

**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 “particular market situation” in PAD 238**

---

Dear Ms Stone,

Non-Confidential

We refer to the Anti-Dumping Commission’s (**Commission**) Preliminary Affirmative Determination (**PAD**) Report No 238<sup>1</sup> published on 13 August 2014.

On behalf of the Government of the People's Republic of China (**GOC**), we make the following submissions in response to the Commission’s findings on the issue of “particular market situation”.

**1. Particular Market Situation and suitability for comparison**

In the PAD, the Commission found that there was insufficient evidence to conclude that “a particular market situation exists in the Chinese deep drawn stainless steel sinks market that renders sales of like goods in that market unsuitable for determining normal values under s.269TAC(1)”. (page 26) The Commission observed that as each exporter had reasonable levels of profit, the ultimate selling prices of stainless steel sinks in the Chinese market may still be reasonable for use in determining normal value, although the costs of stainless steel have been influenced by GOC interventions.

We are pleased to see that the Commission found that China does not have a particular market situation in relation to deep drawn stainless steel sinks. The Commission has correctly observed that despite the *alleged* GOC’s influence on the stainless steel prices, that influence does not affect or “flow through” to the selling prices of the end goods.

However, we object to the Commission’s finding that the Chinese stainless steel costs are distorted due to GOC interventions and the use of an external benchmark price to inflate the constructed normal value. Our contention in this regard is elaborated in sections 2 and 3 below.

Generally, we believe that the Commission’s findings are contradictory and unreasonable:

- on the one hand, the Commission has found that the *alleged* GOC’s influence on the stainless steel prices does not affect or “flow through” to the selling prices of stainless steel sinks;
- whereas on the other hand, in calculating the constructed normal value, the Commission has used an external benchmark price for stainless steel due to the

---

<sup>1</sup> <http://www.adcommission.gov.au/cases/documents/041-PADReport-238.pdf>

*alleged* GOC's influence on the stainless steel prices. The use of the benchmark price has effectively increased the selling prices of stainless steel sinks, which prices the Commission had found to have *not* been influenced by the *alleged* GOC's influence.

The Commission needs to justify the inconsistency in its findings above and, in particular, why the Commission has not used Chinese stainless steel prices in calculating the constructed normal value given that it had found that any *alleged* distortions of the prices are unlikely to affect or "flow through" to the selling prices of stainless steel sinks. Since the Commission has formed the view that the alleged GOC's influence on stainless steel costs does not affect the *suitability* of the domestic selling prices of stainless steel sinks for comparison with export price, its use of an external benchmark price for stainless steel which effectively inflates the constructed normal value has undoubtedly made the constructed normal value *unsuitable* for comparison with export price.

The PAD explains that the Commission had been requested by the sampled exporters to use a constructed normal value rather than the actual selling prices of stainless steel sinks because of the significant physical difference between stainless steel sinks sold domestically and exported. (pp. 21-22) However, the exporters' request does not provide a justification for the Commission to disregard the actual input costs of stainless steel sinks as recorded in the financial accounts of the exporters and producers. Had the exporters not made the request, the Commission would have based on the actual costs of stainless steel and the actual selling prices of stainless steel sinks in determining normal value, giving the Commission's finding that the selling prices of stainless steel sinks are not distorted by any alleged distortions of the costs of stainless steel.

## **2. Government influence and Market competitiveness**

In the PAD, the Commission found that

stainless steel (coil and sheet) prices in China are affected by ... GOC influences in the iron and steel industry, and hence do not reasonably reflect competitive market costs, and should be replaced by a competitive market substitute. (page 27)

The Commission's finding is based on its or its predecessor Australian Customs and Border Protection Service's (**Australian Customs**) findings in several previous investigations mainly including the hollow structural sections (**HSS**) investigation (REP 177), the zinc coated (galvanised) steel and aluminium zinc coated steel (**Galvanised Steel**) investigation (REP 190), and the hot rolled plate steel (**Plate Steel**) investigation (REP 198).

The Commission's finding above and in particular, its disregarding of the GOC's position and submissions in the previous investigations mentioned above is unacceptable. In these previous investigations, the GOC has argued repeatedly with supporting evidence against the position that the price of steel input has been distorted due to any alleged GOC's influences in the iron and steel industry. The GOC reiterates its arguments on this issue:

- China maintains a market economy and has a very competitive market for steel inputs whose prices are set by the market and not by the government and are not unduly influenced or artificially lowered by the government;<sup>2</sup>
- neither Australian Customs nor the Commission has ever had any evidence to conclude that Chinese government policies and industry regulations have affected the costs of steel inputs to the extent that the costs cannot be regarded as market competitive prices. In its review of the HSS investigation, the then Trade Measures Review Officer (**TMRO**) made findings in support of the GOC's position in this regard, whereas Australian Customs and the Commission have consistently chosen to ignore these findings;<sup>3</sup>
- the fact that Chinese steel input prices may be lower than the prices of the same steel input in the other markets provides no basis for the conclusion that the Chinese prices are distorted or artificially lowered and do not reflect competitive market prices. Rather, it merely indicates that Chinese steel industry is more competitive and efficient than the steel industry in these other countries and that its costs to make steel are lower than in other countries. It is not acceptable under the WTO rules or Australian laws for Australia to take action to redress effects arising from the competitiveness and efficiency of Chinese industries.<sup>4</sup>

Government policies and industry regulations are common and necessary in every country and are certainly legitimate and not incompatible with the operation of an undistorted market economy. Therefore, the Commission cannot conclude that the cost of stainless steel is distorted by merely relying on the existence of government policies and industry regulations in the Chinese iron and steel industry. There must be positive evidence that the GOC has in some way regulated prices and evidence as to way it has done so. No such evidence has been provided.

The Commission must have been aware that Australian steel industry receives considerable government support and subsidies. The Australian government

recognises that the viability of the steel industry chain is vital to our economic prosperity. To support the industry the government has established various initiatives, provides various forms of assistance and has identified a number of resources relevant to the Australian steel industry.<sup>5</sup>

For instance, under the Steel Transformation Plan, the Australian government has provided \$300 million assistance to the steel industry to encourage innovation, investment and

---

<sup>2</sup> In the Plate Steel investigation, the GOC submitted expert evidence in support of this argument: see <http://www.adcommission.gov.au/cases/documents/004-Submission-ForeignGovernment-GovernmentofChina.pdf>, pp. 11-12; In the HSS investigation, the GOC submitted a graphical representation of SBB data on HRC prices: see <http://www.adcommission.gov.au/cases/documents/033-GovernmentofChinaSubmission-rePAD.pdf>, pp. 15-16.

<sup>3</sup> Detailed submissions by the GOC in this regard can be found at: <http://www.adcommission.gov.au/cases/documents/126-Submission-ForeignGovernment-GovernmentofChina.pdf>, pp. 8-11.

<sup>4</sup> Detailed submissions by the GOC in this regard can be found at: <http://www.adcommission.gov.au/cases/documents/004-Submission-ForeignGovernment-MOFCOM-PRC.pdf>, pp.11-14.

<sup>5</sup> <http://www.industry.gov.au/industry/steel/Pages/default.aspx>

production.<sup>6</sup> According to Australia's notification to the WTO, this assistance continues until 2016.<sup>7</sup> If the Commission's reasoning to the Chinese market is applied, a particular market situation must be found to exist in relation to Australia's steel market such that the steel input costs in Australia are distorted and do not reflect competitive market price. Further, Australia's notification to the WTO also shows that a wide range of industry-specific subsidies and government grants are currently in place. Should the GOC treat the provision of the subsidies and the government regulations and policies that mandate the grant of the subsidies as being sufficient evidence to establish that a particular market situation exists in, for example, Australia's agricultural industry rendering the costs of agricultural inputs distortive?

### **3. Use of benchmark price**

In the PAD, the Commission used a benchmark price of stainless steel for the calculation of a constructed normal value, which, we believe, is inconsistent with the WTO rules. The Commission's decision to use an external benchmark is based on two grounds:

- (1) the Commission's finding of GOC's influences in the iron and steel industry; and
- (2) the GOC's influence above "has likely impacted the whole Chinese stainless steel sector, regardless of whether the entity producing the stainless steel has any state ownership...". (p. 27)

As argued above, it is unfounded for the Commission to determine that the existence of government policies and industry regulations itself leads to undue GOC influence in China's iron and steel industry rendering the costs of any steel inputs distortive. The Commission must not make such conclusions unless it is provided with sufficient and positive evidence (if any).

In previous investigations, it has been argued repeatedly that under the ADA and Regulation 180 Australian Customs and the Commission are obligated to use the costs of steel inputs recorded in the financial accounts of Chinese producers of end products for calculating a constructed normal value.<sup>8</sup> We do not repeat the GOC's previous submissions in this regard but believe the Commission is required to consider these submissions in this investigation.

### **4. Fair comparison**

Given the Commission's unjustified use of the benchmark price discussed above, a further obligation under the WTO that the Commission must observe is to ensure a fair comparison between the constructed normal value and the export price in accordance with Article 2.4 of the ADA.

Article 2.4 of the ADA provides:

A fair comparison shall be made between the export price and the normal value.  
This comparison shall be made at the same level of trade, normally at the ex-

---

<sup>6</sup> <http://www.acci.asn.au/getattachment/d8b45df3-5478-4e5c-bd08-e71a0ff4c7a0/Carbon-Announcement-support-for-steel-industry.aspx>

<sup>7</sup> G/SCM/N/253/AUS, 11 September 2013, p. 35.

<sup>8</sup> <http://www.adcommission.gov.au/cases/documents/314-GovernmentofChinaSubmission-reChinesedomesticHRC.pdf>

factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.* [reference omitted] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties. [emphasis added]

Article 2.4 does not deal with “the basis for and basic establishment of the export price and normal value”<sup>9</sup>, but sets forth a general and independent obligation to make a “fair comparison” between export price and normal value.<sup>10</sup> The term “fair” requires that a comparison conducted for the purposes of calculating dumping margins must be impartial, even-handed and unbiased.<sup>11</sup> More specifically, Article 2.4 requires that

“allowances” be made for “*any other differences* which are also demonstrated to affect price comparability.” There are, therefore, no differences “affect[ing] price comparability” which are precluded, as such, from being the object of an “allowance”.<sup>12</sup> (original emphasis)

Accordingly, even assuming that the Commission were allowed to use the benchmark price for the calculation of a constructed normal value, the Commission has an *independent* obligation under Article 2.4 of the ADA to ensure that a comparison between the constructed normal value and the export price for the purpose of determining dumping margins is “fair”, that is, being impartial, even-handed and unbiased. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body ruled that the use of zeroing under the transaction-to-transaction comparison methodology is not “fair” because it “artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.”<sup>13</sup> For the same reason, the Commission’s approach to comparing the constructed normal value and the export price cannot be regarded as being impartial, even-handed and unbiased because:

- the constructed normal value is calculated based on the external benchmark for stainless steel costs resulting in an uplift being applied to the actual stainless steel costs incurred by the exporters;
- whereas the export price is based on the actual stainless steel costs incurred by the exporters without the uplift.

---

<sup>9</sup> Panel Report, *Egypt – Steel Rebar*, paras. 7.333–7.334.

<sup>10</sup> Appellate Body Report, *EC – Bed Linen*, para. 59; Appellate Body Report, *US – Zeroing (EC)*, para. 146.

<sup>11</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.

<sup>12</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

<sup>13</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

Accordingly, the constructed normal value is an inflated price of stainless steel sinks whereas the export price remains unchanged. Therefore, the Commission's comparison between the constructed normal value and the export price has artificially inflated the magnitude of dumping and made the finding of dumping more likely.

The fundamental problem of the Commission's comparison approach comes out from the fact that the Commission has failed to treat the domestic selling price of the subject goods and their export price impartially or even-handedly. If the Commission considers that the alleged distortion of stainless steel costs would affect the ultimate constructed normal value, then the Commission should have also considered whether the distortion has also affected the actual export price, and if so, to what extent. Such a consideration should form the basis of the Commission's comparison between the constructed normal value and the export price. Without such a consideration and necessary adjustment (as will be explained below), the Commission's comparison between the constructed normal value and the export price is essentially based on different costs of raw materials and hence is unfair and biased.

A difference in the cost of raw materials is undoubtedly a factor that can affect price comparability between normal value and export price, and hence is subject to due adjustments or allowances under Article 2.4 of the ADA. As stated above, the Commission has replaced the actual stainless steel prices incurred by exporters with a higher benchmark price for the calculation of the constructed normal value but continued to use the actual export price which is based on the actual stainless steel prices. To ensure the fairness of the comparison, the Commission must consider the differences between the surrogate cost of stainless steel used for calculating the constructed normal value and the cost of stainless steel on which the export price is based. Since the surrogate cost is higher than the actual stainless steel prices incurred by exporters, the Commission must make an downward adjustment of the constructed normal value to the extent of the surrogate cost of stainless steel in excess of the actual stainless steel prices to achieve fair comparison.

Our contention above finds support in the Anti-Dumping Review Panel (**ADRP**) report in its review of the Galvanised Steel investigation. In dealing with the issue of whether a particular market situation exists in relation to hot-rolled coil the main input for the production of galvanised steel, the ADRP observed:

the situation in the market identified for the purpose of subparagraph 269TAC(2)(a)(ii) does not have to affect the domestic prices differently to the export price. *Adjustments are made under subsections 269TAC(8) and (9) for differences affecting the comparability of the export price and normal value.*  
(emphasis added)

This finding suggests that even though the fact that a distorted input cost affected normal value and export price equivalently may not preclude the Commission from finding that a particular market situation exists in relation to the input, the Commission is required under subsections 269TAC(8) and (9) of the *Customs Act 1901*, which give effect to Article 2.4 of the ADA, to make adjustments of any difference that arises from the use of the distorted input cost to calculate a constructed normal value and affects the comparability of the constructed normal value and export price.

In short, we submit that the difference in the cost of raw materials is demonstrated to affect the comparability between the constructed normal value and the export price and hence a

---

due allowance or adjustment need to be made by the Commission to the constructed normal value to ensure fair comparison.

If the Commission disagrees with our submissions above, please provide us the relevant legal basis and evidence so that we can review and comment.

If you have any queries, please let us know.

**Corrs Chambers Westgarth**



**Andrew Lumsden**  
Partner  
(02) 9210 6385  
andrew.lumsden@corrs.com.au

**Andrew Percival**  
Special Counsel  
(02) 9210 6228  
andrew.percival@corrs.com.au