Canberra
T +61 2 6163 1000

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Mr G Gleeson
Director Operations 3
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

moulislegal

commercial+international

By email

Dear Mr Gleeson

Investigation concerning hollow structural sections from China
Submission in response to Statement of Essential Facts No. 177

We refer to Statement of Essential Facts 177 ("the SEF") published by the Australian Customs and Border Protection Service ("Australian Customs") on 23 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 iron and steel industry and that there exists a program (the so-called "Program 20") for the provision of hot rolled coil ("HRC") 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 hollow structural sections ("HSS") 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 iron and steel industry or in the HSS market. In Appendix A of the SEF, it is concluded:

> *...that the GOC has exerted numerous influences on the Chinese iron and steel industry, which are likely to have materially distorted competitive conditions within that industry and affected the supply of HSS, HRC, narrow strip, and upstream products and materials...*
>
> *...[Australian Customs] analysis of the information available indicates that prices of HSS*

in the Chinese market are not substantially the same (likely to be artificially low), as they would have been without the GOC influence. Customs and Border Protection considers that GOC influences in the Chinese iron and steel industry have created a 'market situation' in the domestic HSS market, such that sales of HSS in that market are not 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 iron and steel industry"* and more specific *"implementing measures that go towards actively executing the aims and objectives of these policies and plans"* on the *"Chinese iron and steel industry"* as a whole. Upon finding that such plans do in fact influence the Chinese iron and steel industry, the SEF then considers their impacts on the *"determinants of supply of HSS"*.

It is the claimed influence of these policies on supplies and prices of HSS that the SEF appears to consider is the *"distorting"* factor which contributes to the *"likely to be artificially low"* prices of HSS in the Chinese domestic market. On that basis the SEF proposes that such prices will be excluded from consideration 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. The SEF does not apply a proper or recognised test to establish the existence of a situation in which sales of HSS did not permit a determination of normal value in 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 HSS in the Chinese market are not substantially the same as they would have been without GOC influence.

No finding is made as to what the price for HSS 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 a particular market situation existed is that prices of HSS in the Chinese market were not the same as they would have been without GOC regulation of its domestic market. But 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 Australian Customs' assessment is based on factors which are irrelevant

to the existence of a particular market situation. At all times HSS prices have been determined in accordance with supply and demand in a competitive market.

2 Economic analysis used to establish a particular market situation

The economic assumptions and/or constructions allegedly 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 as to 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 iron and steel industry. Those analyses appear to be based on a degree of economic theory, but there is no confirmation that this theory reflects either the experience of Chinese iron and steel producers or the impacts of GOC policy on the inputs of HSS.

For example, the SEF considers that structural adjustments, technological and operating efficiency saving measures, export restrictions in relation to coke and "subsidisation" were *"likely"* to have caused a fall in the price of HSS. Australian Customs seems quite happy to assume this has occurred, however, there is no evidence provided of a lower price or of any increases in efficiency in the production of HRC.

The GOC notes that Australian Customs has previously taken the position that hypothetical notions about the effect of GOC policy on HSS price cannot form the basis for a finding of the existence of a particular market situation. In Report 116, 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 prices*[1]

There is nothing in the particular market situation analysis in the SEF that shows any appreciation of the impact of policy implementation, whether such policies have in fact been adhered to and to what degree, or of their influence on HSS prices. With respect, the GOC finds the economic reasoning to be half-understood at best, and simply unsupportable at its 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.

The GOC submits that Australian Customs has not identified a single distorting factor or feature of the iron and steel industry that can be said to create *"artificially low prices"*. 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.*

In its finding that GOC policy influences have increased efficiency and caused the supply curve of the HSS market to shift to the right, the SEF endorses the view that the price of HSS is an equilibrium price.

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[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

The scenario explained in the SEF is one where, through increased efficiency, HSS 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, therefore the price cannot be claimed to be *"artificially low"*.

B Program 20

The SEF expresses the conclusion that SIEs operating within China provided HRC to HSS 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 HRC 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 HSS producers by the provision of HRC at less than adequate remuneration. SIEs operating in the iron and steel industry in China are not public bodies, nor do they provide, nor are they authorised or delegated to provide HRC to HSS 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 HRC; does not fix, set, guide or limit any prices for HRC; and does not intervene in price determination by HSS 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* (WT/DS379).[2] The purpose of this submission is not to reiterate the GOC's positions. Nonetheless we remind Australian Customs of those submissions and again request that close attention be paid to them.

As was the case on the previous occasion on which Australian Customs made such a "public bodies" finding, the GOC again finds that there is no evidence for the proposition asserted under the tests which Customs claims to apply in assessing the issue.

The findings with regard to Program 20 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"*.

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[2] 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.

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 that SIEs carry out a government function, namely the achievement of the GOC's national industrial policy"* and that Australian Customs considers the overall goals of these policies to be to *"advance and improve the Chinese steel industry, which is clearly a government mandate and function"*.

The GOC takes issues with the finding that *"the achievement of the GOC's industrial policy"* is a government 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 anyway 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, to give only one of many, many examples - could also be characterised as a public body. Such an outcome is 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 indicates 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 20", 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 can be cited of the vesting of government authority in SIEs is because there is no such vesting and no government programs to provide HRC to HSS 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 HRC 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 HRC.

References in the SEF to the GOC's submissions concerning Chinese domestic HRC costs and comparisons seem to be drafted in such a way as to endorse or signify agreement on the GOC's part with the use of a "benchmark" from outside the country in which the "provision" took place for determining adequacy of remuneration in accordance with Article 14(d) of the SCM Agreement. This is wrong. The GOC has expressly noted in its previous submissions that:

> *By citing DS257[3] in this way, the GOC is not to be taken to be in agreement with the Appellate Body's formulation of an exception to the use of prices in the country of provision as stipulated by Article 14(d).*

The GOC considers that Australian Customs' view of the WTO Appellate Body's report in DS257[4] 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.

In addition, the GOC does not agree that *"private (non-SIE) prices for HRC were materially distorted"*. As noted above, the SEF fails to demonstrate such distortion in its particular market situation analysis.

With respect, the reasoning for rejecting prices of imported HSS as a benchmark is considered to be entirely illogical. The SEF argues that import prices for HRC in China in the investigation period are not reasonable for establishing a benchmark *"as they would logically need to be at levels that are comparable to the GOC-distorted domestic HRC price in order to be a viable alternative"*. If such prices were distorted to the point where they were *"less than adequate remuneration"*, then there would be no incentive for an external producer to continue to export them.

There were no grounds for the adoption of the external benchmark prices based on average verified HRC prices incurred by those other exporters cooperating with the investigation from Korea, Malaysia and Taiwan. This is a chimera that fails to relate, reflect or otherwise connect with the prevailing market conditions in China.

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 to do this in the circumstances of this investigation.

The GOC is also concerned that there is no evidence of consideration having been given to the

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[3] Appellate Body report in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, (WT/DS257/AB/R), adopted by the WTO Dispute Settlement Body on 17 February 2004.

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

evidence supplied by the GOC in its response to the Second Supplementary Government Questionnaire.

Finally, the GOC is concerned with the references in the SEF to material relied upon from third parties and other sources, which has not been tendered for the purposes of this anti-dumping and countervailing investigation. In particular,

1 European Commission and Canada Border Service Agency findings - these findings were based on different laws that applied non-particular market situation tests and that 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.

2 WTO Panel and Appellate Body findings in *China – Raw materials cases* (WT/DS394, DS395 and DS398), referred to in relation to exports of coke - the quoted recommendation did not in fact apply to many of the measures listed in SEF177 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.

3 "General Steel Holdings" information (SEF p.97) – the attention paid to this information in the SEF, the use to which it is put and the reliance placed on it, is startling. This information was not verified in any form. We have not been able to locate it within the public record maintained for the purposes of this investigation. The GOC finds it alarming that this untested information, taken from an entirely different context, which is unknown to the parties whose interests it apparently critically affects, has been used in such strong support of the particular market situation and Program 20 findings. The General Steel Holdings information is not at all persuasive in relation to those finding, and the information provided by the GOC and cooperative exporters points to a different outcome.

   The GOC understands that companies are required to report to the United States Securities and Exchange Commission ("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 General Steel Holdings 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.

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The GOC considers that the assessment of the existence of a particular market situation and the existence of the alleged Program 20 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.

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 Australian Customs to sincerely and carefully review the SEF and to reconsider and reverse its particular market situation and "Program 20" findings expressed therein.

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

Yours sincerely

Daniel Moulis
Principal