

January 23, 2009

Director Policy
Trade Measures Branch
Customs House
5 Constitution Avenue
CANBERRA ACT 2601
AUSTRALIA

Dear Sir

Comments on the draft revised Dumping Manual and discussion paper regarding anti-dumping applications claiming existence of a particular market situation

I am writing to you in response to the invitation to stakeholders to comment on the draft revised Dumping Manual (“the exposure draft”) and on the discussion paper regarding anti-dumping applications claiming existence of a particular market situation (“the discussion paper”) notified in Australian Customs Dumping Notice No 2008/47.

The Ministry of Commerce (“MOFCOM”) has overall responsibility amongst the ministries of the Government of China (“GOC”) for the administration of trade, economic cooperation and foreign investment. In particular MOFCOM is responsible for the overall coordination of China’s antidumping, countervailing and safeguard measures, related to both import and export trade.

A Summary of our comments

- 1 In relation to the proposed changes shown in the exposure draft, MOFCOM requests Australian Customs to:
- (a) reconsider the suggestion, as set out in lines 1266 to 1271, that Customs might be constrained in using other seller's sale prices for normal values due to confidentiality reasons, and might use other methods in such circumstances;
 - (b) revise the section on "Value Added Tax on exports" in lines 1994 to 2027 to accord with proper methodology and correct mathematical calculation;
 - (c) reconsider certain aspects of the wording of section 27 in lines 3354 to 3415 dealing with "Reinvestigations" in relation to the contents of reports, the matters that Customs should consider in a reinvestigation, and the application of the rule of law.
- 2 In relation to the discussion paper, MOFCOM welcomes the attempt to clarify the definition of "market situation" for the purposes of implementing the relevant Australian law. MOFCOM is concerned about possible abuse of the "market situation" provision, in a way which does not recognise the fact that markets of all countries are impacted in different ways by the regulation of their governments, and by the anti-competitive behaviour of private actors. The weight of legal and administrative precedent concerning the disqualification of domestic sales on a "market situation" basis is that the situation in the market must deprive the market of its ability to set prices. The absence of a profit motivation amongst sellers, or the lack of any discretion in price setting, are examples of conditions which investigating authorities could view as "market situations" of sufficient severity and degree so as to render domestic sales prices unsuitable for normal value purposes. Certain parts of the discussion paper suggest a much less strict "market situation" interpretation than the interpretation which is required under Australian law and which is preferred internationally. In relation to those parts of the discussion paper MOFCOM requests Australian Customs to adjust the wording to reflect the interpretation which properly reflects the available authority and precedent.

B Detailed comments concerning the discussion paper

<i>A particular market situation requires a comparative difference between markets</i>
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3 Article 2.2 of the WTO Anti-Dumping Agreement¹ provides as follows:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (footnote omitted)

4 We think it is significant to note that the focus of the Article is on the comparison of a normal value with an export price. In other words, the Article permits an implementing Member to depart from a domestic selling price as the basis for normal value where the conditions of the domestic sale are different to the conditions of the export sale, and therefore distort the comparison. It is this difference that causes the market situation to be of a type that would affect the comparison. On one view, then, Article 2.2 should be limited to this comparative context. China's position is that low costs, whether arising from regulated basic commodity or energy pricing, which affect the sales of the product no differently on the domestic market when compared with the sales of the product on the export market, cannot of themselves create a "particular market situation" under Article 2.2. Where an absence of competition affects the domestic market, such as might arise by way of price fixing of the product concerned in that market, and where no such factor affects competition in the export market, then Article 2.2 could come into play.

¹ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*

5 At the same time China notes that the practices of some WTO Members (or, where there has been no practice, the views of some WTO Members) have trended away from this “comparative” appreciation of Article 2.2, towards a test which measures the severity of impact of any particular factor, or factors. Nonetheless this severity must still impact upon competitive conditions in the market, and prevent competitive forces in the market concerned from setting a price for the relevant product.

WTO Member implementation emphasises the severity of effect on competition, and the need for comparatively different impacts

6 Two themes emerge from the explanations given by Members who have adopted the Article 2.2 “particular market situation” concept into their domestic legislation. One of these is the “comparative” aspect of such an analysis. The other is the severe nature of the situation which must emerge from the facts of the relevant case, in order to exclude the domestic selling price from normal value consideration.

7 Canada does not have a separate provision in its legislation referring specifically to “particular market situation”. When asked about the criteria that Canada would use to implement the concept of a “particular market situation” and thereby disregard calculation of normal values on the basis of home market price, Canada advised:

The criteria in the Special Import Measures Act (SIMA) related to the concept of a "particular market situation" would be those factors deriving from subparagraph 15(a)(i) referring to sales to purchasers not associated with the exporter; paragraph 15(c) which requires that the goods be for use in the country of export under competitive conditions, and paragraph 16(2)(a) which requires domestic sales to more than one purchaser.² (emphasis added)

8 The focus of the Canadian implementation is therefore seen to be on the need for competitive conditions to exist in the market. An absence of these conditions would cause the Canadian investigating authority to use the

² G/ADP/W/263; G/SCM/W/273 (96-0310).

alternative methods to determine the normal value. An absence of such conditions could arise from price fixing in relation to the product concerned, or from monopoly or monopsony behaviour in the “market” for the product. However if competitive conditions do exist then the domestic selling price cannot be disregarded.

- 9 Like Canada, the US also places emphasis on the need for prices to be competitively set. The US referred to its Statement of Administrative Action (“SAA”), published to accompany the US legislation which implemented the Uruguay Round, in a WTO document as follows:

[The SAA] states that a particular market situation might exist, for example, where a single sale in the home market constitutes 5 per cent of sales to the United States, or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. It also may be the case that a particular market situation could arise from differing patterns of demand in the United States and in the foreign market. For example, if significant price changes are closely correlated with holidays which occur at different times of the year in the two markets, the prices in the foreign market may not be suitable for comparison to prices in the United States.³ (emphasis added)

- 10 If the element of competition exists, then MOFCOM assumes that the US would not implement its “particular market situation” provision except in cases of other, significant, comparative differences, such as in the example of seasonality of demand given by the US.⁴

³ G/ADP/Q1/USA/10; G/SCM/Q/USA/10 (98-3933).

⁴ In the US case of *HuSteel Company v US*, the Court of International Trade ruled that the Department of Commerce (“DOC”) had not made out its case that sales to the Chinese market were not “representative”. As a consequence, the Court held that third country sales by a Korean exporter to that market could not be excluded from use as the basis for normal value determination. Although dealing with a different normal value test to the “particular market situation” test, observations made in that case can be usefully considered given the subject matter of the discussion paper.

DOC was of the view that domestic prices in a non-market economy are not determined on market principles, and that foreign suppliers to non-market economies compete with domestically-set prices, and that therefore the sales to such a market could not be “representative”. The CIT held that DOC could not presume that sales from market economy sellers to non-market economy buyers are made at distorted non-market prices.

- 11 In another relevant discussion under the auspices of the WTO, Peru responded to a question from Mexico about the “special factors” in a domestic market which can distort prices in such a manner as to make them unfit for comparison with export prices. Peru responded:

*The other special factors in the domestic market of the country of origin which, in the opinion of the Commission, can affect prices in such a manner as to make it impossible to make a proper comparison, include situations such as, inter alia, the existence of a centralized economy, an economy affected by a high degree of hyperinflation or special trade treatment areas.*⁵

DOC also argued that the price could not be representative because prices for the merchandise sold by the exporter on the Chinese market were less than the prices to the rest of the world. The CIT rejected this:

The second issue with the data is that the mere fact that the prices are different is not in and of itself legally significant. Commerce does not indicate that the agency generally suspects the validity of a sale merely because the price for it differs from average world price. The difference in prices matters here because Commerce argues that it shows that the Chinese government is setting the price of OCTG inside China, and the distorted domestic price in China led Respondents to sell OCTG for export to China at distorted, nonmarket prices. However, Respondents raised a persuasive argument that the average price data relied on by Commerce actually undermines the agency’s claim.

Respondents claimed that “the data shows significant variation in [average prices] for all source countries for OCTG into the PRC, and this should not happen if, as Commerce alleges, prices for OCTG are set by the government.” (Remand Results 32 (Commerce summarizing Respondents’ argument).) Commerce responded that it “expects this type of variation to be found for all of the countries that collect this type of data.” (Id.) But why? If the nonmarket economy government sets the price, why would it differ from export country to export country? To explain the variation, Commerce relies on the very market considerations (volume of sales, specific grade of merchandise, etc.) that it argues are not present in sales to a nonmarket-economy buyer. Commerce has not adequately dealt with the objection to the average price data raised by Respondents. (emphasis added)

Lastly, DOC argued that the Chinese government controlled the oil and gas industry, and that this necessarily meant that the Korean exporter’s prices into that market were not market based. The CIT responded:

The relevant question is not whether the Chinese government controls the oil and gas industry within China, but whether its control over the oil and gas industry means that Chinese buyers of OCTG can dictate distorted, nonmarket prices to Respondents. And it is not enough to conclude that this is so; this is the issue on which Commerce must present evidence.

(Husteel Company, Ltd and SeAH Steel Corporation, Ltd v United States & Ors, United States Court of International Trade Slip Op. 08-62, Court No. 06-00075 (2 June 2008))

⁵ G/ADP/Q1/PER/12; G/SCM/Q1/PER/12 (98-3638).

12 MOFCOM interprets this as another indication of the magnitude of a situation that must be found to exist before domestic prices are deemed to be unsuitable, and of the proposition that the difference must impact on the comparison. A centralised or planned economy is a severe circumstance, and would prevent meaningful competition taking place in the market concerned.⁶ Hyperinflation in the domestic economy is another severe example of a distortion, and is one which would definitely impact on the comparison between the two markets (domestic and export).

13 Despite conceding a lack of practical experience in the application of the “particular market situation” exception, the European Commission has offered a similarly limited interpretation of the circumstances in which such a situation might be found to exist in its filings with the WTO:

More specifically, the particular market situation concept seems to be the more appropriate sedes materiae when the prices of the exporting producer subject to investigation are to a considerable extent distorted because of structural reasons which significantly affect the economic sector in question or its upstream sectors. The term “structural reasons” should be understood as referring to factors which affect the play of market forces to an extent that prices and costs can no longer be considered as being the result of such play. An example falling under this category could be price fixing.⁷ (emphasis added)

14 Lastly, we note that at least one WTO Member equates a “particular market situation” as being confined solely to the situation applying in non-market economies,⁸ another relates it to the situation of no sales,⁹ and that at least 12

⁶ China is neither a non-market economy nor an economy in transition. The Australian Government recognised China’s “full market economy status” in paragraph 2 of the *Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People’s Republic of China on the Recognition of China’s Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People’s Republic of China* on 18 April 2005.

⁷ G/ADP/Q1/EEC/22; G/SCM/Q1/EEC/22 (03-4632).

⁸ Eg, Uruguay, see G/ADP/Q1/URY/8; G/SCM/Q1/URY/8 (97-3145).

⁹ Eg, Argentina, see G//ADP/W/286; G/SCM/W/294 (96-0778).

WTO Members,¹⁰ China included, see no need for the exception and have proposed that it be deleted from Article 2.2.

Legal and administrative precedent supports the view that “particular market situations” will rarely arise in competitive economies such as China’s

15 Australian Customs has steadfastly and correctly insisted on a sufficient level of evidence to be provided in an application before an investigation of an alleged “particular market situation” could be justified. MOFCOM supports the discussion paper in this regard. Where Australian Customs has investigated such allegations, it has consistently ruled that the alleged “situation” was either not proven to exist, or did not exist. MOFCOM also commends these outcomes, but notes that some of the factors investigated have not been of the type or degree which could validly trigger the application of the “particular market situation” exception, even if they had been proven to exist.

16 Thus MOFCOM notes that:

- (a) in a 2008 investigation report concerning toilet paper,¹¹ Australian Customs found that Indonesian government policies regarding inputs (timber and pulp) may have resulted in a lower cost of production but that such reduced costs were unlikely to have a material effect on domestic selling prices, and emphasised the need to establish market impacts;¹²

¹⁰ Chile; Colombia; Costa Rica; Hong Kong, China; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand. See TN/RL/W/150, 16 April 2004.

¹¹ *Toilet Paper Exported from the People’s Republic of China and the Republic of Indonesia*, Trade Measures Branch Report No 138, 16 December 2008.

¹² In MOFCOM’s opinion, merely focussing on lower costs of production would not satisfy the “particular market situation” test. The severity and their comparative effect on pricing between the domestic and export markets would also need to be assessed. MOFCOM notes that Australian Customs properly related the need for a “particular market situation” to be identified as well, in its following comments:

The submission also made no attempt to examine the toilet paper market in Indonesia. Market information in relation to toilet paper will necessarily form the foundation for analysing the market situation. While at the same time recognising the inherent difficulties for the applicants in this regard, Customs expects that market situation claims in relation to government influence on upstream inputs should be supported, to the extent possible, by any

- (b) in a 2007 investigation report concerning sodium tripolysphate,¹³ Australian Customs agreed that it is possible for a degree of government influence to exist without the result being a particular market situation or a non-competitive market;¹⁴ that on the facts of the case concluded that there was no direct government price control; that VAT refunds did not distort market pricing; that government directives did not impact on pricing; that electricity and rail freight were paid for at regular rates; and that the lack of full compliance with WTO accession requirements had no demonstrated relevance to the market;
- (c) in a 2007 investigation report concerning sodium bicarbonate,¹⁵ Australian Customs examined factors such as subsidies, taxes, state ownership and regulation and ultimately concluded that a competitive market existed comprised of a number of State-owned enterprises together with private companies, and that regulatory controls did not provide market specific benefits or subsidies;
- (d) in a 2005 report concerning mushrooms,¹⁶ Customs acknowledged that there was a State monopoly in salt, and that SOEs provided utilities, but that these inputs were provided under market conditions, were minor, and would not impact the domestic selling price.

publicly available market information, studies, and statistics that go to demonstrate the likelihood of how government intervention in one upstream factor of production will impact on the particular markets for the products of interest. (emphasis added)

¹³ *Termination of an Investigation - Alleged dumping of sodium tripolyphosphate exported from the People's Republic of China*, Trade Measures Branch Report No 121, 11 May 2007.

¹⁴ Importantly, Customs said the following in its Report:

Customs considers that even the most competitive markets operate in an environment subject to government policy settings, and where changes in these settings may impact on the market. To find that a government policy change, such as the reduction of VAT export rebates on phosphate rock and phosphorus, rendered a market for a downstream product unsuitable for establishing normal values, Customs would need to be satisfied that the change caused the costs of phosphate rock and or phosphorus to no longer reflect competitive market costs. (emphasis added)

¹⁵ *Review of Measures Applying to Sodium Hydrogen Carbonate (Sodium Bicarbonate) exported from the People's Republic of China*, Trade Measures Branch Report No 119, 21 February 2007.

¹⁶ *Preserved Mushrooms exported from the People's Republic of China*, Trade Measures Branch Report No 99, 27 September 2005.

17 Australian legal precedent is referred to by Australian Customs in its discussion paper. MOFCOM believes that it is important to consider the facts of the subsidy which was considered by the Federal Court in its decisions in the *La Doria*¹⁷ case more closely, lest that case be mistaken as authority for the proposition that any subsidy will create, or is likely to create, or is capable of creating, a “particular market situation” of the type contemplated by Article 2.2 (and by Section 269TAC(2)(a)(ii) of the Act).

18 The subsidy in *La Doria* was a production aid, paid to Italian canned tomato producers. It was of severe impact and significance in both its design and effect. The Full Court of the Federal Court said that it was open for the decision maker to find, as a matter of fact, that the production aid rendered the “market situation” unsuitable for normal value assessment based on price, in the following context:

Canned tomatoes have been consistently sold by La Doria at prices less than it costs to produce and sell them. Indeed, the percentage loss without resort to the production aid is substantial. The Italian canners are compensated for the high cost of tomatoes and the losses are recoverable within a reasonable time. Production aid is received by the canners later than sales (local and export sales) are made by them of canned tomatoes. Without the production aid it would be impossible for the canners to sell the canned tomatoes at the prices at which they are sold because the higher price paid by them to the growers for the processing tomatoes reflects their anticipation of the receipt in due course of an amount of money which will convert a trading loss into a profit. (emphasis added)

19 Clearly then, this was a subsidy which removed the need for canned tomato producers to compete in the domestic market. The production aid was designed to ensure profitability, and had that effect. The distortion was severe.

¹⁷ *Minister for Small Business, Construction and Customs and Others v La Di Diodata Ferraiolli Spa* (1994) 33 ALD 35.

This is the key aspect of the *La Doria* decision, and it should be understood in that context.¹⁸

20 It is the severity of the impact of a non-competitive factor, and the withdrawal or absence of competitive forces occasioned by the impact, that is fundamental to the “particular market situation” test. This view is further supported in comments made by Hill J of the Federal Court in the *Hyster*¹⁹ case. Hill J said the following:

21 *In Enichem, I did not attempt an exhaustive discussion of the circumstances where arm's length sales might be found to be “unsuitable”. Such a discussion would certainly not be appropriate, even if otherwise possible. I gave as an example (at 21), the case where there was:*

“some factor which so distorts the market that arms length transactions made in the ordinary course of trade are rendered unsuitable to give the true normal value in the country of export.”

22 *By way of illustration, I instanced the circumstance where the existence of government monopoly of the trade or the existence of government control of the domestic price made use of arm's length prices unreliable. It was conceded in Enichem that the existence of a non-government monopoly could be a relevant matter in determining*

¹⁸ The decision of the single judge, Lee J, in the lower court was reversed by the Full Court on appeal. However that reversal did not contradict this statement of principle by that judge:

*Whether the domestic market in Italy is a market in the sense of a free trading market is not the question required to be addressed under sub-para.269TAC(2)(a)(ii). Depressing or inflating factors affecting the price of goods sold in that market will not in themselves establish that there is a situation in the market that makes prices obtained in the market unsuitable for use for the purpose of sub-s.269TAC(1). (See *Hyster Australia Pty. Ltd. v. Anti-Dumping Authority* (1993) 112 ALR 582 per Hill J at pp 587-592; *C.A Ford Pty. Ltd. trading as C A Ford Castors v. Comptroller-General of Customs* (1992) 25 ALD 275. (emphasis added))*

(La Doria Di Diodata Ferraioli S.P.A. v David Peter Beddall, Minister for Small Business, Construction and Customs; Anti-dumping Authority and Comptroller-General of Customs, No. NG541 of 1992 Fed No. 391)

¹⁹ *Hyster Australia Pty Ltd v Anti-Dumping Authority (No1)* (1993) 40 FCR 364; (1993) 112 ALR 582. *Hyster* was applied in *La Doria* in confirming that a “particular market situation” finding is a factual finding for the decision maker concerned.

whether domestic prices in the country of export were suitable for use for the purposes of s.269(1). Hence I did not discuss that question in any detail. Having regard to the concession, I commented (at 23):

“Clearly enough a question of fact would be involved. The mere existence of a monopoly might, but need not, lead to a distortion of the market price. A monopolist might promote competition in the market under consideration, or might set the price in the domestic market by reference to arms length prices elsewhere. In either of those cases, the mere existence of the monopoly would not make the domestic prices unsuitable for use for the purposes of s.269TAC(1) of the Customs Act 1901.
(emphasis added)

21 Hill J completed his explanation by saying this:

The conclusion of the Authority that imperfect market conditions are of themselves insufficient grounds to ignore domestic prices is, in my view, correct.

22 This weight of authority, which requires the intervention in the normal operation of the market to be of such a type and degree to remove a competitive dynamic from the market in order to conclude that a “particular market situation” exists, is not limited to Australia.²⁰

Adjustments to wording of the discussion paper to better reflect the principles outlined above

23 MOFCOM does not presume to suggest the precise drafting changes which Australian Customs should consider making in order to reflect the principles,

²⁰ The US Department of Commerce considered the requirements of a “particular market situation” finding in the context of Korean government intervention in the Korean steel industry:

Although petitioners have provided evidence indicative of a not insubstantial level of government interest, and even involvement, in the day-to-day operations of the Korean steel industry, including domestic price levels, the record nevertheless does not show that the Korean government controls the domestic steel prices to such an extent that home market prices cannot be considered to be competitively set.

(Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews Fed. Reg. 62:72, April 1997, 18404 at p 18411)

and the administrative and legal precedent, which is mentioned in this submission. The discussion paper is a matter for Australian Customs. However we do wish to direct attention to certain important aspects.

24 Respectfully, we submit the following comments:

- (a) lines 76 to 79 – the “material price reduction” test is insufficient because it does not reflect the requirement that there be a lack of competition in the market;
- (b) lines 155 to 157; 159 to 160; and 164 to 169 – these statements grossly understate the type and degree of effect of a factor on market conditions, whether by reason of government influence or any other factor, that could make domestic selling prices unsuitable for use, even going so far as to suggest that immaterial effects, or more or less than *de minimis* effects, might be sufficient;²¹
- (c) lines 205 to 208 – if this is meant to suggest that facts adverse to the government of the country of export or its exporters could be used instead of other facts, for no reason other than their adverse nature, then MOFCOM could not accept that suggestion: an investigating authority must establish the facts properly and evaluate them in an unbiased and objective manner;
- (d) lines 325 to 331 – the paragraph should be qualified to indicate that only subsidies having a severe degree and effect on competitive conditions in the market for the product, such as to prevent prices from being competitively set, will be capable of triggering the “particular market situation” exception, and that the mere existence of subsidies, or of government influence on input prices, or of government-owned enterprises as sellers or buyers in the market, will not be sufficient to establish such a situation;

²¹ MOFCOM notes that footnote 9 in the discussion paper contradicts the low thresholds of impact which are contemplated by the discussion paper as potentially being enough to establish a “particular market situation”.

- (e) lines 378 to 391 – we are somewhat concerned by the use of the word “manipulation” and request that consideration be given to reviewing the use of this word; and
- (f) lines 434 to 435 - the statement understates the compulsion to consider the “extent/materiality” of an alleged distortion: this is important and must be done in all cases.

MOFCOM generally supports the guidance provided by Customs in the Dumping Manual regarding “particular market situation”

25 MOFCOM agrees with the general thrust of the explanations provided in lines 1194 to 1207 of the Dumping Manual. The text in these lines of the Dumping Manual contemplate the fact that low prices or costs do not render markets non-competitive, and that “significant” distortions and “artificial” price lowering is required before a particular market situation can be established. Therefore we submit that the discussion paper needs to be brought into line not only with our comments, but also with Australian Customs’ own Manual.

C Detailed comments concerning the exposure draft

Confidentiality of an “other seller” price should not prevent its use for normal value purposes

- 26 In lines 1266 to 1271, Australian Customs postulates that “Customs may be constrained in using other seller’s sales process” and that “Customs will consider whether other approaches to determining normal value are more appropriate” where there is an inability to allow an exporter to comment on the prices of an “other seller” or on the conditions under which those sales are made.
- 27 The sensitivity indicated by Customs towards the need for proper disclosure and transparency in anti-dumping investigations is welcomed. Nonetheless MOFCOM is advised that under Australian law there is a hierarchy of methods under the *Customs Act* 1901 for determining normal value, and that an inability to disclose confidential details of an “other seller” price, or its

circumstances, is not a factor which would permit Customs to move to the next method in that hierarchy.

- 28 An investigating authority is, of course, under an obligation to establish the facts properly, and to evaluate them without bias and objectively. Of necessity, and as a matter of law, interested parties trust Australian Customs with the responsibility of conducting an investigation in a fair and reasonable manner.²² Customs might come to the conclusion that an “other seller” price is not truly comparable, and that adjustments could not be made to it, such that an “other seller” price was not available for the purpose of determining an appropriate normal value. However the inability of the exporter to comment on those matters cannot, of itself, render the “other seller” price unusable for normal value purposes.

VAT methodology

- 29 MOFCOM advises Australian Customs that the outcomes achieved by using the methodology which is set out in the exposure draft under the heading “Value Added Tax on exports” are incorrect. Moreover, the methodology will inevitably encourage or exaggerate unfavourable outcomes for exporters where VAT refunds are a valid due allowance. Before explaining the correct calculation methodology, MOFCOM would like to make a few opening comments:
- (a) First, it should be recognised that the application of the formula used to work out the amount of VAT payable on exports does not take into account VAT-exempt imported material as a deduction from the FOB value on which the tax is payable. This is an aspect of the relevant Chinese VAT law. Therefore Australian Customs is requested to be mindful of such differences which might arise in individual cases, and to permit individual exporters to demonstrate how a VAT rebate adjustment should be calculated in respect of their own individual circumstances. Related to this point, MOFCOM queries whether Australian Customs knows that there are no other indirect tax refund

²² See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/AB/R (24 July 2001) at paras 167, 168 and 178.

systems in the world other than that pertaining to China. If it does not know this, it is not clear to us how the exposure draft can properly claim to reflect the methodology that will be used in all cases.

- (b) Secondly, we wish to point out that the text in lines 2020 to 2022 does not reflect Chinese law. The relevant *Circular for VAT Refund* explicitly uses the export FOB value as the basis for the refund calculation. Customs states that the VAT liability in respect of a product with an FOB export price of \$110 would be 12% of \$123.20. This is simply not the case.
- (c) Thirdly, in so far as your calculation involves changing the FOB export price, as appears to be the case, it would not be in compliance with Section 269TAC(8) of the *Customs Act* 1901. That section mandates that adjustments are to be made to the normal value to account for the differences in taxes, and other differences. Similarly, the adjustment must reflect reality. It cannot be “constructed” based on assumptions chosen by Australian Customs.

30 Assume that a product (the “widget” in the example given by Australian Customs) consists of two purchased raw materials. Raw material A cost \$46.80, made up of \$40.00 + 17% VAT. Raw material B cost \$35.10, made up of \$30.00 + 17% VAT. In Australian Customs’ example the manufacturer concerned sold the product on the domestic market for \$128.70, made up of \$110.00 + 17% VAT. In this example the input tax paid by the manufacturer was \$11.90, made up of \$6.80 (VAT on raw material A) and \$5.10 (VAT on raw material B). The output tax collected was \$18.70. The manufacturer calculates its VAT liability by deducting the input tax from the output tax. This is \$18.70 minus \$11.90, which is \$6.80. The manufacturer is required to pay this to the tax authorities.

31 The manufacturer also sold the product on the export market. Assume that the VAT rebate is 5% (as per the Australian Customs example). In China’s case, this is a shorthand way of describing a VAT liability imposed on an exporter at a rate of 17% (ie the standard rate applicable to domestic sales) less 5% (the “rebate” or “refund”). The widget is the same product, and the raw materials

used are the same, thus the input tax was again \$11.90. The calculation formula under Chinese law requires the export FOB value to be multiplied by the standard rate minus the refund rate. Using a manufacturer's export FOB price of \$110, then the tax liability is $\$110.00 \times 12\%$, or \$13.20. Deducting the input tax of \$11.90 from the tax liability of \$13.20 results in a requirement to pay \$1.30 to the tax authorities.

32 It is the tax liability that must be adjusted. In the case of the domestic sale, the tax liability is \$6.80. In the case of the export sale, the tax liability is \$1.30. In MOFCOM's understanding, the difference to be adjusted is therefore \$5.50. The domestic price is to be adjusted downwards by that amount. Thus, the normal value is \$128.70 less \$5.50, which is \$123.20. A comparison of this with the export price of \$110 indicates a dumping margin of \$13.20.

33 The process by which Australian Customs used the same selling price information (\$110), the same standard VAT rate (17%), and the same VAT refund rate (5%) to come up with an FOB normal value of \$124.99 (rounded to \$125), which is \$1.80 more than the correct normal value of \$123.20, is not comprehensible to MOFCOM. We note that:

- (a) \$125 is not the export price (line 2019): the export price is \$110 as stated at lines 1016-1017;
- (b) following on from that, 12% of the export price is not 12% of \$123.20 (line 2021).

34 The exposure draft's treatment of this issue therefore is not considered to be a correct implementation of the WTO Anti-Dumping Agreement nor of Australian law, and/or has been incorrectly calculated due to that error and other errors. We therefore request that this be rectified by Australian Customs.

In reinvestigations Australian Customs should act in accordance with law and be mindful of the opinions of the TMRO

35 MOFCOM submits that line 3387 is incomplete, and that it confuses the meaning of the paragraph in which it is to be found. It does not appear to be correct to say that the CEO "must affirm" the CEO's findings "and must set out any new findings", etc. The CEO must only affirm those findings where he

is of the view that they should be affirmed. This appears to be nothing more than an inadvertent error in the wording of this part of the exposure draft.

36 MOFCOM submits that the views of the Trade Measures Review Officer (“TMRO”) will always be matters of relevance in a reinvestigation by Australian Customs. Indeed the views of the TMRO are always referenced in reports of reinvestigations which are undertaken by Australian Customs. For reasons of justice, consideration should be given to making specific reference to the relevance of the views of the TMRO in the conduct of a reinvestigation (in section 27 of the exposure draft).

37 Lastly MOFCOM notes that interested parties are entitled to expect, in every anti-dumping user country, that the rule of law will be observed when anti-dumping decisions are made. This essential principle has been a guiding light in China’s rapid commercial development. In that context MOFCOM is concerned about possible misinterpretation of the words used in lines 3408 to 3410 of the exposure paper. The words in these lines might be taken to suggest that Customs will not adjust its position in a reinvestigation (and presumably at any stage of an investigation) from that based on its “own” interpretation of the Act and its policy and practice as outlined in the Dumping Manual. MOFCOM respectfully requests that this part of the Dumping Manual should be amended to recognise that existing policy and practice might not accord with law, and that Customs officers need to be careful so that inflexible rules of policy do not override Australian law as interpreted in light of the WTO Anti-Dumping Agreement.

D Concluding comments

38 Australia has accepted China’s market economy status. Article 15 of China’s Accession Protocol is not applicable to China. Anti-dumping duties and countervailing duties are accepted methods of counteracting (respectively) price discrimination by private players between markets, and subsidisation by governments, where material injury is caused by either of those practices.

39 WTO Members regulate and intervene in the functioning of their domestic markets. Buyers, or sellers, might engage in anti-competitive conduct. The

“particular market situation” exception recognises that in certain cases competitive forces might not determine prices in a domestic market, and that in such cases normal value may be derived from third country sales (ie sales into an unaffected market) or from costs to make and sell. For the “particular market situation” test to be activated, the situation must be severe, such that the competitive interaction between buyers and sellers is not determinative of domestic prices.

- 40 Australian Customs has considered the application of the “particular market situation” test in the case of Chinese producers on many occasions. On each occasion there were no grounds for application of the test. These administrative precedents have reviewed the type of government regulations and price-influencing mechanisms which can and do exist in China, but which are becoming less and less prevalent. In each case the regulations or influences have not been sufficient to enliven the “particular market situation” exemption.
- 41 Therefore China, which is neither a non-market economy nor an “economy in transition” for the purposes of Australian law, and whose market economy status has been recognised by the Australian Government, does not believe that there will be a valid or regular role for the use of the “particular market situation” test in disqualifying the domestic selling prices of its exporters other than in very extreme circumstances. China is constantly liberalising in terms of economic freedom, and is not “going backwards”. Thus it must be accepted that the likelihood of establishing a “particular market situation” is becoming more remote, not more likely.
- 42 In some respects the discussion paper is suggestive of a downgrading of the severity of a situation which might satisfy the “particular market situation” test. MOFCOM submits that this would be inconsistent with law and administrative precedent. Australian Customs is respectfully requested to carefully consider its explanation of its policy concerning “particular market situation”, and to adjust the wording of the discussion paper accordingly, so that the discussion paper is consistent with law and does not have a misleading effect.

43 MOFCOM refers to its comments on the exposure draft and asks that these be carefully considered as well.²³

Yours sincerely

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²³ The failure by MOFCOM to address any other aspects of the discussion paper or of the exposure draft (including any aspects of the exposure draft which are not new) is not to be taken as an indication of its agreement with or acquiescence to any of those aspects. MOFCOM's comments are for the assistance of Customs, in response to the invitation to comment issued by Customs. MOFCOM will rely on its WTO and other legal rights in relation to the implementation of the discussion paper or of the exposure draft which might affect the interests of the GOC.