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Our ref 11276

Dear Ms Reid

Resumption of Investigation into Alleged Dumping in respect of Quick Lime Exporter to Australia from the Kingdom of Thailand

We act for Alcoa of Australia Limited.

Our client made submissions during the substantive investigation (Consideration Report no. 179) and relies generally on those submissions but wishes to address the issue of the resumption of the investigation post the recommendation made by Trade Measures Review Officer (**Review Officer**) made on 25 June 2012.

We submit that the Review Officer's recommendation should not be accepted and the matter terminated. From our client's perspective, Customs' finding at the conclusion of the substantive investigation was that the goods imported from Thailand by our client were for the purpose of testing and no material injury could be attributed to those imports.

1. **General - the resumption of the investigation**

1.1 We note the Applicant's appeal to the Review Officer's recommendation only relates to the non-alumina sector. However, Customs found that quicklime imported for the alumina sector is a *like good* to those imported for the non-alumina sector. Accordingly, if the decision to terminate was set aside and measures were imposed, such measures would cut across both sectors and apply to alumina sector in which our client competes. Should Customs' initial decision be set aside, the inherent unfairness to our client (and those operating in the alumina sector) would crystallise.

1.2 Significantly, the Applicant initially argued that the price of the imported lime was the only consideration relevant to the issue of dumping. After the publication of the statement of essential facts on 20 February 2012, and faced with the Termination Report, the Applicant sought to argue that an allowance for quality difference had been made in its reduced price offering to Customers.[1] [2]

[1] In the Termination Report at page 31 Customs stated "*Prior to the publication of the SEF, Cockburn Cement has consistently argued that whilst quality differences between various quicklime products may result in customers using slightly more or less, price rather than quality was the key factor. Following publication of the SEF, Cockburn Cement*

1.3 The Applicant's shifting and tailoring if its arguments to suit the difficulties it has encountered works an unfairness to the parties who engaged with Customs during the course of the substantive investigation. Interested parties such as our client invested significant resources and incurred significant legal costs in meeting and addressing the claims **as made** in the initiation application, the statement of essential facts, and the issues paper concerning threat of material injury. In each such submission made by our client we addressed in a full and detailed way that no dumping occurred during the relevant period or that there was no material injury caused to the Applicant. We did so by reference to the investigation period. Our client had a legitimate expectation that that was the relevant period it had to address - not some other case or other period some 3 months before.

2. **Response to ACDN No. 2012/38**

2.1 In reply to the Australian Customs Dumping Notice and the call for submissions, we are instructed to submit the following:

(a) it is improper in the extreme that the investigation period be varied by the Review Officer. Consideration Report No. 179 was first issued on 27 October 2011. The investigation period was expressly referred to as being **1 July 2010 to 30 June 2011**.[3] It defies credibility that the Applicant and its specialist consultant was not aware of this period. At no time was there any suggestion by the Applicant or its consultant that the investigation period ought to have been any period other than that specified in the Consideration Report;

(b) the Applicant's consultant refers to a meeting between himself/the Applicant and Customs at what is termed a "pre-initiation meeting". The Applicant's consultant complains that Customs gave *no inkling that injury resulting from price depression in Cockburn's sales occurring from March-June 2010 could not be attributed to dumped imports*. A complaint is made that Customs acted in breach of the rules of natural justice and unreasonably. These claims are wrong in law and hollow. The consultant has misunderstood the concept of natural justice and unreasonableness. Clearly, the Applicant was heard and thus Customs initiated a case and eventually it came to a conclusion on all of the evidence. It could hardly be said that Customs' decision was so unreasonable that no reasonable decision could have come to it in a *Wednesbury* sense;[4]

(c) The claim that the Applicant's consultant had no *inkling* that Customs would utilise an investigation period which excluded the three month period in which it is alleged that

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now argues that it is necessary to remove the effect of higher quality quicklime from the price analysis, and that it took the higher quality quicklime into account when reducing its price to customers".

[2] Further the admission made by Cockburn Cement that quality was a significant factor requiring a price adjustment, made after the statement of essential facts, not only introduces a new claim but calls into question the finding made on "like goods".

[3] See page 24 of the Consideration Report.

[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

price depression first occurred and that such an investigation can be readily changed is not credible:

(i) in a recent submission from the same consultant, dated 10 April 2012, in relation to the investigation into *Aluminium Road Wheels from China*, the consultant said :

> "*While Customs will examine the period 2006 to 2011 in its injury assessment, it is only injury experienced* ***during the investigation period (IP) which can be attributed to the dumped/subsidised exports to China.***" (Our emphasis).

It is evident that the consultant is well aware of the importance of and limitation imposed by the investigation period; and

(ii) the same consultant filed a detailed submission in support of his client's case, which exceeded 15 pages, in response to the statement of essential Facts. Not a skerrick of a case was put that the investigation period prejudiced his client's case. The first time that this issue has been raised is in the application to the Review Officer.

3. **Issues governing the selection of an investigation period and injury analysis period**

3.1 Although there is no binding legislation on this question, and the Anti-dumping Agreement is silent on the point, the issue has been the subject of formal consideration by the Committee of Anti-Dumping Practice and its recommendations have been adopted by WTO members. Notably, the recommendations have been cited with approval in various panel reports.[5] The main recommendation is that the period of data collection for dumping should:

(a) be 12 months;

(b) in any case, be not less than six months; and

(c) end as close as possible to the date of initiation as practical.

3.2 In this case, the date of initiation was 31 October 2011 with the investigation period nominated being 1 July 2010 to 30 June 2011. Although not as close as possible to the date of initiation, the 12 month period was consistent with the usual financial year reporting date. Customs' selection of that period is therefore entirely consistent with the recommendation of the Committee of Anti-Dumping Practice.

3.3 The nomination of the investigation period would have been within the expectation of the Applicant's consultant, an anti dumping specialist.

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[5] Panel Guatemala – Definitive Anti-Dumping Measures on Portland Cement WT/DS156/R, par 8.266; Panel United States Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan WT/DS/184

4. **The Review Officer's decision regarding the investigation period**

4.1 The Review Officer's recommendation is wrong to suggest that the investigation period does not limit the assessment of materiality of injury suffered by Australian Industry. In this respect, the Review Officer referred to s 269T(2AD) which states:

> *"The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry or to an industry of a third country."*

This section must not be interpreted as suggesting that a finding of material injury can be made prior to the investigation period. So much was decided in *Re ICI Australia Operations Pty Ltd v Donald Fraser; the Anti-Dumping Authority and the Minister of Small Business and Customs* (1992) 106 ALR 257. In that case, Black CJ, Neaves and Von Doussa JJ found that a finding of material injury can only be made after a finding of dumping and a finding of dumping cannot be made in respect of matters that pre-date the investigation period.

4.2 Additionally, the purpose of s 269T(2AD) is to ensure that in determining whether material injury was sustained during the investigation period, regard ought to be had to the injury analysis period. In this way, benchmarks can be established so as to assess the materiality of the injury during the investigation period. In short, injury factors can be assessed over a period of time prior to the investigation period so as to determine whether the materiality of the injury during the investigation period can be attributed to the dumped imports

4.3 At paragraph 23 of the Review Officer's decision, the Review Officer considers it technically possible to amend the investigation period by relying on s 33 of the *Acts Interpretation Act 1901* (Cth). However, this section must be read together with the general provision in s 2 of that Act, which states that the Act is subject to a "contrary intention". No mention is made by the Review Officer as to the possibility of any contrary intention or what factors may prove to be so. Be that as it may, the Review Officer (at paragraph 23) recognises that the amendment to the investigation period can only occur if:

(a) the review could still be completed from the statutory framework and timeframe set out in the Customs Act itself (**Period Not Expired Issue**);

(b) no interested party is denied procedural fairness (**No Denial Of Procedural Fairness Issue**); and

(c) a public notice was given in respect to of the amendment (**Public Notice Issue**).

Each of the above will be addressed in turn.

4.4 In respect of the Period Not Expired Issue, the investigation was terminated after the completion of the investigation, after the publication of the statement of essential facts (20 February 2012), and after the 40 day period for parties to make submissions in response. Although the decision to terminate may be reviewed, it is no longer possible to amend the actual investigation period as the investigation itself has concluded.

4.5 In respect of the No Denial Of Procedural Fairness Issue, and as set out above, the parties who made submissions during the course of the substantive investigation did so in good faith. In fact it is they who were denied procedural fairness:

(a) our client, for example, was not aware of the pre-initiation meeting and nor was it aware that the alleged price depression over a 3 month period prior to the investigation period was "*relied [on] heavily*" by the applicant such that that was its substantial case (see page 3 of application to the Review Officer);

(b) the application to which all parties directed their attention was the allegation of material injury during the investigation period. The expansion of the injury investigation period to include the 3 month period prior, makes a fundamental change to the manner in which those parties responded. Importantly the expansion of the investigation period may result in the exporter needing to be revisited and further information needs to be provided by our client, and others, about the negotiation process.

(c) In effect, this is not the resumption of an investigation but the initiation of a new case with different parameters.

4.6 In respect of the Public Notice Issue, this does not cure the lateness of the amendment. There is an overriding public policy in ensuring efficient resolution of matters and finality in decision making. The issuance of a notice cannot undo the unfairness already occasioned to our client.

5. **Conclusion**

5.1 Our client considers that the Review Officer committed an error of law in stating that it was open to the CEO of Customs to amend the investigation period and continue the investigation as a resumed investigation. In doing so, the Review Officer ignored the contrary intention of the Anti-dumping Agreement and the *Customs Act 1901*. We consider that the only decision available to Customs is to confirm the CEO's original decision.

Yours sincerely

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