

# 中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA  
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**Non-Confidential**

Date: 26 June 2023

Dear Mr. Griffiths, dear Sirs,

**Subject: AS0022: Request for deadline extension and additional information by the Government of China (“GOC”)**

We refer to the statement of essential facts (“SEF”) issued by the TRA in the anti-subsidy (“AS”) investigation concerning optical fibre cables from China on 20 June 2023, with the opportunity for the GOC to comment until 16 July 2023.

In this regard, the GOC would like to make two requests as detailed below.

## **I. Deadline extension request**

The GOC respectfully requests an extension of 10 working days, until Friday, 28 July 2023 to file comments on the AS SEF as the current deadline does not provide “*sufficient time*” within the meaning of Article 12.8 of the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), to the GOC to defend its interests.

As underlined by the Panel in *US – Ripe Olives from Spain*, “Article 12.8 directs investigating authorities to inform interested parties of those facts in sufficient time to ensure they can defend their interests.”<sup>1</sup> The Panel in *Ukraine – Ammonium Nitrate* -- while discussing the parallel provision of Article 6.9 of the Anti-Dumping Agreement -- noted that the sufficiency of time provided to interested parties depends on, among others, “*the nature*

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<sup>1</sup> Panel Report, *US – Ripe Olives from Spain*, para. 7.386.

*and complexity of the issue to which the parties have to respond in order to defend their interests.”<sup>2</sup>*

Against this background, first, the GOC notes that after almost 14 months of investigation, the TRA has issued the 155-page SEF. During the 14-month period, the GOC was not made aware of any aspect of the TRA’s investigatory process and/or considerations. The GOC recalls that it filed comments on the initiation of the proceeding and again on 29 May 2023. In each of the submissions the GOC requested the TRA for further information and clarification of fundamental issues and conflicting data in the file among other essential matters of fact and law. However, no response was received by the GOC. Thus, no opportunity within the meaning of Article 12.3 of the SCM Agreement was provided to the GOC to understand even the most basic facts and possible bases of the TRA’s findings in order to be able to comment on the same. It is only through the SEF that the GOC has obtained a first view of the TRA’s considerations and findings on various legal and factual matters underlying the determination of injurious subsidization. Indeed, until the issuance of the SEF, the GOC was not even aware of the subsidies that the TRA may or may not consider, the factual bases of the subsidy margin calculations, and the legal and factual bases of the possible injury determination as well as the multiple intermediate findings of the TRA linked to each legal aspect.

Second, the multiple and complex legal and factual findings made by the TRA concerning supposed subsidies granted by the GOC to Chinese OFC producers are based on alleged GOC documents and actions among others. The GOC needs time and opportunity to carefully consider and analyze the legal and factual information relied upon by the TRA for its affirmative determination. The information relied upon by the TRA concerns a plethora of government levels, bodies and departments. Hence, these matters cannot be speed-read and in fact, need careful assessment and coordination among various governmental bodies and agencies, which takes time. There is no one-stop-shop at the GOC for all information on all China-related documents. The GOC requires time to solicit the comments of the relevant government departments and agencies to provide meaningful comments on the TRA’s findings.

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<sup>2</sup> Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251.

Third, the GOC also wishes to underline that the present investigation is the first AS investigation of the UK against Chinese imports implying that this is the first time that the GOC has become aware of the UK's AS practice against Chinese imports. This is not a routine matter, and the GOC attaches great importance to the TRA's findings and needs more time to put forward its position and fully exercise its rights of defence.

However, the TRA has provided extremely limited time to the GOC -- especially when contrasted with the time of almost 14 months taken by the TRA itself to issue the SEF -- to respond to the SEF. It is relevant to note that the TRA has given interested parties merely 18 working days to respond to the SEF; indeed, there are 4 weekends in between and in fact, the deadline set by the TRA is also on a Sunday and effectively implies Saturday for the GOC on account of the time difference between the two continents. The 18 days' time was further reduced for the GOC -- and likely for all Chinese interested parties -- to 15 days because the disclosure was accessible to the GOC only on 21 June 2023 on account of the time difference between China and the UK. Thus, the SEF was received on the eve of the Dragon Boat Festival in China when most people were away. As the TRA is aware, 22-24 June 2023 were national holidays in China on account of the Dragon Boat Festival. Indeed, in several jurisdictions as also in WTO disputes, deadlines for the parties involved are drawn taking into account the national holiday periods and disclosures are generally not issued during/around the holiday period and if at all issued, the disclosure deadline periods are extended.

In sum, the short period provided to the GOC effectively denies it a right to a fair hearing in this proceeding.

Fourth, the GOC also notes that it appears that in the present case, the GOC and other interested parties have been given a shorter period to comment compared to other AS cases. For instance, in the AS investigation concerning *Ironing boards from Turkey*, the TRA provided interested parties 33 days from the issuance of the SEF to comment. The open file of that case does not provide further details, but it is clear that the Government of Turkey

seems to have submitted comments (or talking points) almost 48 days after the issuance of the SEF.<sup>3</sup>

In view of the above, the GOC respectfully notes that its request for 10 days' extension is reasonable and is unlikely to result in undue delay or problems, considering that the TRA has until 26 October 2023 to complete the investigation. Moreover, the limited extension requested by the GOC is in line with that granted by the TRA in the AD investigation concerning *Aluminium Extrusions from China*.

## II. Request for disclosure of essential facts

The GOC notes that the SEF does not provide several essential facts – within the meaning of Article 12.8 of the SCM Agreement – underpinning the TRA's findings of injurious subsidization. Without prejudice to the additional submission/s that may be made by the GOC in this regard, the GOC requests the TRA to disclose the below-mentioned information at the earliest.

First, with regard to subsidization, the facts/information requested below are the basis of the TRA's findings of benefit and subsidization and qualify as "essential facts". The Panel in *US – Ripe Olives from Spain* held that, "given that the margin or amount of subsidization lies at the centre of a decision of whether or not to apply definitive measures, facts relating to the calculation of the margin or amount of subsidization are "essential facts" within the meaning of Article 12.8 of the SCM Agreement."<sup>4</sup> Indeed, the essential facts requested below are routinely provided by investigating authorities to exporting country governments in AS cases. In the absence of a disclosure of these facts the GOC cannot fully understand and comment on the TRA's findings of subsidization, thereby impeding its right of defence. Therefore, the GOC requests the disclosure of the following factual information:

### 1. Alleged preferential financing:

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<sup>3</sup> <https://www.trade-remedies.service.gov.uk/public/case/AS0020/submission/062bd127-d01a-47bc-a9fe-23090f36b582/>

<sup>4</sup> Panel Report, *US – Ripe Olives from Spain*, para. 7.386.

- (i) For loans – (a) the benchmark rate calculated by the TRA based on the interest rates of the Turkish Central Bank and the factual data underlying that benchmark; (b) adjustments, if any, made to the interest rate with respect to, among others, the specifics of the loan/s and to reflect the prevailing market conditions in the country of provision of the loan/s, i.e., China; and (c) how the benefit amount was established. The summary statement in paragraph 223 of the SEF does not provide the essential factual information supporting the finding of benefit and subsidization; and
- (ii) For credit line fees – (a) the data from “*the independent bank in the benchmark country*” used to establish the benchmark allocation fee; and (b) the benchmark allocation fee.

The GOC notes that the mere provision of the links to the Turkish Central Bank/HSBC data webpages without any indication of the data used and the benchmarks themselves, does not permit an understanding of the factual basis of the findings of benefit and subsidization. The GOC recalls that, as noted by the Panel in *Ukraine – Ammonium Nitrate*, “*interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts.*”<sup>5</sup> Moreover, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* held that a “*narrative description of the data used*” does not constitute sufficient disclosure of essential facts.<sup>6</sup> In “*all cases*”, investigating authorities must disclose the facts “*in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping.*”<sup>7</sup> The same applies to the calculation of the subsidy margin.

- 2. Alleged provision of land-use rights at less than adequate remuneration: (a) the factual basis underlying the selection of the Turkish OFC producer’s land lease costs as the

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<sup>5</sup> Panel Report, *Ukraine – Ammonium Nitrate*, at para. 7.227.

<sup>6</sup> Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.133.

<sup>7</sup> Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.131. (Underlining added).

appropriate benchmark; and (b) the benchmark established; and (iii) any adjustments made to the benchmark.

The GOC is cognizant that the Turkish producer's data is confidential but as noted by the Appellate Body in *Russia – Commercial Vehicles* (in the context of the parallel provision in the Anti-Dumping Agreement), “[t]he treatment of information as confidential under Article 6.5 [of the Anti-Dumping Agreement] does not absolve the investigating authority from its obligation to disclose essential facts as required under Article 6.9 [of the Anti-dumping Agreement]. When information treated as confidential under Article 6.5 constitutes essential facts within the meaning of Article 6.9, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts.”<sup>8</sup>

Second, the GOC requests the TRA to disclose the following factual information as regards the definition of the UK industry:

- (i) Whether the TRA undertook a standing exercise pre-initiation, and if it did, whether the other UK producers listed by the Applicant in the Application were contacted by the TRA. These are essential facts concerning the definition of the UK industry which forms the basis of the injury assessment;
- (ii) The total UK production calculated/estimated by the TRA. This essential fact underpinning the TRA's calculation of the total UK production is not provided in the SEF;
- (iii) The facts underlying the TRA's conclusion that the Applicant represented more than 50% of the overall UK production during the POI;
- (iv) The data concerning the estimated production of the other UK producers as well as the Applicant. In the Application, the Applicant itself disclosed its production in ranges so clearly there is no confidentiality concern as regards that data and elsewhere in the SEF<sup>9</sup> the TRA has disclosed the CRU data.

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<sup>8</sup> Panel Report, *Russia – Commercial Vehicles*, para. 5.183.

<sup>9</sup> SEF, para. 93.

It is recalled that as noted by the Panel in *China – Broiler Products*, ““essential facts” are not simply the disclosure that a determination has been made, but rather the data that are the basis of the determination.”<sup>10</sup>

Third, the GOC requests the TRA to clarify the factual basis of the total UK consumption and how it was calculated. In particular, were the UK consumption figures based on the CRU data as noted in paragraph 93 of the SEF, or were they based on the “*HMRC import volumes of like goods from all countries and the domestic sales volumes provided by the UK industry*” as noted in paragraph 337 of the SEF? Without this factual clarification interested parties cannot understand the establishment of the UK OFC consumption noted in the SEF on the basis of which the Chinese and domestic industry market shares were calculated and several injury findings were made.

Last, with regard to the TRA’s finding of injury on account of the Chinese OFC imports, the GOC requests the TRA to disclose the below-mentioned essential facts:

- (i) The HMRC import statistics used by the TRA to calculate the Chinese import volumes of OFC into the UK and the ratio of Chinese OFC imports in the total imports calculated per year of the injury investigation period (“IIP”). The SEF provides this information only for the POI;<sup>11</sup>
- (ii) The average prices of the Chinese OFC imports per year in the IIP used for the price depression analysis and the price data underlying these average prices as also the data on any adjustments made to these prices for price comparability. In this context, it is deemed relevant to recall that the Appellate Body held in *China – GOES* that, “[I]n the context of the second sentence of Articles 3.2 [of the Anti-Dumping Agreement] and 15.2 [of the SCM Agreement], we consider that the essential facts that investigating authorities need to disclose are those that are required to understand the basis for their price effects examination, leading to the decision whether or not to apply definitive measures, so that interested parties can defend their interests.”<sup>12</sup> As further noted by the Panel in *China – X-Ray Equipment*, average unit values

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<sup>10</sup> Panel Report, *China – Broiler Products*, para. 7.90

<sup>11</sup> SEF, para.329.

<sup>12</sup> Appellate Body Report, *China – GOES*, para. 242.

determined by an investigating authority and the price data underlying those average unit values, are factual in nature<sup>13</sup> and qualify as essential facts under consideration which form the basis for the decision whether to apply definitive measures, and should be disclosed pursuant to Article 12.8 of the SCM Agreement.<sup>14</sup> In the present case, table 18 of the SEF does not provide the average prices of the Chinese OFC imports nor the price data underlying the indexed data. As the average Chinese OFC import prices are noted as being based on the HMRC data<sup>15</sup> which is non-confidential, there is no basis to treat such data as confidential. Furthermore, there is no information whatsoever on the actual price data used, and whether landed prices were used and whether any adjustments were made to make the Chinese prices comparable to the UK industry prices;

- (iii) The factual information as regards the representativity of the undercutting margin calculation: The SEF merely states that the comparable PCNs represented 78% of the total import volume and 89% of the import value of the UK sales of the overseas exporter.<sup>16</sup> The GOC requests the TRA to provide the factual information regarding the percentage of sales in volume and value terms of the UK industry represented by the comparable PCNs. Without this basic factual information, interested parties cannot comment on the relevance of the undercutting and injury margin calculations. Moreover, it is only natural and fair that this information be disclosed for the domestic industry when such information has been disclosed in the SEF for the sole cooperating exporting producer. There can be no excuse for confidentiality in this regard;<sup>17</sup>
- (iv) The average OFC sales prices of the domestic industry in ranges and any adjustments made and the quantum thereof, for the purpose of the price undercutting and price depression assessments. While no information has been provided in the context of price depression, in the context of price undercutting the SEF presently merely states that “*to ensure price comparability, we adjusted where needed.*”<sup>18</sup> To recall, as noted

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<sup>13</sup> Panel Report, *China – X-Ray Equipment*, para. 7.403.

<sup>14</sup> *Ibid.*, para. 7.404.

<sup>15</sup> SEF, Table 18.

<sup>16</sup> SEF, para. 343.

<sup>17</sup> Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.183.

<sup>18</sup> SEF, para. 342.

by the Appellate Body, a “*narrative description*” does not constitute sufficient disclosure of essential facts;<sup>19</sup>

- (v) The sales volumes of the other UK producers as a market share has been calculated for these producers in table 21 of the SEF; and the market share data in percentages as that was also calculated by the domestic industry and disclosed in the Application, implying that there is no need for the confidential treatment of this data;
- (vi) The domestic industry’s unit production costs over the IIP in ranges, as this data is the factual basis for the injury margin calculation and essentially the findings concerning profitability, among other factors;
- (vii) The data in ranges for all the economic indicators of the domestic industry including the sales volumes, sales value, market share, employment, wages, productivity, return on investments, cash flow, production capacity, capacity utilization and profit margin. These data have been disclosed by the Applicant in the Application in ranges. Therefore, clearly, the Applicant itself agrees to the provision of ranges and the TRA should not unilaterally grant more confidentiality to the data than requested by the Applicant; and
- (viii) The unit import prices of the third country imports and how they were calculated considering that this factual information is the basis of the TRA’s finding that third country imports did not break the causal link between the Chinese OFC imports and the injury to the domestic industry.

### **III. Conclusions**

For the reasons mentioned above, the GOC hopes that the TRA will positively consider the present deadline extension request and extend the deadline to comment on the AS SEF until 28 July 2023.

Additionally, the GOC also looks forward to a prompt disclosure of the essential factual information requested above at the earliest so that the GOC can duly comment upon the TRA’s SEF.

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<sup>19</sup> Appellate Body Reports, *China – HP-SSST (Japan)* and *China – HP-SSST (EU)*, para. 5.133.