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To Ms Andrea Stone, Director, Operations 2 - Australian Anti-Dumping Commission

From Andrew Lumsden / Andrew Percival

Date 19 September 2014

Subject **Dumping & Subsidy Investigation – Stainless Steel Sinks – Comments of the Government of China concerning new subsidies in the supplementary government questionnaire**

Dear Ms Stone Non-Confidential

We refer to your emails dated 22 August 2014 and 26 August 2014 submitting a supplementary government questionnaire and an addendum to the supplementary government questionnaire (**Questionnaire**) to the Government of the People's Republic of China (**GOC**) for the GOC to complete.

In addition to the GOC's response to the Questionnaire, we make the following submissions on behalf of the GOC.

The GOC is concerned about the Anti-Dumping Commission's (**Commission**) investigation into new subsidy programs (**New Subsidy Investigation**), which programs were not included in the written application of the Australian industry (**Application**) and were not identified as causing injury to the Australian industry, in the course of the investigation. It is unclear to the GOC why subsidy programmes, assuming they exist, that have not caused injury to the Australian industry are now being included in the investigation.

Article 11.1 of the WTO Agreement on Subsidies and Countervailing Measures (**SCM Agreement**) provides

> Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of *any* alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry. (emphasis added)

Article 11.6 provides

> If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation*, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation*. (emphasis added)

Article 11.2 sets out the evidentiary requirements for the initiation of an investigation by either a written application or the authorities' initiative, that is,

> sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury…, and (c) a causal link between the subsidized imports and the alleged injury.

Article 11.2 further provides

> Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

Finally, Article 11.3 requires the authorities to

> review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

This investigation was initiated by a written application of the Australian industry and hence not by the Commission's initiative. However, the Application does not identify any of the new subsidy programs set out in the Questionnaire; nor does it provide any evidence to show the existence or the amount or the countervailability of the subsidies; nor does it claim that the subsidies have led to a material injury to the Australian industry.

The Application forms the basis for the Commission to initiate the investigation. Accordingly, the Commission's investigation must be limited to the subsidies identified in the Application. Apparently, the Application itself does not request the Commission to consider any other subsidy programs other than those identified in the Application.

The Commission's New Subsidy Investigation appears to be in violation of a number of provisions of the SCM Agreement, including:

1. given that it is the Application, not the Commission's initiative, that provides the basis for the initiation of the investigation, the New Subsidy Investigation is not supported by the Application and hence must not be initiated unless it is based on a new written application or the Commission's initiative to initiate such a new investigation. Failing that, the New Subsidy Investigation is in breach of Article 11.1 of the SCM Agreement;
2. the Application provides no evidence in relation to the new subsidy programs as required under Article 11.2 of the SCM. Accordingly, the New Subsidy Investigation has violated Article 11.3 of the SCM which requires the Commission to be satisfied by sufficient evidence before it initiates an investigation. Importantly, Article 11.2 imposes the obligation to adduce sufficient evidence on the applicant (in the case of a written application under Article 11.1) or the Commission (in the case of the Commission's initiative to initiate an investigation under Article 11.6), and not on any exporters involved in an investigation. However, the New Subsidy Investigation is completely based on information that the Commission has obtained from the cooperating exporters during verifications. By way of the Questionnaire, the Commission further expects the GOC to gather evidence for its investigation. This is unacceptable because the New Subsidy Investigation has effectively and unjustifiably exonerated the applicant from its evidentiary obligations under Article 11.2 of the SCM and has shifted these obligations to Chinese cooperating exporters and the GOC;
3. even accepting that the Commission may undertake the New Subsidy Investigation in the course of the investigation (which the GOC denies), the Commission cannot be satisfied that the evidence before it is sufficient to prove that the new subsidies are countervailable or the subsidies have resulted in a

> material injury to the Australian industry. If the Commission considers that the information it has obtained from the exporters constitutes sufficient evidence, it must provide all of the information to the GOC for review and comments. Unfortunately, the only information that the Commission has provided to the GOC is the Questionnaire which does no more than identify the new subsidy programs and cannot be regarded as having contained sufficient evidence to justify the New Subsidy Investigation under Articles 11.2 and 11.3 of the SCM Agreement.

We note that Section 269TC(10) of the *Customs Act 1901* provides

> If, during an investigation in respect of goods the subject of an application under section 269TB, the Commissioner becomes aware of an issue as to whether a *countervailable* subsidy (other than one covered by the application) has been received in respect of the goods, the Commissioner may examine that issue as part of the investigation. (emphasis added)

Based on the discussions of the relevant WTO rules above, we believe that Section 269TC(10) is not consistent with the WTO rules "as such" by permitting the Commission to investigate into new subsidies without a written application. Even accepting that Section 269TC(10) is not WTO-inconsistent, it clearly requires the Commission to be satisfied that the new subsidies are countervailable before it investigates them. As discussed above, such evidence relating to countervailability of the new subsidies simply does not exist.

In light of the above, we believe the Commission's New Subsidy Investigation is unjustified either under the WTO SCM Agreement or Section 269TC(10) of the *Customs Act 1901*. Accordingly, the New Subsidy Investigation should be terminated. If the Commission has a different view, please provide us the relevant legal basis and evidence in support of it.

If you have any queries, please let us know.

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