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*By email:*

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Dear Sir, **Non-Confidential**

**Anti-Dumping Investigation – Exports of Deep Drawn Stainless-Steel Sinks from China – Submissions – Particular Market Situation, Due Allowance, Adjustments and Causation & Material Injury**

I refer to the verification report for Primy prepared by the Anti-Dumping Commission (**Commission**) and to the Commission's Statement of Essential Facts (**SEF**).

The following submissions are made in relation to those documents. Please note that a separate submission will be made on the Commission's dumping margin calculations and methodology for Primy.

**1. Initial Observations**

The goods under consideration are deep drawn stainless steel sinks exported from China.

Deep drawn stainless-steel sinks are:

- produced using similar manufacturing processes;
- produced using the same principal raw material (i.e. stainless steel) that is likely to be purchased from the same or similar sources in China;
- produced with the same or similar CTMS (i.e. labour costs, raw material costs, energy costs, etc., and general selling and administrative costs) with differences being between different models of deep drawn sinks and accompanying

accessories; and
- either sold domestically or exported.

The description of the goods under consideration does not comply with section 269TB(1) and (2) of the Customs Act 1901, which refer to 'consignments' of goods imported into Australia. It, therefore, is necessary to identify what those consignments are and what goods were contained in those consignments in an application for the imposition of antidumping measures supported by relevant, probative evidence. This has not been complied with.

Consequently, arguably the investigation was not validly initiated. That is, the whole investigation is tainted by this failure.

Also, given the foregoing, it would seem reasonable to assume that export prices, normal values, whether based on domestic selling prices or constructed normal values, and dumping margins would be either the same or similar.

If there are material differences between dumping margins between exporters, this would seem to indicate that there has been a flaw in the determination of normal values given that export prices are generally fixed and not subject to adjustment. Accordingly, the question that arises how such material differences are possible in dumping margins given the above circumstances. There would seem to be a flaw in the determination of normal values for one or more of the exporters.

As reflected in the SEF, the dumping margins for exports of deep drawn stainless-steel sinks from China ranges from negative 12% to 88%. No explanation is provided in the SEF as to why there is such a range of dumping margins notwithstanding that the CTMS, domestic selling prices and export prices would broadly be the same for each exporter.

Has the Commission undertaken a 'health check' why there are such material differences between dumping margins for each of the exporters investigated, which would include a comparison of export prices and normal values between each such exporter and other exporters? If not, why not?

As the Commission only has the data to undertake such a 'health check', it should do so before reporting to the Minister, unless the continuity inquiry is terminated beforehand.

On 'health checks', the dumping margin for Primy has increased from 5% in the original investigation to over 50% in this continuity inquiry. Why, especially when production processes have remained unchanged, inputs to manufacture have remained unchanged, CTMS has remained unchanged and there have been no material changes to its deep drawn stainless sink business during the intervening years? What has changed? The only thing that has changed is the Commission's methodology in determining dumping margins and, in particular, its MCC methodology, the appropriateness of which has to be questioned and re-examined as detailed in the separate submission addressing this issue. It has served only to artificially inflate dumping margins that have no relationship with commercial reality.

As detailed in the separate submission, the methodology used by the Commission for the

calculation of the dumping margin for Primy is inappropriate and serves only to artificially inflate the dumping margin. Consequently, the methodology set out in the separate submission should be adopted by the Commission in substitution for the Commission's methodology and the dumping margin for Primy be re-calculated using that methodology in substitution for the Commission's methodology.

In addition, has the Commission complied with Australia's international legal obligations under Articles 2.2 and 2.2.1.1 of the WTO Anti-Dumping Agreement as determined by the WTO Panel in "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019) brought by the Republic of Indonesia. Please see attached. This also is addressed further below.

Also, if a dumping margin for a particular exporter is significant, the questions that arise consists not only why that dumping margin is significant but also are that exporter's export prices comparable to those of other exporters and, if so, are the exporter's domestic selling prices (or constructed normal values) comparable to those of other exporters. If not, why not?

Similarly in relation to the Commission's calculation of normal values. Are the normal values for exporters, whether based on domestic selling prices or on constructed normal values competitive with one another? If not, why not? What is it in an exporter's costs to make and sell that renders its deep drawn stainless-steel sinks, based on the normal values calculated by the Commission, uncompetitive with its competitors in the domestic market?

## 2 Statement of Essential Facts – particular market situation

A SEF is defined in section 269ZHE(1) of the Customs Act 1901 as a statement of the 'facts' on which the Commissioner proposes to base his or her recommendation to the Minister concerning the continuation of the antidumping measures in question (i.e. deep drawn stainless steel sinks from China).

At Section 7.3 of the SEF the Commission determined that a 'particular market situation' existed in relation to the major input to manufacture of stainless steel deep drawn sinks, namely, the supply of stainless steel, a major input to the production of deep drawn stainless steel sinks.

This was not based on any investigation by the Commission as to whether market conditions prevailed in the supply of stainless steel to manufacturers of deep drawn stainless-steel sinks.

Rather, it was based on the Commission's finding in the original investigation over five years previously: see section 6.5 and Non-Confidential Appendix 3 of the SEF.

Accordingly, the Commission's finding that a 'particular market situation' existed in relation to the supply of a major input to manufacture of deep drawn stainless-steel sinks, namely, stainless steel, was based on several assumptions, namely, that:

- the finding in the original investigation that a 'particular market situation' existed in China in relation to the supply of a major input to manufacture of deep drawn stainless-steel sinks, namely, stainless steel, was correct and based on objective, probative evidence;
- the finding in the original investigation that a 'particular market situation' existed in China in relation to the supply of a major input to manufacture of stainless-steel deep

drawn sinks, namely, stainless steel, was not tested in this continuity inquiry but, rather, it was simply assumed that there had been no change since the original investigation;

- no examination was conducted in relation to the supply of a major input to manufacture of deep drawn stainless-steel sinks, namely, stainless steel and whether government intervention or influence had distorted current prices of stainless steel and, if so, to what extent; and
- no examination whether any distortion to the price of an input to manufacture, namely stainless steel, due to government intervention or influence had flowed through to the domestic selling price of the goods under consideration and, if so, to what extent.

Having regard to the foregoing, there existed no basis on which the Commission could make a finding of 'fact' that a 'particular market situation' existed in China in relation to the supply of a major input to manufacture of deep drawn stainless steel sinks, namely, stainless steel, nor in relation to the domestic selling price of the goods under consideration. There was no evidence to support such a finding of facts in the continuity inquiry. Accordingly, the Commission's finding on this issue is fundamentally flawed and it taints the whole of the dumping margin calculations and determinations for exporters of deep drawn stainless-steel sinks from China and must be set aside.

An investigation into whether a 'particular market' exists is in relation to the goods under consideration, not inputs to manufacture (see later below), should involve an investigation into factors such as:

- whether prices for the goods under consideration respond to market signals or conditions;
- whether accounting records are kept in accordance with accounting standards in the country of export and/or international accounting standards and whether those records are independently audited;
- whether the producer is subject to bankruptcy laws in the country of export;
- whether the producer is supplied with utilities on commercial terms;
- whether the producer has the right to hire and dismiss employees and to fix salaries, subject to an industrial awards or regulations; and
- whether the producer has the right to make decisions about prices, costs, inputs, sales and investments free from significant government interference.

No such investigation was undertaken in this continuity inquiry. Consequently, the Commission could not know whether a 'particular market situation' existed in the country of export in relation to the goods under consideration for the purposes of this continuation inquiry.

In "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019), the WTO Panel found that in determining whether a 'particular market' situation existed the investigating authority:

- must investigate, on a case-by-case basis, whether a finding of a 'particular market situation' as a question of f act based on probative evidence; and
- must determine whether a 'particular market situation' existed was in relation to domestic sales of the goods under consideration in the country of export.

This did not preclude the price of inputs to manufacture that have been distorted by government influence also distorting domestic selling prices of the goods under consideration in the country of export. However,

this would require a finding of fact based on probative evidence that the distorted prices of inputs had distorted domestic selling prices and to what extent. That is, whether and to what extent distortions to inputs to manufacture had flowed through to the domestic selling prices of the goods under consideration. Absent such an examination, the Commission cannot know whether a 'particular market situation' exists in relation to domestic sales of the goods under consideration.

As noted, the reference to, in effect, a 'particular market situation' (i.e.*"… the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1)*" of section 269 of the Customs Act 1901) is a reference to the market in the country of export for, here, the market for deep drawn stainless-steel sinks.

It is not a reference to inputs to manufacture. This is evidenced by the fact that section 269TAC(2)(c)(i) of the Customs Act 1901 refers to 'the cost of production or manufacture of the goods in the country of export' (underlining added). This requires an examination by the investigating authority of what actually are the costs of production and sale of the goods under consideration (i.e. deep drawn stainless-steel sinks) in the country of export , as well as whether, in particular, domestic selling prices of the goods under consideration in the domestic market have been distorted and, if so, to what extent.

There is no evidence in the SEF that the Commission conducted such an examination. It, therefore, has not complied with its legal obligations under Article 2.2 of the WTO Anti-Dumping Agreement.

Instead, the Commission stated at Paragraph 6 of Non-Confidential 3 of the SEF that:

> "*The Commission's assessment and analysis of the available information indicates that the GOC materially influenced conditions within the Chinese HRC markets during the investigation period and because of that influence, the domestic prices for Chinese steel pallet racking were substantially different to those that would prevail in normal competitive market conditions.*"

No investigation was undertaken as to how the Government of China 'materially influenced conditions within the Chinese HRC markets' and, if so, to what extent. Nor was there an investigation as to how the Chinese Government's influence on HRC prices, assuming such influence, actually affected prices of deep drawn stainless-steel sinks in the domestic market and, if so, to what extent.

Further, it is unclear why the Commission has referred to domestic prices for the goods under consideration substantially different to those that would prevail in normal competitive market conditions. No explanation is provided as to why 'competitive market conditions' are relevant and what are 'normal competitive market conditions' and what evidence that domestic sales of deep drawn stainless-steel sinks are not sold domestically in China in competitive market conditions.

**3. Price Comparison**

It is evident from the WTO Panel's decision in "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019) that a finding of a 'particular market situation' is not determinative of whether recourse may be had to a constructed normal value. This depends upon whether domestic prices 'permit a proper comparison' with export prices:

> "*Where a 'particular market situation is found to exist' the investigating authority must examine whether 'a proper comparison' of the domestic and export price is permitted or not.*" "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019) (para.7.73 and see

also paragraphs 7.75, 7.76, 7.79, 7.89, 7.2.4.5 and 7.2.5)

Just as was the case in the A4 Copy Paper case that Australia had acted inconsistently with Article 2.2 of the WTO Anti-Dumping Agreement in failing to examine whether a 'proper comparison' of domestic and export prices was permitted. No such examination was made by the Commission in this investigation. The Commission has not complied with Australia's legal obligations under Article 2.2 of the WTO Anti-Dumping Agreement in this regard and, consequently, its determination of normal values are fundamentally flawed.

## 3. Calculation of CTMS for Primy

At section 7.8.3 of the SEF, the Commission set out how it calculated normal values for Primy.

The Commission stated that normal values for Primy had been calculated as follows:

- consistent with findings in section 7.3 of the SEF, Commission determined it necessary to replace each exporter's reported stainless-steel production costs with a suitable competitive market substitute;
- for two models of Primy's deep drawn stainless steel sinks the Commission considered that there were sufficient domestic sales in the ordinary course of trade and, consequently, normal values could be calculated under section 269TAC(1) of the Customs Act 1901;
- four the remaining four models the Commission considered that there were insufficient domestic sales in the ordinary course of trade and, therefore, normal values were to be calculated under section 269TAC(2) of the Customs Act 1901.

The issue is whether the calculation of normal values for Primy in this manner was consistent with relevant legislative provisions and with relevant provisions in the WTO Anti-Dumping Agreement.

In relation to this the issue is not merely whether the Commission's methodology for the calculation of Primy's normal values is consistent with relevant Australian legislative provisions but also whether that methodology and relevant Australian legislative provisions were consistent with Articles 2.2 and 2.2.1.1 of the WTO Anti-Dumping Agreement. Whether the Commission's methodology was appropriate given the factual circumstances applying to Primy is addressed and detailed in the separate submission regarding the methodology used by the Commission in calculating the dumping margin for Primy.

The relevant Australian legislative provisions are sections 269TAC and 269TAAD and Regulations 43 to 45 of the Customs (International Obligations) Regulation 2015. These provisions set out how an exporter's cost to make and sell and its profit are to be determined for the purposes of calculating a normal value for that exporter.

Of relevance here is whether those legislative provisions are consistent with Articles 2.2 and 2.2.1.1 of the WTO Anti-Dumping Agreement, as well as the methodology adopted by the Commission in calculating the normal value. In "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019), the WTO Panel found that relevant Australian legislative provisions and the methodology adopted by the Commission in the investigation into A4 Copy Paper from China were inconsistent with requirements under the WTO Anti-Dumping Agreement.

To begin with the WTO Panel had regard to the first sentence of Article 2.2.1.1 of the WTO Anti-Dumping Agreement. That sentence provides as follows:

> **"***… costs shall <u>normally</u> be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the <u>generally accepted accounting principles</u> of the exporting country and <u>reasonably reflect the costs</u> associated with the production and sale of the product under consideration*." (Underlining added)

The WTO determined that this sentence contained two conditions for the use of an exporter's records in calculating the exporter's costs. Those conditions were that (i) the records were kept in accordance with generally accepted accounting principles of the exporting country and (ii) those records reasonably reflected the costs associated with the production and sale of the goods under consideration. Only if those two conditions are satisfied, does the word 'normally' become operative according to the WTO Panel permitting an investigative authority to disregard an exporter's records in 'compelling' circumstances.

The first issue is whether relevant Australian legislative provisions regarding the calculation of an exporter's cost to make and sell the goods under consideration comply with the requirements of the first sentence of Article 2.2.1.1 of the WTO Anti-Dumping Agreement. Relevant in this regard is Regulation 43(2) of the Customs (International Obligations) Regulation 2015. It provides as follows:

> "*(2) If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) <u>reasonably reflect competitive market costs</u> associated with the production or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.*"

Clearly the reference to 'reasonably reflect competitive market costs' in Regulation 43(2)(b)(ii) of the Customs (International Obligations) Regulation 2015. It does not comply with the second condition in the first sentence of Article 2.2.1.1 of the WTO Anti-Dumping Agreement where no mention is made of 'reasonably reflect competitive market costs'.

The condition is that the exporter's records 'reasonably reflect the costs associated with the production and sale of the goods under consideration'. Accordingly, not only is this regulation inconsistent with the second condition in the first sentence of Article 2.2.1.1 of the WTO Anti-Dumping Agreement but also any methodology used by the Commission to calculate an exporter's

cost to make and sell the goods under consideration based on 'competitive market costs' also is inconsistent with that condition. This was confirmed by the WTO Panel in "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019).

The calculation of Primy's cost to make and sell the goods under consideration need to be re-calculated in accordance with the requirements of the first sentence of Article 2.2.1.1 of the WTO Anti-Dumping Agreement. Further, Primy's records should not be rejected unless there is a 'compelling' reason for their rejection: see paragraphs 7.110 to 7.117 of the WTO Panel's decision in "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019). It is difficult to imagine what would be a 'compelling' reason to reject such records where they are kept in accordance with generally accepted accounting principles in the country of export and no such 'compelling' reason has been advanced by the Commission in the SEF.

It does not follow that certain costs may be disregarded, as opposed to the exporter's records, where such costs have been distorted by, for example, government intervention or influence. The WTO Panel considered this to be permissible: see paragraphs 7.132 and 7.158 and 7.159 of "*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019) and the WTO Appellate Body decision in the case referred to in those paragraphs.

Of importance, the WTO Panel found that whatever information an investigating authority used in calculating the costs of an exporter in producing the goods under consideration, the investigating authority has to ensure that such information is used to arrive at the cost of production in the country of origin and this may require the investigating authority to adapt the information it collects so that it achieves this result. This also includes the investigating authority considering alternate available sources for replacing the distorted recorded costs so as to use costs that are unaffected by the distortion to the extent possible.

In any event, in using replacement costs for the recorded distorted costs, the investigating authority is obligated, as much as possible, to use replacement information that conforms to the requirement to use the cost of production in the country of origin for the exporter in question.

It is not apparent from the SEF that the Commission has undertaken and satisfied this obligation in using replacement information for Primy's recorded costs. Instead, it appears that the Commission has used updated information of steel from benchmark SBB European and North American average prices. These obviously are high cost producers of steel and query whether alternate more suitable replacement information was available to ensure that the use replacement information that conforms to the requirement to use the cost of production in the country of origin (e.g. China).

The Commission should undertake such an investigation into alternate sources of replacement information instead of relying on the sources of information in the original investigation, which may no longer be relevant or suitable, to ensure that such replacement information, with appropriate adjustments, conforms to the requirement to use the cost of production in the country of origin.

## 4. Due allowance

We note that in the calculation of a normal value various adjustments have been made, both upwards and downwards: see section 9 of the draft verification report.

No doubt these adjustments are made pursuant to sections 269TAC(8) & (9) of the *Customs Act 1901*. Such upwards and downward adjustments are consistent with the Commission's past practice in other, previous investigations. No doubt they have been made to purportedly effect a fair comparison between export prices and normal value, that is, that the normal values are comparable with export prices.

However, we draw your attention to Article 2.4 of the WTO Anti-Dumping Agreement. That Article relevantly provides that a "fair comparison shall be made between an export price and the normal value" but the third sentence to that Article stipulates that:

> "*Due allowance shall be made in each case, on its merits, for differences that affect price comparability …*". (Underlining added)

Section 269TAC(8) of the *Customs Act 1901* is intended to give effect to this provision in the WTO Anti-Dumping Agreement. This is reflected in the Commission's 'Dumping and Subsidy Manual': see section 15.1 of the Manual.

The issue is what is meant by "due allowance". The term "allowance" refers to something that is allowed or permitted. The Macquarie Dictionary states that the term, amongst other things, refers to a "deduction".

In other words, Article 2.4 of the WTO Anti-Dumping Agreement arguably does not contemplate 'upward and downward adjustments' to effect a fair comparison between export prices and normal value but only 'downward adjustments' to domestic selling prices or a constructed normal value to effect a 'fair comparison'.

That is, an 'upward adjustment' arguably is in breach of Article 2.4 of the WTO Anti-Dumping Agreement and is not permissible.

Support that this is the correct approach/interpretation of the reference to "adjustments" in Article 2.4 of the WTO Anti-Dumping Agreement may be had by section 15AB of the *Acts Interpretation Act 1901* which permits recourse to extrinsic material (i.e. Article 2.4 of the WTO Anti-Dumping Agreement) in construing the term "adjustments".

The term 'adjustment' in section 269TAC(8) of the Customs Act 1901 should not and must not be construed in a manner that is in breach of the WTO Anti-Dumping Agreement.

Accordingly, only 'downward adjustments' arguably are permitted in the calculation of a normal value for Primy.

**5. Reference to "Due" in "Due Allowance"**

Further, the reference to "due" in "due allowance" refers to the extent of any adjustment to normal values. The extent of any adjustment is only that which is necessary to effect a 'fair

comparison' between the export prices and normal value. That is, to make prices 'comparable'.

For example, if the domestic inland freight is $100 but the inland freight for exports is $80, then a downward adjustment of $20 only is required. This approach should and must apply to all adjustments. Any departure from this would not result in a 'fair comparison'.

This reflected in the Panel decision in '*EC – Fasteners (China)*' (para 7.298).

> "*Accordingly, the reference to 'due' in 'due allowance' refers to any adjustment must be only to the extent that the adjustment in question affects prices. Mere differences between exports and domestic sales (or a constructed normal value) do not permit an adjustment if they do not affect prices and, if they do, the extent that they affect prices must be determined. This is reflected in wording in Article 2,4: "Due allowance shall be made in each case, on its merits, for differences which affect price comparability …". (underlining added) Merely to adjust for differences does not result in comparability in prices as the size of the adjustment for a difference in export and domestic sales may not reflect the extent to which prices are affected by the adjustment in question.*"

It does not appear that such an assessment and appropriate adjustments have been made to the adjustments set out in the draft verification report and accompanying dumping margin calculations when they should have been.

It would seem that all that has occurred is differences between export prices and normal values appear to have been identified by the Commission and adjustments made purportedly to account for those differences. There seems to have been no assessment as to whether those differences affect the prices of deep drawn stainless steel sinks destined for domestic consumption in the country of export and, if so, the extent that they do so and the amount of an adjustment to take account of the extent of any such differences.

This required by Article 4.2 of the WTO Anti-Dumping Agreement, as evidenced by relevant WTO jurisprudence, and by section 269TAC(8) of the *Customs Act 1901*.

**6. Further comments on adjustments**

For some adjustments, the Commission has simply deducted an amount from the domestic selling price and substituted an amount for the same category incurred in export sales. For example, there has been deducted 'domestic inland transport' from domestic selling prices and substituted 'export inland transport'. Similarly, with respect to credit terms and, apparently, accessories.

No assessment apparently has been made as to what extent these adjustments affect export prices, if in fact they do, and, therefore, what size of the adjustment should be made in the calculation of the normal value.

Further, in relation to upward adjustments, assuming upwards adjustments are permissible, if those adjustments had existed in domestic sales then the domestic selling price would be different. That is, it would not consist simply of adding the adjustment to the domestic selling price. Rather, the domestic selling price itself would be different to remain competitive.

For example, no commissions are payable in relation to domestic sales. To add commissions payable on exports to domestic sales, not only is it a fiction (i.e. no commissions were actually payable on domestic

sales) but also, if they were, then the domestic selling price presumably would be different to take account of the commission and for the domestic price to remain market competitive. It would not simply consist of adding the commission to the price.

That of itself does not ensure that normal values are comparable. It fails to recognise "due" in "due allowance". It also fails to recognise that the resulting "price" is not a "price" that is competitive the domestic market for stainless steel deep drawn sinks.

For example, in adding commissions as an adjustment the Commission has simply calculated a commission for each consignment by dividing the "Revised Commission" (Column BU) by the "Quantity" of sinks for the individual consignment (Column AM). It is unclear how the "Revised Commission" was calculated. However, the adjustment for commissions assumes that the commission for each domestic sale would be calculated in exactly the same way. This is commercially unrealistic.

## 7. Profit margin

In relation to profit margin calculations for those consignments for which a constructed normal value has been calculated, regulation 45(3) of the *Customs (International Obligations) Regulation 2015* is relevant. See: http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_reg/cor2015466/s45.html

This would indicate that the profit margin for those consignments should be calculated in accordance with paragraph (3)(a) of that regulation. That is, by "*identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export*". That information would be available from the deep drawn stainless steel sinks for which normal values were based on domestic sales (i.e. using section 269TAC(1)).

Instead, a formula has been applied using initially XXXXX and XXXXX which is applied to the Export CTMS (see the normal value calculation for constructed normal values). This means that the same margin of profit applies to all deep drawn stainless-steel sinks regardless of any other factors that may affect profits. Using such a formula would seem uncommercially unrealistic. It is unlikely that any business would have the same margin of profit for all its products. It ignores other factors that would be taken into account by a business in determining profit margins for individual products.

This does not seem to have been considered or been addressed by the Commission in determining profit for deep drawn stainless-steel sinks produced and sold by Primy in the domestic market.

## 8. Causation & Material Injury

### 8.1 *Australian industry's sources of stainless steel*

The Australian industry's sources of stainless steel are not identified either in its verification report or in the SEF.

If the Australian industry sources all or part of its requirements of stainless steel from China, then, based on the Commission's erroneous finding that a 'particular market situation' exists in relation to stainless steel inputs to manufacture, this would apply equally to the Australian industry. The

Commission, however, is silent on this issue despite the fact that it would affect the analysis of the Australian industry and its performance.

If it sources all or parts of its requirements of stainless steel from other countries such as, for example, Japanese or Korean, or from North American or European, producers of stainless steel, then the question is whether it is sourcing such requirements of stainless steel form high cost and high priced countries and whether this is the cause of its injury given that stainless steel is the major input to manufacture of deep drawn stainless steel sinks. This does not appear to have been investigated by the Commission despite the obvious consequences it may have for the performance of the Australian industry.

Also, the Australian industry's verification report indicated that its imports of stainless-steel coils are split by a third party in Australia and then on supplied to the Australian industry. Presumably that third party is the importer of the stainless-steel coil and adds the cost of such imports plus its CTMS and profit margin on the stainless steel it on-supplies to the Australian industry. Presumably this would be included in the Australian industry's CTMS. Has this been investigated by the Commission and has this third party's imports of stainless steel and its CTMS and profits been verified by the Commission? If it has, why is there not a verification report on the public file? If it has not, why not?

Also, has the Australian industry's CTMS (e.g. energy costs, labour costs, inputs to manufacture, etc.) been benchmarked against comparable costs in China or other Asian countries such as Vietnam, Thailand, Indonesia, etc.? In other words, is the Australian industry simply a high cost producer of deep drawn stainless-steel sinks under a flawed business plan?. Would it not be more competitive for it to have overseas entities manufacture its deep drawn stainless-steel sinks to its specifications that it then imports and distributes them in Australia?

Is a high cost flawed business plan not the cause of any injury that the Australian industry may have incurred? Has this been assessed? Is this not a relevant consideration on material injury and causation?

*8.2 Price undercutting, causation and the lesser duty rule*

In the SEF stated that it did not consider the 'lesser duty rule' in relation to exports from China. The reason given was that the:

> "*Minister is not required to have regard to the lesser duty rule because the normal value of the goods exported from China was not ascertained under subsection 269TAC(1) due to the operation of 269TAC(2)(a)(ii) (i.e. due to the existence of a particular market situation in the steel pallet racking market in China)*."

Justification for this approach is given by the Commission as section 8(5BAAA) of the Customs Tariff (Anti-Dumping) Act 1975.

However, the application of this provision is not mandatory. The issue is whether the 'lesser duty rule' should have been applied to remove the injury caused to the domestic industry by dumping. As discussed later below, dumping, per se, does not cause injury to the domestic injury. Rather, an

examination needs to be undertaken as to whether and, if so, how and to what extent the injurious effects of dumping have caused injury to the domestic industry.

It essentially is a causation issue. That is, as indicated above, whether and, if so, how and to what extent the injurious effects of dumping have caused injury to the domestic industry. This requires not only consideration of the extent of dumping from the country or countries in question (i.e. the dumping margins in question) but whether and, if so, how and to what extent the level of dumping margins have caused injury to the domestic industry. This is examined below.

In the SEF the Commission stated that exports of deep drawn stainless-steel sinks had undercut the Australian industry's prices as follows:

- for sales to the OEM market segment, by between 3% to 46% with an average by 29%; and
- for sales to the other market segments, by between 23% to 48% and on average by 25%.

This is important because antidumping measures must not exceed the full dumping margin and, in addition, must only be imposed at a level that remedies the injury cause by dumping. See Article 9.1 of the WTO Anti-Dumping Agreement which provides that in the imposition of antidumping measures:

> *"It is desirable …that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry*".

Article 9.1 of the WTO Anti-Dumping Agreement does not stipulate how effect is to be given to this requirement. It is a matter for the relevant government authorities provided that the lesser amount of duty is sufficient to remove the injury to the domestic industry. Nor does it make application of the lesser duty rule mandatory but desirable but that is the nature of antidumping measures – i.e. to remove the injury caused to the domestic injury by the alleged dumping. The aim of antidumping measures is to 'offset' the injury to the domestic industry caused by the alleged dumping: Article VI.2 of GATT 1947. This requires an examination as to what is causing the injury to the domestic industry.

The usual answer is that 'dumping' caused the injury to the domestic industry. Dumping, per se, cannot be a cause of injury to the domestic industry. For example, if it is found that export prices are less than normal values, how does that of itself cause injury to the domestic industry? It does, then why have the provisions contained in Articles 3.1, 3.2, 3.4 and 3.5 of the WTO Anti-Dumping Agreement required? Those provisions require an examination by the investigating authority of what effect the allegedly dumped imports have had upon the prices, sales volumes, revenues and profits of the domestic industry, as well as other relevant economic factors. This can only be determined by the extent to which the allegedly dumped imports have undercut the prices of the domestic industry, if at all, and, consequently, price depression, price suppression, reduced sales volumes, reduced revenues and, therefore, reduced profits. Absent, price undercutting due to dumping, these other forms of injury arguable cannot be attributed to dumping.

If, for example, the level of antidumping margin imposed is the full margins of dumping for exporters but a lesser amount would be sufficient to remove the injury caused to the domestic industry, what is the purpose of imposing antidumping measures in excess of the level sufficient to remove the

injury to the domestic industry? It is here useful to recall Article VI.1 of GATT 1947. It stipulates that dumping is to be condemned only if it causes injury to a domestic industry. To the extent that dumping does not cause injury to the domestic industry, then it is neither condemned nor permissible to impose antidumping measures that do not remedy the injury caused by dumping. The imposition of antidumping measures in excess of that required to remove the injury caused by dumping means that the amount of the excess is a penalty exacted on the relevant exporters, which is not sanctioned by either Article VI of GATT 1947 nor the WTO Anti-Dumping Agreement.

Consequently, an examination is required of what level of antidumping measures is sufficient to remove the injury caused to the domestic industry by dumping. This is not dependent upon the full amount of each dumping margin as discussed below.

Given the price undercutting referred to above and set out in the SEF, would antidumping measures less than the full dumping margins be sufficient to remove the injury to the Australian Industry caused by exports from China. This requires an examination of the injury and causation analysis

To begin with, for example, if it is determined that the goods under consideration are not undercutting the prices of the Australian industry, then there would be no impediment in the Australian industry increasing its prices, nor reducing its prices, or incurring reduced sales due to price under cutting. Consequently, the Australian industry would not be incurring reduced revenues and profits due to price undercutting as there would be no price depression, price suppression or reduced sales due to price undercutting by dumped exports. See Articles 31, 3.2 and 3.5 of the WTO Anti-Dumping Agreement.

Where, on the other hand, there is price undercutting by dumped exports, the issue is what level of antidumping measures would be sufficient to remove the price undercutting and, thereby, remove the injury that flows from the price undercutting (e.g. price depression, price suppression, reduced sales volumes, reduced revenues, reduced profits, etc.). Obviously antidumping measures at the full dumping margin, particularly if there is a range of dumping margins, as is here the case, would not be required. Instead, the 'lesser duty rule' should be applied except where antidumping measures imposed on a full dumping margin would be less than the 'lesser duty'. In such a case, the antidumping measures could be imposed upon the full dumping margin.

Given the wide range of dumping margins in this continuity inquiry and the level of price undercutting of the Australian industry's prices, the 'lesser duty rule' must be applied equal to the level of price undercutting to remove the injury caused by price undercutting (e.g. price depression, price suppression, reduced sales volumes, reduced revenues, reduced profits, etc.).

## 9. Conclusion

Having regard to the foregoing, it would seem that normal value calculations and the dumping margin calculations, as well as the findings on material injury and causation, in the SEF need to be revisited and revised in accordance with the law and international legal obligations and consideration be given to what level of antidumping measures be imposed to remove the injury caused to the Australian industry, if any, through dumping to avoid any such measures constituting a penalty.

Finally, I note that in the dumping investigation into power transformers from China the Commission accepted submissions from interested parties, including the Australian industry, well after the 20-day period for submissions after publication of the SEF in that investigation. As disclosed in the extension of time within which to report to the Minister, the reason for the extension was to enable the Commission to 'properly consider submissions' it had received in response to the SEF and, ultimately, those submissions delayed the Commission in reporting to the Minister as evidenced by the further extension of time.

In the interests of consistency of administration, no doubt the Commission will continue to accept submissions after the 20-day period for submissions in response to the SEF in this continuity inquiry has expired.

Yours faithfully

Kind regards,

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**Attachment**

**"*Australia – Anti-Dumping Measures on A4 Copy Paper*" (WT/DS529/R) (4 December 2019)**

WTO Panel Report - A4 Copy Paper.pdf