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11 January 2017

Mr Tim King
Assistant Director
Anti-Dumping Commission
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By email

Dear Director

Dumping and subsidisation investigation – ADC 341 A4 copy paper from the People's Republic of China

As you know we represent the Government of the People's Republic of China (the "GOC") in this investigation.

In this letter the GOC wishes to address two specific issues in the Statement of Essential Facts No 341("the SEF") as issued by the Commission in this investigation, namely:

- that the Chinese exporters of A4 copy paper benefited from an alleged countervailable subsidy in the form of "Program 1 – Policy loans to the paper industry";
- that the benefit amount in relation to the subsidy under "Program 7 - Preferential income tax program for high or new technology enterprises" is to be worked out based on an amount of benefit received prior to the period of investigation ("POI")

A Program 1 – Policy loans to the paper industry

1 Chinese State-invested commercial banks are not public bodies

First and foremost, the GOC disagrees with the belief, expressed in SEF 341, that Chinese State-invested commercial banks can be considered to be "public bodies" for the purposes of a countervailing investigation under the WTO *Subsidy and Countervailing Measures Agreement* simply because they take into account government policies in deciding whether to fund commercial projects.

In this regard it must be recalled that the banks under consideration are commercial banks, and not so-called "policy banks" such as might be set up by a government with the specific purpose of providing non-commercial loans to government-backed or supported initiatives. As an example, we note the concept and operations of the Australian Clean Energy Finance Corporation, established under the *Clean Energy Finance Corporation Act 2012* which explains itself thus:

> *The Australian Government announced that it will establish a $10 billion commercially oriented Clean Energy Finance Corporation (CEFC) as part of its Clean Energy Future Package.*

ABN 56 231 964 609

> *The objective of the CEFC is to overcome capital market barriers that hinder the financing, commercialisation and deployment of renewable energy, energy efficiency and low emissions technologies*.
>
> *The CEFC will invest in firms and projects utilising these technologies as well as manufacturing businesses that focus on producing the inputs required. It will not invest in carbon capture and storage technologies.*
>
> *The CEFC will not provide grants. It is intended to be commercially oriented and to make a positive return on its investments.*
>
> *The CEFC is not intended to compete directly with the private sector in the provision of financing to the clean energy sector; instead, it is intended that the CEFC will act as a catalyst to private investment that is currently not available for clean energy technologies and thereby contribute to reducing carbon emissions and cleaner energy.*[1] [underlining supplied]

Standing well apart from such *policy banks* are normally operating *commercial banks* that exist and compete within the economic framework of any country, and are not relevantly "public bodies" simply because they pay attention to the laws and policies of the government of the country in which they decide to lend money in assessing lending risk. They do not possess government authority nor are they vested with government authority merely because they do so.

The GOC considers that the common practice of commercial banking entities – either with or without State investment – of taking into account relevant regulatory settings, industrial policies, and broader economic security in its business decision-making cannot serve as evidence that such entities, *"exercise governmental functions and therefore possess or have been vested with governmental authority"*. This just does not make sense, legally or semantically.

The relationship between policy making and finance is commonplace and uncontroversial. In a December 2016 speech to the Australasian Finance and Banking Conference, the Australian Treasurer, the Hon Scott Morrison MP, stated as follows:

> *All debt has to be repaid and there has to be a return on any investment. There still needs to be a vigorous process to identify the best projects that will be most beneficial to productivity and economic growth*.
>
> *There is a difference between economic stimulus and strategic investment in productivity enhancing and capability building infrastructure. The Turnbull Government will not repeat the stimulus mistakes of the Rudd-Gillard-Rudd Government with cheques to 16,000 deceased people, overpriced school halls and catastrophic programs like the home insulation debacle. These schemes saddled Australia with a generation and more of debt and have now constrained our capacity to deal with our current challenges. Labor remains in denial of these facts. We will continue to choose to invest and put in place policies that encourage others to invest – to unlock the jobs and growth that exists within our transitioning economy.* [2]
> [underlining supplied]

Australia's Westpac Bank also recognises the role that governments play in the market settings that can facilitate the achievement of major public goals, such as in environmental regulation. In Westpac Group's *Principles for Doing Business*, the Bank states:

> *We believe that environmental outcomes can be greatly assisted through the development*

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1 http://www.cefcexpertreview.gov.au/content/Content.aspx?doc=thecefc.htm
2 http://sjm.ministers.treasury.gov.au/speech/023-2016/

> *and utilisation of trading and other market mechanisms. We are therefore committed to using trading and other market mechanisms to achieve environmental goals.*[3]

Whether or not market interventions by a government run counter to one or other GATT 1994 principle; and whether or not there are disciplines that capture market creation and regulation, are different issues to the one that the GOC seeks to address here. The issue the GOC wishes to emphasise is that the industrial policies or plans that a government might have – its vision for the future – do not vest commercial entities with government authority.

The GOC has provided full cooperation to the Commission in this investigation, providing contemporary and relevant information to enable the Commission to properly understand current market conditions in China. Accordingly, it is with great disappointment that the GOC notes the heavy reliance of SEF 341 on "evidence" which is out-dated and derivative. This includes findings of the Australian Customs and Border Protection Service in 2008, and the conclusions of a foreign jurisdiction under laws and policies which are consistently and strongly antithetic towards the GOC and Chinese exporters.

Significantly, SEF 341 places substantial emphasis on the alleged role of "policies" in constituting Chinese commercial banks as "public bodies", but appears to neglect clear advice from the GOC that stresses the opposite conclusion that must be drawn from Chinese law. Quite simply, Chinese commercial banks are strictly required, by law, to make their lending decisions based on commercial factors:

> *The GOC rejects the claim that Chinese State-invested commercial banks are "public bodies". The allegation by the applicant in relation to so-called preferential loans lacks legal basis. The industry policies that the GOC issues are aspirational in nature and are not mandatory on stakeholders. Commercial banks in China will take those industry policies into consideration when evaluating whether a loan is to be provided to a company, but they are not the decisive factor and certainly do not dictate the behaviour of the banks. The most critical factors the commercial banks will consider in the process of lending money to entrepreneurs and enterprises are the commercial terms of the proposed loan and the ability of the borrower to pay interest and to repay the principal. Interest rates are determined on the basis of market conditions when the situation is being evaluated. Chinese banks are completely market-oriented in this undertaking.*
>
> *To ensure that this is the case:*
>
> - *In relation to the provision of working capital loans, all financial institutions in China - commercial banks, rural credit cooperatives and other banking financial institutions - are specifically required to keep their operation of working capital loans in conformity with the Working Capital Loans Measures. This requires that the issuance of working capital loans must be prudentially decided by the banks based on a reasonable estimation of the borrower's working capital demand and a fair consideration of cash flow, liabilities, repayment ability, guarantee status and other factors applicable to the situation of the borrower.*
>
> - *In relation to fixed asset loans, the Measures for the Administration of Fixed Asset Loans requires all commercial banks in China to consider the full spectrum of risk issues impacting on the situation of the borrower. Naturally, this will include the questions of whether the fixed assets project under consideration conforms with relevant laws and policies concerning things such as environmental protection, land use and industry compliance, and to factor all of these things into the decision*

[3] https://www.westpac.com.au/docs/pdf/aw/Principles_for_doing_business.pdf

concerning the borrower's credit rating and the risks of the loan.

These laws and processes simply reflect the commercial risks involved – risks which naturally include things associated with regulatory compliance and sovereign risk. These are factors that any commercial banks in the world would take into account in considering loan applications, and which any investor would think are wholly reasonable and appropriate.[4]

2 No evidence of the provision of "policy loans" or of any "benefit"

In relation to the determination of benefit, SEF 341 states:

In determining whether a financial contribution confers a benefit, the making of a loan by a government or public body does not confer a benefit unless the loan requires the enterprise receiving the loan to repay a lesser amount than would be required for a comparable commercial loan which the enterprise could actually obtain.[5]

However instead of conducting an objective determination based on positive evidence to determine this question, SEF 341 appears to simply out-source its analysis and decision making to the US Department of Commerce ("USDOC"), by way of citing the views of USDOC from various previous investigations in which this question was raised for its consideration. Whether the loans were provided at a "lesser amount" must be determined by referring to the relevant information regarding the commercial loans which were available and actually obtained by the Chinese exporters. Jumping directly to the conclusion that *"the USDOC interest rate benchmarks are a suitable proxy…"* is an improper approach, because it does not comply with either Australian or WTO law, and represents an abdication of the Commission's own responsibility to consider comparable commercial loans which Chinese A4 copy paper exporters could actually obtain.

To the extent that the Commission may consider USDOC's previous views in its previous investigations to be relevant information, the GOC notes that USDOC's findings in question are based on that investigating authority's unrevised views of more than 10 years ago. SEF 341 states, in support of its benefit finding:

The Commission also notes that in DS379 the Appellate Body specifically examined USDOC's public bodies determination in the OTR Tires investigation and found that "the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government.[6] [footnotes omitted]

However, the Appellate Body made this clear in "DS379":[7]

We note that there was only one year's difference between the period of investigation in CWP, LWS, and OTR and the period of investigation in CFS Paper, and that, in CFS Paper, the USDOC expressly acknowledged that "banking reforms in China may be starting to take effect" and that "the scope and extent of government control over SOCBs was changing". Had a longer period of time elapsed between CFS Paper and the investigations at issue, we question whether it would have been appropriate or sufficient for the USDOC to simply incorporate by reference its earlier determination in CFS Paper, without explaining why, despite the passage of time, such determination remained valid. As indicated above, we are of the view that merely incorporating by reference findings from one determination into

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4 GOC *Government Questionnaire* at pages 25 and 26.
5 SEF 341 at page 141.
6 *Ibid.*
7 *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R, 11 March 2011)

another will normally not suffice as a reasoned and adequate explanation.[8]

The USDOC decisions examined by the Appellate Body relied on the USDOC's own analysis in the CFS Paper investigation in 2005. The USDOC has been effectively re-applying and reciting these views, including most recently in its 2016 investigation concerning uncoated paper from China.

With respect, the GOC submits that USDOC's views and analysis cannot be simply imported or transplanted by the Commission and be applied to the current investigation. The Commission is obliged to make its own findings, based on the relevant information provided by interested parties in this investigation. This has not been done. Further, whilst the Appellate Body did not reject the use of an external benchmark by USDOC (on the basis of the facts and circumstances before it at that time), the Appellate Body did not support the actual benchmark as determined by USDOC either (on the basis of insufficient undisputed facts on the Panel record).

The GOC is disappointed to note that the slavish imitation of the USDOC approach in the determination of a comparable commercial loan interest rate in SEF 341 is clearly inconsistent with the Commission's own approach on this issue in its own recent investigations – where it has applied the People's Bank of China's interest rate as the basis for determining the existence of any benefit.[9]

The GOC requests that the Commission should again find that the base interest rates as published by the People's Bank of China are the appropriate benchmark for comparison purposes for RMB-denominated loans. Even then, the Commission is still obliged to fairly take into consideration the relevant terms and conditions surrounding each individual loan obtained by the Chinese A4 copy paper, as well as the individual corporate circumstances of the exporters themselves, in determining the existence and amount of benefit. It is incorrect and unrealistic to apply a one-size-fits-all benchmark interest rate for all Chinese A4 copy paper companies, or indeed all Chinese companies. Loans have different purposes, borrowers have different assets to offer as security and different balance sheets for banks to rely upon.

3 No evidence of "specificity"

SEF 341 claims that the loans provided to A4 copy paper exporters by State-invested commercial banks are specific, on the following bases:

- because the Australian Customs and Border Protection Service discovered, in its 2008 investigation concerning certain toilet paper from China:

  > *…documents provided by ICBC and CCB [which] showed that their assessment of loan applications by exporters of toilet paper to Australia was supported in large part because of the companies' categorisation as 'encouraged' enterprises. Customs found that granting of loans to exporters was specific because preferential treatment by the banks favoured particular enterprises, being those in industries classified as 'encouraged'.*[10]

- because *"USDOC found a program of preferential policy lending specific to paper producers…"*;[11] and

- because there are various national and provincial level industrial plans which mentioned the "paper making" industry as an industry that is "important" or "encouraged".

The GOC submits that the information obtained by Customs in its investigation concerning toilet

8 *Ibid.*, at para 502.
9 For example, ADC Reports No 316, No 322 and No 331.
10 SEF 341 at page 142.
11 *Ibid.*, at page 143.

paper in 2008 is information that is specific to that product, and that investigation, at that time. Surely it cannot be considered to be relevant information for the current investigation. The GOC assumes that the Commission has requested and has been provided with information regarding the relevant loan contracts obtained by the cooperative Chinese exporters of A4 copy paper in the current investigation. The Commission must consider this information and form its own opinion as to whether the circumstances as previously discovered by Customs still apply.

Further, conclusions reached by USDOC cannot serve as evidence or as a basis for the Commission's determination in the current investigation. USDOC is required to make its determination having regard to the laws, regulations and investigation procedures of the United States. The Commission is required to make its own decision, based on the laws and regulations of Australia. The view expressed by a foreign investigating authority cannot be relied upon to discharge the legal obligations of the Commission to make its own determinations based on Australian law and the facts before it.

It is not clear from SEF 341 whether the Commission has actually examined and analysed the circumstances involved in the provision of loans by the Chinese State-invested commercial banks to the cooperative Chinese A4 copy paper exporters. The SEF proposes to find the subsidy to be specific, on the basis that *"SOCBs give preferential treatment in the granting of loans to producers of A4 copy paper as members of an 'encouraged' industry"*.[12]

The GOC submits that the question the Commission must address, in the determination of specificity, is not whether the so-called public bodies provided loans to members of a specific industry. The question the Commission must consider is whether the so-called public bodies provided loans at a preferential rate that conferred a benefit to the borrowers, on the basis that the borrowers belonged to a specific industry. If the so-called public body simply provided a loan to a Chinese A4 copy paper producer at the same rate as it would to any producer, or any company with the same credit rating and on the same terms, in any industry, then such loans could not be said to have conferred a benefit nor could it be said that they were "preferential" or "specific" to a specifically "encouraged" industry.

Simply pointing out that the GOC identifies paper-making as an "encouraged" or "important" industry does not address the question of specificity. It is necessary to consider whether the same treatment was provided to companies in other industries, whether encouraged or non-encouraged.

The GOC submits that there is simply no evidence:

- that loans were provided to the Chinese A4 copy paper producers; nor
- that loans were provided to the Chinese A4 copy paper producers at a "preferential rate",

because those producers belonged to an "encouraged" industry, or were part of the paper-making industry in contrast to any other industry.

In this regard, the GOC takes notice of the submission by one of the cooperative exporters, Asia Symbol (Guangdong) Paper Co., Ltd and its related trading company Greenpoint Global Trading (Macao Commercial Offshore) Ltd (the "Asia Symbol submission"). The Asia Symbol submission indicates that SEF 341 proposes to determine an amount of subsidy in relation to the Macao based trading company for receiving an alleged "policy loan", being a loan that is supposedly given specifically to paper producers *inside China* according to the SEF. However the borrower was a Macao-based company, not a Chinese one. The GOC considers this to be peculiar and incorrect, as it is an example of the same rate of interest being charged by a State-invested commercial bank to a

[12] *Ibid.*, at page 144,

company that is *outside China*.

B Program 7 – Preferential income tax program for high or new technology enterprises

The GOC notes that SEF 341 proposes to determine the amount of subsidy under this program based on the tax benefit received by the exporters relating to its operation in the financial year *prior to the investigation period*.

The Commission's dumping and subsidy manual provides that the subsidy amount calculation method in circumstances such as this will be as follows:

> *A common form of relief from direct taxes is special income tax exemptions, deductions, or credits. A benefit would be the extent to which the taxes paid by the enterprise are less than the taxes the enterprise would have paid had the program not existed. The benefit will generally be expensed to the year in which the benefit is received…*[13]

Accordingly, it should be a straightforward matter for the Commission to examine the exporter's financial records and be satisfied as to how the reduced income tax under Program 7 had been received and expensed.

A preferential income tax is a tax-based subsidy provided in relation to the specific operational performance of an enterprise during a designated period. Any amount received by an enterprise under such a program prior to the investigation period should not be regarded as an subsidy relating to the goods under consideration exported during the investigation period nor as having been received in that period.

The GOC understands that this program has been thoroughly investigated and considered by the Commission in a number of investigations concerning Chinese exports in recent years. The GOC urges the Commission to adopt a calculation method that is consistent with its own practices, meaning that revenue foregone and either credited or otherwise received in and in respect of a prior period is not entitled to be considered as a subsidy benefitting production in a later period.

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Yours sincerely

Charles Zhan
Associate

[13] Anti-Dumping Commission *Dumping and Subsidy Manual*, November 2015 at page 88.