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Mr Jukka Mäntynen
Director, Operations 4
Anti-Dumping Commission
55 Collins Street
Melbourne
Victoria 3000

By email

Dear Director

Dumping and subsidisation investigation – ADC 355 Steel shelving units from the People’s Republic of China

As you know we act for the Government of the People’s Republic of China (the “GOC”) in this investigation.

Summary of this letter

The GOC submits that this investigation suffers from what must be considered to be serious and irremediable procedural defects.

The information gathering process that has been engaged upon has been unclear and uncertain. By reason of that ambiguity, the exporters involved have not been treated fairly, and cannot be treated equally. Interested parties do not know what case they must answer, whether in terms of the dumping allegations or the injury claimed.

The GOC calls for the cessation of this investigation.

We are instructed to express the GOC’s serious concern regarding the lack of clarity of this investigation. A properly defined scope of the goods that are claimed by the Australian industry to be causing material injury is critical to the safe initiation and carriage of an investigation such as this.

Knowing the key subject matter – the *goods under consideration* - is a critically important procedural issue. There cannot be a proper establishment of facts for the purposes of an investigation, nor can they be properly evaluated, if interested parties do not know the case that is sought to be made out against them and do not know what facts are relevant to that case.

The GOC is concerned to note that there has been disagreement between the applicant and the Commission, and confusion amongst interested parties, as to the precise scope of this investigation and the proper meaning of the description of the goods, throughout.

In particular, based on the information available from the Commission’s public record in this investigation, the following issues are pertinent:

- The description of the goods in the application for dumping and countervailing measures (the

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“Application”), as has been reflected in the public notice for initiation of the investigation, is considered to be too broad and ill-defined.¹

- Summit Select Pty Ltd, the applicant in this matter (“Summit”, or “the Applicant”) has repeatedly tried to clarify and redescribe the scope of the goods intended to be under consideration.
- There are flaws in the description of the goods, adding to the imprecision and inability of interested parties to understand the case, and to defend their positions.
- There is ambiguity surrounding the kind of goods being specifically “excluded” from the goods, particularly in relation to “*industrial shelving*” and “*slotted angle shelving*”.²

By reason of these matters, the GOC believes that the Application was improperly documented; that the investigation was improperly initiated (whether with the benefit of hindsight, or not); that interested parties have been misled as to the scope of this investigation and the information which is relevant (whether innocently or otherwise); and that the Commission does not and cannot have the ability to properly consider the allegations made by the Applicant or to form the correct and preferable conclusions that would ultimately be called for.

The lack of clarity regarding the scope of this investigation was identified by the Commission itself, at a very early stage. Soon after initiation of this investigation, in a letter from the applicant to the Commission dated 22 July 2016,³ the Applicant attempted to respond to “*questions posted by the Anti-Dumping Commission*” about “*industrial shelving*” and “*slotted angle shelving*”, specifically, “*what is meant by these terms*”, and “*whether Summit manufactured these shelving types itself*”. These terms describe products that were intended to be specifically excluded from the scope of the goods.

Also on 22 July, in a meeting between the Commission and Romak Hardware Distributors (Australia) Pty Ltd (“Romak”), being an importer of steel shelving units, the Commission acknowledged that “*it could not provide further clarity on other shelving units and whether they would be captured by the description*” (apart from “*shelving units with wire shelves*”). The Commission further advised that “*it is consulting with Summit to clarify the goods description, and will provide further advice to interested parties as a priority*”.

The precise scope of the goods, particularly the goods intended to be excluded from the scope, has been subject to numerous submissions from interested parties, including the Applicant.

Today, five months since initiation of the investigation, and at a time when participating exporters have lodged their Exporter Questionnaire responses, there is still a lack of clarity on this fundamental aspect of the investigation. The Commission again drew attention to this problem in its notice of an extension of time to publish the Statement of Essential Facts (“the SEF”):

¹ See Public Record File No 010 – File Note of meeting with Romak Hardware; Public Record File No 011 – submission by Guangdong Guanyu Metal Products; Public Record File No 025 – submission by Geelong Holdings; Public Record File No 028 – File Note of meeting with Geelong Holdings; Public Record File No 031 – submission by Romak Hardware; Public Record File No 0043 – submission by Summit Select; Public Record File No 045 – File Note of meeting with Bunnings Group; Public Record File No 047 – File Note of meeting with Geelong Holdings; Public Record File No 049 – ADN 2016/112 Extension of time granted to publish Statement of Essential Facts; and Public Record File 053 – submission by Geelong Holdings.

² For example, see Public Record File No 010 – File Note of meeting with Romak Hardware and Public Record File No 045 – File Note of meeting with Bunnings Group.

³ See Public Record File No 009 – submission by Summit Select.

Ambiguities in the goods description have contributed to delays in the provision of information from interested parties. These delays have impacted the ability of the Commission to verify relevant data. Accordingly, I requested a longer period of time to publish the SEF.⁴

The Commission's view is that without clarity regarding the goods description its ability to undertake the investigation is compromised. The GOC wholeheartedly agrees, and thinks that this very considerably understates the extent of the problem that has arisen. The GOC considers that it is impossible for the Commission to make any determination without such clarity, and that the time for arriving at such clarity is not during an investigation but at the time of its initiation. Without a clear understanding and definition of the scope of the goods from the outset, it should not have been possible to initiate the investigation. Moreover, it has been impossible for interested parties to properly ascertain what data was relevant and what data needed to be reported to the Commission.

An application for anti-dumping and countervailing measures must contain sufficient information to establish a *prima facie* case that certain goods were exported to Australia at dumped prices, or were subsidised, and have caused material injury to the domestic industry producing like goods.

Article 5.2 of the WTO Anti-Dumping Agreement ("the AD Agreement") requires an application to contain the following information:

- (i) *the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;*
- (ii) *a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;*
- (iii) *information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;*
- (iv) *information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3. [underlining supplied]*

Article 5.3 then requires that the investigating authority, in considering an application, must "examine the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of the investigation".

Equivalent requirements are provided for under Articles 11.2 and 11.3 of the WTO Subsidy and

⁴ ADN 2016/112

Countervailing Measures Agreement (“the SCM Agreement”).

Likewise, Section 269TB(4) of the *Customs Act 1901* (“the Act”) requires that an application for dumping measures must include “*such information as the form requires*”. The approved form in turn requires the Applicant to “*fully describe*” the imported and locally produced goods which are “like” to the imported goods. Specifically, the approved form asks an applicant to:

- *Include physical, technical or other properties.*
- *Where the application covers a range of products, list this information for each make and model in the range.*
- *Supply technical documentation where appropriate.*

Further, Section 269TC of the Act provides that the Commissioner must reject the application, unless satisfied:

- (a) *that the application complies with subsection 269TB(4); or*
- (b) *that there is, or is likely to be established, an Australian industry in respect of like goods; or*
- (c) *that there appear to be reasonable grounds:*
 - (i) *for the publication of a dumping duty notice or a countervailing duty notice, as the case requires, in respect of the goods the subject of the application; or*
 - (ii) *for the publication of such a notice upon the importation into Australia of such goods;*

Quite simply, these requirements under the AD Agreement, the SCM Agreement and the Act were not met by the Application. On that basis the GOC submits that the Applicant did not offer reasonable grounds for the publication of dumping duty and countervailing duty notice, on a *prima facie* basis or any other basis. It seems fairly apparent that there has been insufficient clarity about the precise scope of the imported goods subject to the Application from the outset. On that basis the Application should have been rejected, and no investigation initiated unless and until these matters could be clarified.

Following the Commissioner’s decision to not reject an application, he must set out the precise scope of the goods subject to the application, being the goods under consideration in an investigation, in a public notice under Section 269TC(4) of the Act. The scope of the investigation is governed by the public notice issued under Section 269TC(4).

There is no disagreement amongst the interested parties to this investigation, including the Applicant, that the particulars of the goods must not be changed once the application is lodged, accepted and an investigation initiated in response.⁵ If the Application contained insufficient information to allow the Commission to understand the precise scope of the goods or, in this instance, with insufficient information from the Applicant to clearly stipulate or understand the scope of the goods said to be the focus of its allegation, then the application should have been rejected.

Further, if the particulars of the goods as described in an application are considered to be reasonably clear, understandable, and accurate, then those particulars should be given their plain

⁵ See Public Record File No 043 - submission by Summit Select, at page 1.

meaning. The GOC considers it possible that certain terms may have a commonly accepted industrial meaning within a particular industrial sector or product market. In such circumstances, clarification may be required from the relevant entities operating in that industry or market, in order to have a better understanding of the generally accepted industrial or market meaning of that term. However this should not be done in an arbitrary manner, or with an approach which results in interpretation that is contradictory or clearly different to the plain language used in an application. Where the particular term used does not have specific industry or market based connotations, the plain meaning of the term should prevail.

The particulars of the goods must be interpreted in accordance with the language and information contained in an application itself, as it is the application that provides the grounds for the investigation to be initiated. Further information may be requested by the Commission prior to initiation, in cases where it is seen to be necessary to sharpen the scope and ensure the descriptions of the relevant products are clear.

However, the ability of an applicant to clarify or restate the scope of the goods should not be considered to extend to a point in time after the initiation of an investigation. The further opportunities which appear now to have been given to the Applicant to “clarify” the description of the goods are in effect invitations for the applicant to change the description of the goods or, even more substantively, to change its mind about what goods should and should not be included in its Application. With respect, this cannot be permitted. An investigation, once initiated, must be limited to the examination of the allegation raised in the application and advised to interested parties in the public notice. The investigation procedure must not be abused so as to allow an applicant to reconsider its circumstances and to recalibrate its allegations to suit its needs.

In this regard, and as an example, the GOC draws the Commission’s attention to the Applicant’s repeated attempt to define “industrial shelves”:

- on 7 June 2016 they were “*industrial shelving*”, without further explanation;⁶
- on 22 July 2016 they became “*industrial shelving is defined as pallet racking/heavy duty commercial shelving*”;⁷ and
- on 30 September 2016 they became ““*industrial shelving’ relates to ‘pallet racking’ or ‘heavy duty commercial shelving’*”, and the latter is further defined as shelving units with “*over 200kg weight loading per shelf*”.⁸

The GOC is concerned to note that the Applicant does not appear to have a consistent understanding about the description used in its own Application. It has been changing its position about the meaning it has intended to give to the term “industrial shelves”, rather than simply providing some kind of plausible and permissible clarification.

Further, the GOC also takes note of another two issues which have been the subject of multiple clarification attempts by the Applicant, as well as comments from other interested parties and the Commission itself:

- the meaning of “*slotted angle shelving*”; and
- the Commission’s comment that “*the current goods description could include a wide range of*

⁶ See the Application, at page 20.

⁷ See Public Record File No 009, at page 1.

⁸ See Public Record File No 043, at page 2.

other shelving and work bench units... this description could mean that steel shelving imported by Summit could be captured under the goods description.”⁹

The GOC respectfully submits that the Applicant has unfairly placed the Commission and other interested parties in an impossible position. The scope of the goods under consideration has become like “the shifting sands”.

The legal deficiencies that have become apparent have a number of profound implications for the investigation. Without clarity as to what is within the scope of this investigation, it is difficult, if not impossible, for the Commission to collect the relevant information in order to make a correct and preferable decision, and for the relevant Chinese exporters to provide the relevant information so as to defend their position as against the Applicant and to be treated equally as amongst each other.

The broad and ambiguous wording means that goods with different characteristics and competing in different markets may be within the scope of the goods under investigation. This is likely to create further complexities and difficulties when the Commission is required to consider the issues surrounding “like goods”, including the working-out of the normal value of the goods,¹⁰ and in the context of determining the claim by the Applicant that material injury has been caused by dumping.

The Applicant may try to include or exclude certain products from the description of the goods, in order to suit its needs. However, this is not an appropriate way to conduct an investigation in evidentiary and procedural terms. For example, any injury caused by the importation of goods which are excluded from the investigation must not be attributed to the alleged dumping of the goods which are included in the goods description. The uncertainty as to the description of the goods under consideration has impacted and, if this investigation is not ceased, will continue to impact upon the provision of information and its verification and the due process rights of interested parties. Those impacts are equally felt by the GOC as an interested party in this investigation as well. The investigation cannot possibly be conducted in a fair and proper manner, without a clear understanding about the precise scope of the investigation.

The description of the goods is a fundamental and central element of any anti-dumping and countervailing investigation.

It is not the purpose of a dumping or countervailing investigation to explore which goods should be classified within the scope of the goods under consideration. The Australian anti-dumping does not admit of a system whereby the Applicant and interested parties are called upon by the Commission to argue about what should or should not be included in an investigation. These are matters for the Application to define and for the initiation notice to notify, with both clarity and finality. It is an applicant’s responsibility to ensure the scope of the goods is defined, and properly defined, such that the Commission is capable of making an accurate determination as to whether there is *prima facie* evidence for an investigation to be initiated and to thereafter conduct an investigation as requested by the applicant.

⁹ See Verification Report for Summit Select, at page 8.

¹⁰ It is axiomatic that the goods definition must be clear so as to properly define and delimit the universe of goods that are to be included in the determination of a margin. As per the report of the Appellate Body in *US - Hot-Rolled Steel* (WT/DS184/AB/R, 24 July 2001 at para. 118)

[W]e recall that the word ‘margins’, which appears in Article 2.4.2 of that Agreement, has been interpreted in European Communities - Bed Linen. The Panel found, in that dispute, and we agreed, that “margins” means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions. We see no reason, in Article 9.4, to interpret the word ‘margins’ differently from the meaning it has in Article 2.4.2, and the parties have not suggested one. [underlining supplied] [footnotes omitted]

The GOC urges the Commission to re-evaluate the Application in the context of the confusion and disagreement that has emerged regarding the scope of the goods, and to recognise that the Application should have been rejected.

The GOC submits that the public notice initiating the investigation should be declared void *ab initio*. Such action is called for, and there is recent precedent supporting the taking of such action where it is justified. The anti-circumvention inquiry concerning certain quenched and tempered steel plate exported from Sweden was ceased three months after initiation. The Commission recognised the deficiencies that were later detected, and then correctly and honestly declared the decision to initiate the inquiry to be void *ab initio*. The GOC considers that the same principle and approach should apply to the present investigation.

Alternatively, the Commission may find that it is not possible to make a finding as to whether or not dumping or subsidisation of the goods has occurred, or whether the dumped or subsidised goods have caused material injury to the Australian industry producing like goods, because:

- the investigation was initiated based on the poorly worded description of the goods in the Application; and
- this defect is incurable without significant amendment to the Application and the Section 269TC(4) notice itself, neither of which can be achieved in the pendency of the investigation.

Accordingly, and as an alternative to declaring the initiation of this investigation as being void, the Commission would now recommend to the Minister to not impose dumping and countervailing duties, and to issue a notice under Section 269TL of the Act.

Yours sincerely



Daniel Moulis
Principal Partner