many of the "indicia" used in the SEF to establish that SIEs are public bodies are the same as those that were identified in its previous Report 175, which dealt with aluminium extrusions.

In the GOC's previous submissions, it explains that Australian Customs has misunderstood many of the documents used to make its "public bodies" finding, and that it has failed to make out its case that SIEs exercise government functions. The GOC is disappointed that Australian Customs has failed to recognise these submissions, but has rather chosen to restate and rely upon its own faulty reasoning and its misunderstanding of those documents.

The findings with regard to Program 1 are opaque and circular. The SEF concludes that SIEs are public bodies – purportedly within the definition of that term provided by the Appellate Body in DS379 - because such entities exercise government authority in the performance of a government function, namely "the achievement of the GOC's industrial policies".

This is based on Section 36 of the *Law on the State-Owned Assets of Enterprises*, which provides:

A state-invested enterprise making investment shall comply with the national industrial policies, and conduct feasibility studies according to the state provisions; and shall conduct a transaction on a fair and paid basis, and obtain a reasonable consideration.

This is characterised in the SEF as a "direction requiring SIEs to comply with national industrial policies, albeit related to investments". Australian Customs considers this to be a "direction that SIEs carry out a government function, namely the achievement of national industrial policies", and says that a "significant body of circumstantial evidence" provides proof of the "public bodies" status of Chinese aluminium-producing SIEs.

The GOC takes issue with the finding that "the achievement of the GOC's industrial policy" is a governmental function. It is unclear how compliance with a law which is an emanation of government policy can be characterised as the exercise of a government function, or can in any way be considered to constitute the vesting of government authority. If this is the criteria that is to be adopted in consideration of public bodies, then every Australian company which is required to partake in any regulatory framework – such as Australia's emissions trading scheme,

³ Appellate Body report in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R) adopted by the WTO Dispute Settlement Body on 25 March 2011.

to give only one of many, many examples - could also be characterised as a public body. Such an outcome would be manifestly absurd.

Ultimately, the GOC is perplexed as to what it can do to prevent such a finding in the future. We expect that other WTO Members will be equally perplexed. In this case, and in previous cases where SIEs have been characterised as "public bodies", neither the Australian industry which has advanced those claims nor Australian Customs has been able to provide any evidence that points to a statute or other legal instrument which expressly vests government authority in SIEs. Given the alleged scope, effect and regularity of a program such as "Program 1", some evidence of the actual existence of such a statute or other instrument should not be hard to find.

In particular the GOC objects to the following statement:

It is further noted that the GOC was likely to be in possession of further information that may have assisted in Customs and Border Protection's analysis of these matters and provided further evidence of indicia 1 and 2 in particular (particularly the annual reports of identified SIEs), but that this information was not provided.

The implication that the GOC has withheld information, and the wild assumption that the information would have proved the case against it, are both incorrect and unfairly prejudicial. The reason why no evidence of the vesting of government authority in SIEs can be cited is because there is no such vesting and no government programs to provide aluminium to ARW producers at inadequate remuneration.

There has been no reasoned or adequate explanation, let alone any actual evidence, for the finding that it is GOC policy that SIEs provide inputs to the producers of the goods under consideration for less than adequate value – despite the numerous government and exporter questionnaires provided and verified in the investigation.

2 Choice of benchmark

The GOC does not agree with the proposed finding expressed in the SEF that aluminium is provided by SIEs at less than adequate remuneration. The GOC also disagrees with Australian Customs' choice and use of an external benchmark price to determine the adequacy of remuneration paid for aluminium.

The GOC considers that Australian Customs' view of the WTO Appellate Body's report in DS257⁴ as indicating that the material factor for using a benchmark is that "private prices are unsuitable due to market distortion, not the reasons for this distortion" is incorrect. The GOC submits that there is no legal right to use an external benchmark under WTO or Australian law, either at all or in the circumstances of this case.

There are no grounds for the adoption of external benchmark prices based on LME data with a mark-up for alloy. This constructed price fails to relate, reflect or otherwise connect with the prevailing market conditions in China.

⁴ United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada

C Evidentiary issues

The GOC is concerned about the treatment of the evidence it has provided. In particular, Australian Customs seems to be satisfied with its own interpretation of Chinese laws. Interpretation and translation of foreign law is a complex matter. It appears to the GOC that in many instances China's own explanations of its own laws have been rejected. We are not aware of the entitlement of Australian Customs to do this in the circumstances of this investigation.

The GOC is also concerned that much of the evidence relied upon in the SEF to establish the existence of a particular market situation has not been referred to the GOC for clarification in the Government Questionnaire or the Supplementary Government Questionnaire, nor has it been verified in any manner. This can lead - and has led - to mistakes in the interpretation of such documents.

For example:

- The *Nonferrous Metal Industry Adjustment and Revitalisation Plan* identified by Australian Customs as an implementing measure of GOC macroeconomic policy was published by the General Office of the State Council in 2009. The General Office of the State Council is an agency that assists leaders with the day to day administrative operations of the GOC. It does not have a legislative function. A document produced by the General Office cannot implement any policy, and therefore its characterisation as an "implementing measure" is entirely mistaken. The GOC considers that much of the evidence relied upon by Australian Customs is similarly misunderstood.
- During the investigation, Australian Customs sought no information as to the scope, effect or interpretation of any of the "measures to eliminate backward production capacity" identified by Australian Customs in the SEF. The *Notice of State Council on Further Strengthening the Elimination of Backward Production Capacity* was not provided by the GOC during the investigation. The GOC does not know what information the investigation team had before it in interpreting these documents and considers that Australian Customs has substantially misunderstood the nature of these documents and what impact they might have on the aluminium industry at large.
- The *Requirement on Entry into the Aluminium Industry* was considered by Australian Customs in the aluminium extrusions investigation, in the context of its particular market situation examination. In that investigation, Australian Customs concluded that:

...regulation of market entry and production efficiency for manufacturers has the potential to affect the prices of the finished product. However, Customs and Border Protection has no reason to consider these regulations amount to any more than reasonable efforts to encourage improvements to environmental standards, increased efficiency, and sustainable economic development. Customs and Border Protection is not satisfied that the GOC regulations have materially distorted the competitive conditions in the Chinese aluminium extrusion market.

As we have already said, it is unclear why Australian Customs has now changed its attitude in regard to these market entry requirements. No reason is provided in the SEF.

- The *Circular of State Council on Accelerating the Restructuring of the Sectors with Production Capacity Redundancy*, characterised within the SEF to be a "measure to curb production capacity redundancy" was published in 2006. The primary measure for curbing production redundancy is the elimination of backward capacity – the same capacity that is dealt with in the other measures to eliminate backward production capacity.
- Purchases of aluminium by the China State Reserve Bureau were considered during the aluminium extrusion investigation but were not referenced as being a "particular market situation" factor in that investigation. In the current investigation, however, Australian Customs fastens on those purchases as "evidence of the GOC's propensity to impact on aluminium prices generally" (our underlining). As the GOC has previously explained, this measure was undertaken in direct response to the global financial crisis. It has not happened since. Something which took place well before the POI, and which has not taken place since then, cannot be evidence of a distortion during the POI. The inclusion of this as an "implementing measure" is entirely incorrect, and the conclusion that it shows "a propensity to impact aluminium prices generally" is false. The GOC observes the elevation of the alleged significance of these now-historical CSRB purchases to a level which exceeds the significance that Customs ascribed to them during the very period in which they took place with grave concern.
- It is completely unclear to us why Australian Customs would choose to refer to the *Price Law of the People's Republic of China* as an implementing measure in the particular market situation assessment.

Finally, the GOC is also concerned with the references in the SEF to obscure, irrelevant or misconstrued material obtained from third parties and other sources which has been relied upon for the purposes of this anti-dumping and countervailing investigation. In particular we note the reliance on:

- European Commission and Canada Border Service Agency findings - these findings were based on different laws that applied non-particular market situation tests. The findings were made in relation to considerably different periods of investigation. It is both dangerous and wrong to suggest these findings were relevant to their consideration of the particular market situation matter.
- WTO Panel and Appellate Body findings in *China – Raw materials cases* (WT/DS394, DS395 and DS398) - the quoted recommendation in the SEF did not in fact apply to many of the measures listed in the SEF because lengthy sections of that Panel's findings were declared moot and of no legal effect. None of the matters from those findings referred to in the SEF actually support the particular market situation finding.
- Extracts from CHALCO's 20-F Security and Exchange Commission ("SEC") filings - these are unverified and generalised statements. The GOC finds it alarming that this untested information, taken from entirely different contexts, has been used in such strong support of the particular market situation and Program 1 findings. The GOC understands that companies are required to report to the United States SEC on their international operations, and that statements about regulatory impacts and risk are formal aspects of disclosure required by the SEC. These are a common feature of SEC filings. The CHALCO statements express the view that a company in China is subject to China's

environmental, occupational and health and safety laws and regulations, and that compliance with those laws and regulations may affect costs. This is neither surprising, nor is it prejudicial to China in any sense. We expect that there are literally thousands of SEC filings which refer to the impacts of government regulation in doing business in any part of the world you may care to mention. The GOC also notes that the CHALCO filing makes no mention of price distortions or government influence on the price of aluminium alloy. To the contrary, the filing states:

In addition, all our sales of alumina, primary aluminium and aluminium fabrication products are made at market prices.

- CITIC Group's 2009 annual report - similarly, the extract taken from CITIC Group's 2009 annual report is general and lacking in detail. It does not "note the role it plays in carrying out GOC policies" as the SEF suggests.
- Yunnan Aluminium Co Ltd company information from its website - the SEF also refers to Yunnan Aluminium Co. Ltd company information, which "states its role in implementing the objectives of the Yunnan Province 9th and 10th Five Year Plans". This information is not extracted within the SEF, however, the GOC has managed to track it down. The specific phrase on the Yunnan Aluminium website referred to by Australian Customs says this:

Carry forward the creation spirits of 'scientific preciseness, dedicated commitment, dareness to be first, strict management', implement Ninth and Tenth Five-Year-Plan strategic plan, with a global perspective, take a path of ecological aluminium production, adopt high and new technology daringly to reform tradition industry, and make great efforts to actualize the strategic objective of 'set a environment protection apotheosis, build a gardenesque factory, be a civilized employee, establish a first class enterprise'⁵

The GOC notes that the English used in this extract is poor. The statements made are exultant and ambiguous. The website from which it is extracted was last copyrighted in 2001. An objective person would likely decide that it is of no probative value whatsoever. To learn that Customs considers this to be an important piece of evidence in its finding of GOC influence on the price of aluminium and the "significantly different" ARW prices this influence has purportedly created is a severe disappointment to the GOC.

The GOC considers that the assessment of the existence of a particular market situation and the existence of the alleged Program 1 reflect a policy decision to treat China as a non-market economy, in contravention of Australia's international obligations towards China.

Any measures imposed in line with those findings would be a nullification and impairment of China's international legal rights and the trade benefits it expects to accrue to it in the exercise of those rights.

This matter poses serious risk to the trading relations between Australia and China.

⁵ <http://www.ytgl.com/english/wenhua/index.htm>

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It has systemic implications for all WTO Members.

Without prejudice to its rights to seek redress through other means, the GOC requests the CEO of Ausiralian Customs to sincerely and carefully review the SEF and to reconsider and reverse its particular market situation and "Program 1" findings expressed therein.

There is no particular market situation in the market for ARWs in China, and no program for the provision of aluminium to ARW producers at less than adequate remuneration.

Yours sincerely



Daniel Moulis
Principal