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21 May 2021

Director - Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra
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By email

Dear Director

Investigation concerning painted steel strapping Government of China comments concerning SEF 553

As you know we are instructed, together with Dentons, to represent the Government of the People's Republic of China ("the GOC") in this investigation.

We refer to Statement of Essential Facts No. 553 ("the SEF") published by the Anti-Dumping Commission ("the Commission").[1]

A Program 20, "hot rolled steel provided by government at less than fair market value", does not exist 2

B Alleged "particular market situation" does not exist and "proper comparison" was not affected 3

1 No particular market situation in the painted steel strapping market in China 3

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At the outset, the GOC wishes to express its appreciation for the SEF's finding that the goods exported by the cooperative exporter from China were not dumped. The GOC also agrees with the SEF's finding that any subsidy received by the cooperative exporter is not actionable, given that the level of subsidy is negligible. As such, the GOC welcomes the SEF's proposal to terminate the investigation as against the cooperative Chinese exporter. The GOC would also like to commend the SEF's acknowledgement

1 See Doc 064 – SEF 553.

and engagement with the information provided by the GOC in the Response to Government Questionnaire.

On the other hand, the GOC also wishes to express its continued concerns with respect to the SEF's approach towards several key issues concerning the treatment of the Chinese economy, specifically the Chinese steel industry and steel producers, as well as determinations regarding state-invested enterprises ("SIEs").

The GOC provides its detailed comments as now follow.

A Program 20, "hot rolled steel provided by government at less than fair market value", does not exist

Firstly, the GOC welcomes the SEF's finding that *"no benefit has been conferred"* under the alleged Program 20. Particularly, the GOC supports the SEF's view that the hot-rolled coil ("HRC") price that should form the basis of the determination of "adequacy of remuneration" is the domestic HRC market price in China, being the prices that reflect the prevailing market conditions in the country of provision, as required by Article 14(d) of the *WTO Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement").

This approach is not only factually honest. It is also consistent with the latest WTO jurisprudence that emphasises the importance of making such a determination by reference to the specific prevailing market conditions in the country of provision. This is reflected in the WTO Panel Report in *United States – Countervailing Measures on Softwood Lumber from Canada (US-Softwood Lumber VII).*[2] The GOC supports the SEF in its adoption of private market prices in China as the price that reflects prevailing market conditions in China.

Secondly, the GOC notes that in a countervailing investigation of the alleged Program 20 the Commission is required to determine whether the HRC was indeed provided by a government. In this regard, the SEF appears to be incomplete. There is a suggestion that such determination was presumed, on the basis that *"the Commission has previously found that Chinese SIEs producing steel raw materials are 'public bodies' for the purposes of section 269T."* With respect, the GOC advises that such a presumption is incorrect and unsatisfactory. The GOC would like to reiterate its position on this important issue, as stated in the Response to Government Questionnaire:[3]

> *The GOC also wishes to emphasise that its position on public bodies has been officially supported by the Australian Anti-Dumping Review Panel ("ADRP") and its predecessor the Trade Measures Review Officer ("TMRO") time and time again. The legal system and decision-making hierarchy of the Australian anti-dumping system has repeatedly ruled, at the review level, that there is no evidence that the Chinese steel suppliers – especially suppliers of HRC, whether SIEs or non SIEs - are "public bodies".*
>
> *Whether or not a SIE is also a "public body" is a matter that must be factually determined in the context of the applicable law. It cannot be presumed to be the case. To be clear, there are two elements to this test. The first is that the government exercises "meaningful control" over the*

2 See, Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada,* WTO Doc. WT/DS533/R (24 August 2020) *(US-Softwood Lumber VII),* in particular at paras 7.60, 7.69, 7.89, 7.111 and 7.112.

3 See, RGQ, at pages 22 and 23.

> *entity. The second is that, as a consequence, the entity itself possesses and exercises governmental authority. WTO jurisprudence makes clear that "meaningful control" of an entity by government is not sufficient to establish that an entity is a public body, unless that control properly evidences that the entity possesses, exercises or is vested with governmental authority.[4] Thus, there are two elements, and both must exist and be proven to establish the "public body" proposition.*

The GOC respectfully advises that it would be incorrect and non-compliant with the SCM Agreement to adopt a "default" presumption that the diverse and vast number of SIEs operating in China are "public bodies", or are otherwise representative of the GOC, when the true position is that they are commercially driven business entities. The contrary position must be established if it is to be applied. The GOC respectfully requests the Commission to correct any such error in the termination or final report, and to clearly state the decision and the basis of such decision with respect to "public body".

B Alleged "particular market situation" does not exist and "proper comparison" was not affected

1 No particular market situation in the painted steel strapping market in China

The GOC is disappointed that the SEF has once again applied the *"particular market situation"* label in to the Chinese steel sector, this time against the painted steel strapping industry in China. The finding appears to be based on these observations:

- that the GOC has put in place various policies regarding Chinese steel industries;
- that the GOC has encouraged reform in the sector in response to the ever-changing global economy, the risk of over-capacity, and growing environmental concerns.

There has been no quantitative or qualitative assessment of the effect of these policies or regulatory measures, and the Commission has not sought to verify its understanding and assertions regarding the effect of these policies or regulatory measures. The GOC disagrees with the view that the existence of such policies, or the fact that government policies and laws may "influence" or be influenced by a particular industry, somehow renders the Chinese market for painted steel strapping as being subject to a *"particular market situation"*. There is nothing *"distinct, individual, single, specific"* about the situation of the painted steel strapping market in China.[5]

Indeed, it appears that the only "distinctive" feature that the SEF could identify was lower HRC/CRC prices in China, as compared to Korea and Taiwan. The differences between the HRC/CRC prices in China and those other markets were identified as evidence of *"the degree"* of the GOC's *"significant influence over the Chinese steel market"*. The GOC strongly submits that such an opinion is unhinged from a true appreciation of Chinese market conditions, which are the most competitive in the world in terms of the number of entities, the demand for steel, and the scale of industrial development that continues to take place in China. The GOC does not regulate or control steel prices, and that of course extends to HRC/CRC and painted steel strapping. The SEF provides no evidence that the alleged governmental policies and regulatory measures would necessarily result in or would be likely to cause lower HRC/CRC prices in China, or that any price differences between the Chinese market and other

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[4] WT/DS436/AB/R, para 4.36.

[5] *Panel Report, Australia – Anti-Dumping Measures on A4 Copy Paper, WTO Doc. WT/DS529/R (27 January 2020)*, at [7.22]

markets are a result of governmental influence, rather than being a result of China's own economic conditions, market forces and strong competition.

Further, the GOC takes issue with the following comments in the SEF:

> *Simply put, Chinese firms selling and purchasing in China's steel markets set prices and make purchasing decisions that are influenced by the directives and policies of the GOC, competition with SOEs that reflect the economic, social and fiscal goals of the GOC as well as private firm competition on price, product and market share.*
>
> …
>
> *The Commission considers the GOC's involvement and influence over the steel industry to be a primary cause of the prevailing structural imbalances within both the broader steel industry and the HRC/CRC and painted steel strapping markets. The issuance of planning guidelines and directives along with provisions of direct and indirect financial support, creates a domestic market that benefits domestic producers and supports inefficient enterprises, but does not support access and therefore competition from foreign producers.*
>
> …
>
> *It is the Commission's view that these features have the effect of limiting foreign competition and that the price of HRC (and therefore CRC and painted steel strapping) would be substantially different in a market not characterised by GOC influence.*

These comments are self-contradictory and not evidence based.

The GOC does not have any policy that either directs or encourages lower steel prices in the Chinese domestic market. Instead, there are various measures that are aimed at reducing capacity, reducing over-competition and increasing environmental standards. These initiatives, which are no different from regulatory initiatives that can be observed in other world economies, would be more likely to increase costs and prices. The GOC disagrees with the suggestion that the "normality" or "particularity" of the market situation in China should be assessed on a benchmark found in a *"market not characterised by GOC influence"*. The WTO Anti-Dumping Agreement does not and cannot require a market to be free from national governance of the fiscal, social, and environmental matters for which its government is responsible.

The reality is that the GOC does not interfere or influence the daily operation and price-setting of steel in the Chines market. The SEF should have come to the same view about the non-existence of a *"particular market situation"* in China as it has for Vietnam.

Further, the GOC notes that the SEF fails to acknowledge that the most influential factor in the cost of production and the prices of steel products in China is not the GOC's policies, but the cost of iron ore. The Chinese steel industry is heavily reliant on foreign inputs, especially from Australia. We respectfully refer the Commission to the following comment form the GOC's Response to the Government Questionnaire:[6]

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[6] RGQ, at pages 8 to 10.

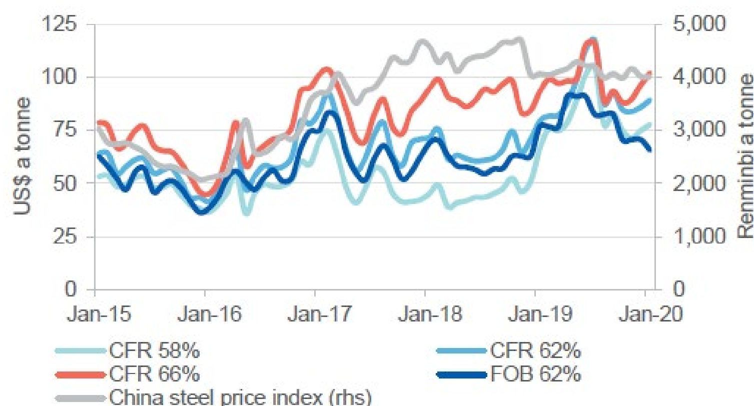
a. *The Chinese steel market is the most competitive market in the world. It is driven by dynamic supply and demand. It has the highest number of market participants of any country. Those market participants are extremely diverse. There is nothing "artificial" about costs in the Chinese steel market, whether that artificiality is alleged to be "low" or "high".*

b. *Steelmaking in China is highly reliant on imported raw materials, especially iron ore. Production and sales of primary steel products such as HRC are not subject to any price control. Nor do they benefit from any substantive subsidies– as has been proven over and over again in Australian-based investigations. HRC and other steel products produced and traded in China can only reflect fair market value. The notion that the Chinese Government or any "public body" is engaged in subsidising the purchase of HRC or other steel raw materials by way of selling such product at "less than fair value" or "less than adequate remuneration" is simply fanciful.*

c. *For the period 1 April 2019 to 31 March 2020, the import volume of iron ore was [CONFIDENTIAL TEXT DELETED - number] MT, export volume was [CONFIDENTIAL TEXT DELETED - number] ton, and China's production volume was [CONFIDENTIAL TEXT DELETED - number] ton. With regard to the apparent consumption volume, the apparent consumption of iron ore was [CONFIDENTIAL TEXT DELETED - number] MT in China during the POI, and the import volume accounted for [CONFIDENTIAL TEXT DELETED - number]% of the total consumption. The data indicates that the iron ore industry in China is import-oriented. As iron ore is one of the main raw materials of steel product, the price of its downstream product, including the GUC, is closely aligned to the prices of iron ore. That is to say, one of the most significant factors in a Chinese steel producer's cost, and the steel price in China, is the price of iron ore from Australia. We respectfully request the Commission to conduct independent research and inquiries with the Australian iron ore industry to confirm this understanding.*

d. *Steel prices in the Chinese market have trended in a similar fashion to the cost of the major raw material input, iron ore, in recent years, as noted by the Australian Government's own research:*

Figure 4.3: Iron ore price by grade and China steel price index



Notes: The OCE forecasts the FOB (free on board) Australia iron ore price, not the benchmark CFR (cost and freight) North China iron ore price.

Source: Bloomberg (2019) Metal Bulletin; Department of Industry, Science, Energy and Resources (2020)

Figure 4.4: Iron ore price vs China steel production growth

Notes: China import Iron ore fines 62% Fe spot (CFR Tianjin port)
Source: Bloomberg (2019) China import prices; World Steel Association (2019)

e. *As noted in the same report referred to in d, Chinese steel production and the Chinese steel market have been driven mostly by strong domestic consumption, supported by a strong property market and major infrastructure projects. The prices and costs of steel production, including HRC and other inputs used for the production of the GUC, are determined by the relevant economic factors and conditions in China, and are influenced by international costs. They are no more and no less "particular" than the economic factors and conditions that exist in other countries. It should not and cannot be expected that the economic conditions relevant to HRC, or other steel products in China, would be identical to the conditions in any other country, whether that be Australia, Korea, or Vietnam.*

As such, unless the Chinese steel market was to behave in a way that is inconsistent with market prices of iron ore, it is plainly impossible for any policy of the GOC to have a comparatively significant influence on the cost and prices of steel products in China. Any question about why HRC/CRC prices in China are lower than those in Korea and Taiwan can be answered by the cost of steel making, which sometimes will be cheaper in China, and other times not; the large number of competitors and strong competition in the domestic market; differences in product specification; economic conditions; and etc. The SEF does not explain why these market factors have been ignored and why the *"government influence"* theory is blindly preferred. Indeed, as the analysis in the SEF itself shows, the Chinese producers were clearly more cost efficient in their steel processing compared to their Australian and Vietnamese competitors:[7]

The Commission has verified the HRC and CRC costs associated with the production of the goods and like goods during the investigation period for all producers. The Commission found that coil costs (whether hot or cold rolled) represented a significant and broadly consistent proportion of the CTM of the goods and like goods. This is depicted in the table below.

Country of production	Percentage of total CTM made up by HRC/CRC	Percentage of raw material costs made up by HRC/CRC
Australia	70%	100%
China	90%	99%
Vietnam	83%	95%

Table 9 – Raw material coil as a proportion of CTM of the goods[24]

[7] SEF, at pages 31 and 32

> *The proportion of CTM represented by raw material costs for Australian producers is higher than that for Chinese and Vietnamese producers primarily due to higher manufacturing overheads.*
>
> *Cooperating exporters from both China and Vietnam advised the Commission that raw material prices are influential in setting selling prices for the goods and like goods, with lower raw material prices resulting in lower painted steel strapping prices.*
>
> *Given the high cost proportion of HRC in the production of the goods and like goods and its influence on pricing decisions, the Commission considers that HRC price has a significant impact on both the production cost and selling price of the goods and like goods.* [underlining supplied]

The *"Percentage of total CTM made up by HRC"* indicates that even with lower HRC/CRC costs the Chinese producers were still able to convert HRC/CRC to the finished goods at much lower conversion costs – likely due to lower manufacturing overheads and overall better efficiency. That is, even if one was to assume that HRC/CRC costs for producers in Australia, Vietnam and China are the same, the Chinese producers would still have enjoyed a 20% cost advantage over the Australian producer, and a 7% advantage over the Vietnamese producer. If the same scenario is true with respect to the steelmaking process, then it would also explain the lower cost/lower prices of HRC/CRC in China. This is evidence that Chinese producers enjoyed comparative advantages due to their better efficiency at manufacturing itself, and not due to any alleged "government influence".

2 "Proper comparison" analysis is flawed

The GOC would also like to express serious concerns with respect to the SEF's approach towards the question of whether the existence of a particular market situation could then lead to a finding that the domestic sales of like goods do not *"permit a proper comparison"* with the export sales, meaning that the domestic sales could not form the basis for a normal value.

The SEF states:[8]

> *The GOC submitted as part of its RGQ that the influence on markets due to different market factors does not mean that prices in the respective markets cannot be properly compared for determining a dumping margin and that under the opposite view, no proper comparison could ever be undertaken as no two markets are the same. The Commission does not share this view. The Commission considers that, if there is a finding that domestic sales and export sales are not equally impacted by a market situation, such a finding may render domestic sales not suitable for the purposes of proper comparison.*

The GOC disagrees with this view in several respects.

Firstly, the SEF has not established that the alleged market situation affected the Chinese exporter's domestic sales of painted steel strapping any differently to its Australian sales. The alleged effect of the particular market situation is a lower cost of production in China. As already discussed above, there is no evidence that the cost of HRC/CRC in China reflects anything other than a competitive market price. In any case, it is not disputed that there are no differences in the cost of production of the goods sold in the domestic market as compared to those exported to Australia. The cooperative Chinese exporter

8 SEF at page 44.

advised the Commission in its response to the Exporter Questionnaire that the main factor for price negotiation in both the domestic and the export markets is the cost of the product. There is no difference.

The only difference, according to the SEF, is to be found in the competitive market conditions in China and Australia respectively. We see major flaws in the SEF's approach to this question.

The proposition that because the cost of production in China is on average lower, therefore all competitors in that market compete on the same basis and have no competitive advantages or disadvantages between them is incorrect and baseless. The fact is that Chinese producers do not all share the same, fixed, or regulated costs at an *"artificially low"* level. The truth is that the Chinese steel market is highly dynamic and highly competitive, and that steel prices are unregulated.

The fact that the cost of production and prices in China may be lower than those in Australia, or that Chinese exporters may have a competitive advantage over there competitors in Australia, merely reflects the comparative differences between different producers in different countries and the differences in the markets in which they operate. This says nothing about whether the alleged particular market situation *in the Chinese market* has had a different effect on domestic pricing and export pricing. As Table-9 in the SEF shows, Australian producers are comparatively disadvantaged due to higher manufacturing overheads, and potentially poorer efficiencies in steel processing. This has nothing to do with the cost of HRC/CRC in China and Australia. Such comparative advantages and disadvantages are a natural and expected part of international trade. Chinese producers should not be discriminated against for being more cost efficient in their production of steel products. They are more cost-efficient whether they sell the product in the Chinese market or to Australia. Or, to put it more clearly, there is nothing about Chinese market conditions that makes them more or less cost-efficient when producing the product concerned for one or other of those markets.

According to the SEF's logic, once it is determined that a particular market situation in the form of "lower costs" exists, the conclusion that the situation impacts on a proper comparison would be inevitable. We refer to the following statement from the SEF:

> *Specifically, Chinese exporters enjoy a cost advantage that either manifests as an increased margin at the prevailing level of competitive pricing in the Australian market, a low export price that undercuts the prevailing level of competitive pricing, or a combination whereby the Chinese manufacturer can enjoy a higher margin while still undercutting other market participants. In other words, the effect of the market situation on export price is to modify the conditions of competition in Australia to the benefit of Chinese exporters and, to the extent that benefit manifests as a low price that undercuts the prevailing level of competitive pricing in Australia, to the detriment of all other market participants in that market.*

That is, whether the Chinese exporters sell the goods in Australia at prices that are:

- higher than the prices in China;
- the same as the prices in China; or
- lower than the prices in China,

makes no difference to the SEF's "proper comparison" determination. This indifference in result suggests that the SEF's analysis has no informative or probative value to the determination of a "proper comparison" at all.

It appears to us that the only scenario in which the SEF's analytical method would result in a conclusion that a so-called particular market situation does not "affect the comparison" would be where the exporter's home market and the Australian market have identical conditions of competition and identical prices. Introducing a requirement of sameness of markets in the evaluation of normal value contradicts the principle of comparative advantage on which international trade is predicated. Such a scenario – identical market conditions in different countries - does not exist in the real world, and must be rejected. If the Commission's thinking were to be upheld, different market conditions between a home market and an export market could be ruled to affect the comparison of the normal value and the export price. In such a case, based on the Commission's logic, an investigating authority need not be troubled by the requirement to use an exporter's actual prices or the exporter's actual costs in the country of export in its dumping margin calculation. The reason for this - that the exporter had tried to sell its goods into the export market at a higher and therefore different price to the price at which it sold the goods in its domestic markets. The price discrimination practice of not dumping would therefore be regarded as a practice that does not permit a proper comparison between prices. This is absurd.

The SEF is therefore the latest instalment in a continued failure by the Commission to give real meaning and effect to the phrase *"permit a proper comparison"* in the context of Article 2.2 of the WTO *Anti-Dumping Agreement*. The approach observed therein undermines the fundamental principle of comparative advantage in international trade, and risks practical invalidation of the primary rules for the determination of whether or not goods are "dumped".

C Constructed normal value must be based on "cost in the country of origin"

The GOC is also disappointed to note that the SEF proposes to calculate the normal value for Chinese exporters by reference to the *"competitive market costs"* of CRC in Korea and Taiwan. The GOC respectfully advises that such approach is inconsistent with both Australian domestic law and the WTO *Anti-Dumping Agreement*.

Regardless of the Commission's view on *"particular market situation"*, the GOC urges the Commission to pay attention to the clear message emerging from the various WTO Appellate Body reports on the subject of an exporter's cost of production. It is abundantly clear that these costs must be determined in accordance with Article 2.2 of the WTO *Anti-Dumping Agreement*. This means that the Commission is obliged to determine costs of production in the country of origin in a manner that correctly and truthfully reflects the cost of production of the goods in that country.

The GOC wishes to again emphasise its clear opinion that the Commission cannot adopt the approach of "parachuting in" an out-of-country cost into the cost construction for the normal values for Chinese exporters. The grounds to do so do not exist. To adopt such an approach would amount to a clear contravention of the WTO *Anti-Dumping Agreement*, and of the rulings of the panels and the Appellate Body with respect to the relevant Articles of that Agreement. The adjudicative arm of the WTO's Dispute Settlement Body has made clear in *EU - Biodiesel (Argentina)* and *EU – Biodiesel (Indonesia)* that, no matter how it is achieved (whether through adaptation or otherwise), an investigating authority must ensure that it arrives at the actual "cost of production [of the exporter] in the country of origin".

The GOC submits that it is now crystal-clear that an investigating authority cannot rely upon what it deems to be an external "benchmark" cost in an exporter's constructed normal value. As per the Panel report in *EU – Biodiesel (Indonesia)*:

> *…it is not sufficient to simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin.*[9]

The GOC respectfully submits that the Commission cannot, legally or in good conscience, surrogate costs which are unrelated to the cost of production in China as part of the cost of production in China. That would be both factually and legally incorrect.

If the Commission, for any reason, considers that the Chinese producer's cost of production can be rejected on the basis of "abnormality" caused by any cost "distortion" in the Chinese steel market, the Commission must properly identify and specify the effect of the "distortion". The GOC would consider it to be unacceptable, and an act of bad faith, if the Commission were to simply come to the conclusion that the Chinese steel market is "distorted" with "artificially low" prices/costs simply because it is able to find a foreign market with higher prices/costs. That would be inconsistent with the rules and principles of the WTO agreements and consequently unlawful.

The SEF's proposal to replace the cost of CRC incurred by producers in China, with the *"competitive market cost"* of CRC in Korea and Taiwan simply fails to meet the requirement to determine the cost of production or *"competitive market cost"* in China. There is no evidence whatsoever that the foreign benchmark cost preferred by the SEF can somehow reflect or represent the cost of production in China. The fact that the CRC price in China might be lower *or* higher than that of another country can be attributed to many economic factors. Indeed, to adopt the SEF's logic, it would be equally possible to assert that the higher prices in Korea, Taiwan, or Australia are due to the influence of governments in those countries. Such reasoning is wrong, baseless, and dangerous. With respect, the GOC advises that the proposition that the prices in a market can only be considered to be "competitive market price" of a country, if it is at the same level as *other countries,* finds no support in economics or law.

We note the SEF's acknowledgement that the market for CRC/HRC in China were indeed "competitive":

> *As part of its RGQ, the GOC rejected the assertion that raw material costs for the goods are artificially low. It submitted that the Chinese steel market is the most competitive in the world with more participants than any other counties and that purchases of raw materials are competitive and based on market conditions. Most steel production is used within the Chinese domestic market. However, China is a significant steel importer and a net importer of both HRC and CRC.*
>
> *Based on the information available to the Commission, the Commission agrees with the GOC that the Chinese domestic market for CRC and HRC is competitive. However, the Commission disagrees that prices are not "artificially low" and is satisfied the evidence from the verification of the cooperative exporter's raw material costs and MEPS data indicates Chinese manufacturers have access to cheaper raw material inputs.*[10]

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[9] EU – Biodiesel (Indonesia), para 7.30.

[10] SEF

Accordingly, even if the Commission is correct in applying a “competitive market cost” standard in determining the cost of production under Article 2.2, which is not supported by the text of the Anti-Dumping Agreement, the only correct conclusion must be that the prices paid by Chinese producers of painted steel strapping for the CRC/HRC purchased in China, being the cost of production of the goods in China, indeed reflected the “competitive market cost” in China. The proposed transposition of “competitive market cost” in another country to be the “competitive market cost” in China is factually and legally incorrect.

The GOC respectfully urges the Commission to respect Australia’s legal obligations under the WTO Subsidies and Countervailing Measures Agreement and the WTO Anti-Dumping Agreement and to cease the anti-competitive and discriminatory treatment of Chinese steel producers in these investigations.

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Yours sincerely

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Partner

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