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Ms Joanne Reid
Director , International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra ACT 2600

Dear Ms Reid,

STATEMENT OF ESSENTIAL FACTS NO 179A – QUICKLIME FROM THAILAND

This response to Statement of Essential Facts No 179A ("the SEF") is made on behalf of Cockburn Cement Ltd ("Cockburn").

The SEF makes it clear that Customs has an agenda to not protect Cockburn against dumped imports of quicklime from Thailand. Fundamental to this agenda appears to be Customs' considerations that Cockburn –

- *held a monopoly share in the Western Australian market; and*
- *has continued to trade at a profitable level since competition entered the market,*

as stated in section 8.5 of the SEF.

Customs is well aware that these circumstances are not relevant to the consideration of whether a domestic industry has suffered material injury because of dumped imports. Customs is well aware that material injury is caused by dumped imports if dumped imports cause the domestic industry to experience substantially reduced sales volume, market share or profit. That the domestic industry has a majority market shareholding and/or continues to trade at a profitable level, are irrelevant to the question of whether the domestic industry has suffered material injury because of dumped imports. This was acknowledged by the CEO's delegate to the original investigation (no. 179) at a meeting prior to its initiation and the investigation was initiated with Customs having definite knowledge of Cockburn's position in the Western Australian market and its profit level prior to and after entry of the dumped imports.

In meeting the said agenda, Customs has cast a dark shadow over its credibility. This resumed investigation has not been conducted in an objective and unbiased manner.

Setting the investigation period

Customs set the investigation period at 1 July 2010 to 30 June 2011 with clear knowledge that the circumstances which caused Cockburn to experience injury between 1 July 2010 and 30 June because of imports from Thailand, occurred between March and June 2010. The CEO's delegate who initiated the investigation was well aware of these circumstances prior to initiation and definition of the July 2010 – June 2011 investigation period.

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In the meetings prior to initiation of the investigation no. 179 to discuss the application and its parameters mentioned in section 7.2.2 of the SEF, at no time was it mentioned by the CEO's delegate, or his support staff, that there was any possibility that Customs would apply its non-mandatory policy to not consider injurious circumstances occurring before the investigation attributable to dumping. In fact, there was absolutely no mention of this by Customs until immediately prior to the publication of the Termination Report No. 179 ("TER 179"). It is clear that the CEO's delegate responsible for the initiation and findings of investigation no. 179 had no intention to apply the said policy to this case and did not do so until immediately prior to publication of the TER179. This policy was not mentioned in SEF179, or at any other time during the investigation, until immediately prior to publication of TER179.

To place blame on the applicant or its representative for not taking issue with the defined investigation period prior to initiation in the circumstances outlined above is totally inappropriate. The applicant and its representative had no idea that Customs would apply the said non-mandatory policy until immediately prior to TER179, as at no time during discussions prior to its initiation or during investigation 179 was it mentioned by Customs.

Section 7.2 of the SEF talks about Customs' (non-mandatory) "policy", of "generally" nominating an investigation period as a period of 12 months immediately preceding the initiation date and ending on the most recently completed quarter or month and that this is in line with "standard practice". However, it also says words to the effect that the investigation period may be different to this if **"submissions or facts arising during the initial phases of the investigation suggest that a 12 month period is unsuitable".** It follows that, if the CEO's delegate believed that there was any possible barrier to the injurious circumstances during March-June 2010 being attributed to dumping because they occurred outside the July 2010 – June 2011 injury period, he would have defined an investigation period which included this period. That he did not, strongly suggests that he saw no such barrier when setting the investigation period.

Statement of Essential Facts No 179 ("SEF 179")

Fundamental to Customs' preliminary finding per SEF No 179 that dumped exports had caused negligible industry to the Australian industry is its finding that prices of dumped imports did not undercut Cockburn's prices in the non-alumina sector.

Customs found that Cockburn's reduction of prices while maintaining its sales volume *resulted in a **substantial reduction in profits** on the basis of 2010-11 revenue* (emphasis added) – refer to section 8.8 of SEF179. It found this profit reduction to be $[redacted] million or [redacted]% of 2010-2011 profit.

A "substantial reduction in profit" of itself constitutes "material" injury. In this regard we refer to the Minster for Justice and Customs' Ministerial Direction of December 2000 which cites a 1990 Ministerial Direction's definition of "material" as *not immaterial insubstantial or insignificant.* Under this definition, Cockburn's **"substantial reduction in profits" must constitute "material" injury.**

In the same 2000 Ministerial Direction it is stated that –

> *Where an industry has suffered a diminution of profits through price depression or suppression which is "material", there is not an additional requirement imposed by the Ministerial Direction that there must also be a finding that the dumped goods have a significant market share.*

There can be no doubt that **Customs' finding that Cockburn's substantial reduction in profits because of its price reductions during March-June 2010 constitutes a finding of material injury.**

The only reason Customs did not attribute this material injury to dumped imports was its (erroneous) finding that the prices of the dumped imports did not undercut Cockburn's prices in the non-alumina sector. There was no mention of the material injury occurring because of Cockburn's price depression and subsequent substantial profit reduction by reason of imports from Thailand not being attributable to dumping because it occurred prior to the investigation period.

Termination Report No 179 ("TER 179")

In response to Cockburn's rebuttal of Customs' finding per SEF 179 that the price of dumped imports did not undercut Cockburn's prices in the non-alumina sector, Customs' final finding per TER 179 is that **"imports undercut Cockburn Cement's selling prices", causing "a substantial reduction in profit"** (emphasis added) – section 10.3.2 refers.

It is stated in Customs' final finding in section 8.1 of TER 179 that –

- *Customs and Border Protection also found that the price of imports from Thailand* ***undercut sales by the Australian industry in the non-alumina sector.*** (Emphasis added.)

These TER 179 findings that imports undercut Cockburn's prices in the non-alumina sector and caused substantial reduction to its profit is reiterated in the SEF which states in section 8.5 –

- *Cockburn Cement's reduction in price came* ***as a result of Chememan entering the market;*** *and*
- *the entry of Chememan into the Australian market* ***did have some impact on Cockburn Cement's revenue and profit levels.***

In TER 179 section 8.10, Customs states –

- *As it (Cockburn) has reduced its profits while maintaining its sales volumes, the lost revenue has directly affected its profits. Customs and Border Protection found that* ***these price reductions resulted in a substantial reduction in profits on the basis of its annual revenue.*** (Emphasis added.)

Having found that it could not terminate investigation no. 179 on the fundamental ground that Cockburn's substantial profit reduction (material injury) was not the result of imports from Thailand undercutting Cockburn's prices in the non-alumina sector, Customs **for the first time** introduced its (non-mandatory) policy of material injury occurring before the investigation period not being attributable to dumping and terminated the investigation on this ground. That is, to maintain its preliminary decision to terminate the investigation, Customs found that the material injury sustained by Cockburn in the form of substantial reduction in profit as a consequence of its price reductions in response to imports from Thailand undercutting it prices in the non-alumina sector, could not be attributed to dumping as the price reductions occurred between March and June 2010, whereas the investigation period commenced in July 2010.

The abovementioned finding was found to be inappropriate by the Trade Measures Review Officer in his review of Customs' termination decision per TER179. Details follow.

TMRO review

The TMRO's review of Customs' decision to terminate investigation no 179 concluded that –

a) Cockburn's revenue and profit losses between January 2010 and June 2011 constitute material injury;
b) it was open to Customs to have amended the investigation period to include the injury sustained by Cockburn in the 3 month period immediately preceding the investigation period; and
c) the particular circumstances of this case are such that it would have been appropriate for Customs to have –
   - amended the investigation period per (b) above; and
   - analysed the export price and normal value of the imports from Thailand in the period immediately preceding the investigation period to determine whether the material injury sustained by the applicant during this period was caused by dumping.

On the basis of the above conclusions the TMRO revoked Customs termination decision per TER 179 and recommended that in the resumed investigation, Customs either –

- amend the investigation period to cover the period between January and June 2010; or
- otherwise analyse whether the injury sustained during that period (January and June 2010) was caused by the dumping of quicklime.

The TMRO report containing the abovementioned conclusions and recommendations was made on 25 June 2012.

Resumed investigation no 179A ("the resumed investigation")

Customs' reasons why the investigation period should not be changed

It is of note that, while the said TMRO report was made on 25 June 2012, Customs did not resume the investigation until 3 August 2012. Furthermore, despite the provisions of subsections 269ZZT(2) and (3) of the Customs Act that –

> *(2)* ***As soon as practicable*** *after the Review Officer has revoked a reviewable decision under subsection (1), the CEO must publish a statement of essential facts under section 269TDAA in relation to the application for a dumping duty notice or countervailing duty notice that is related to the review*; and
>
> *(3)* ***Following the publication of the statement of essential facts*** *under subsection (2), the investigation of the application concerned resumes under this part.* (Emphasis added.)

Customs did not publish SEF 179A ("the SEF") until 19 March 2012, ie almost 9 months after the TMRO's report and more than 7 months after initiation of the resumed investigation.

In the above circumstances, Customs statement in section 7.2.3 of the SEF that *an issue concerning procedural fairness may also arise if the investigation period were to be altered at this stage* is a nonsense. Customs had opportunity to amend the investigation period as recommended by the TMRO at anytime after the TMRO's report on 25 June 2012. The TMRO found that it is open for Customs to do so and the SEF confirms this.

Despite Customs' strong desire for it to do so, the resumed investigation has not found that it is not open to Customs to amend the investigation period to include the injury sustained by Cockburn in the 3 months immediately preceding the investigation period. That is, despite its strenuous efforts to do so, **Customs has been unable to refute the TMRO's conclusion in this regard.**

The SEF reports no legislation, case law, or WTO jurisprudence that provides grounds for not changing the investigation period because of the particular circumstances of this case, as recommended by the TMRO. This is because there are none. The "Pilkington" case cited by Customs in section 7.2.3 of the SEF does not address the matter of amending the investigation period. Nor is s269TACB of the Customs Act relevant to this matter.

In section 7.2.4 of the SEF Customs states that *it considers that the investigation period established in this case was reasonable in the circumstances,* but does not cite the circumstances which cause it to consider it reasonable. It merely bases this consideration on *information received in the initial application and the pre-initiation meeting.* This of itself is an unacceptable basis, for reasons provided in the "Setting the investigation period" section above. It is not true that *due care was taken in the selection of the investigation period based on the information available at the time of initiation of the case and the applicant has suffered no injustice from the process.* We reiterate that, from information provided in the initial application and pre-initiation discussions, the CEO's delegate who set the investigation period had definite knowledge that the main cause of injury to Cockburn was price depression and consequent loss of revenue and profit because of imports from Thailand undercutting Cockburn's prices in the non-alumina sector between March and June 2010. If Customs' non-mandatory policy to not attribute injury occurring prior to the investigation period to dumped imports was to apply in the circumstances of this case, **it was a grave mistake by Customs to define the investigation period of 1 July 2010 to 30 June 2011.** There is certainly an injustice to Cockburn as a consequence of this Customs' error which is fundamental to the termination of investigation no. 179.

Despite the TMRO's finding that the particular circumstances of this case make it inappropriate for Customs to apply its (non-mandatory) policy to not attribute injury occurring before the investigation period to dumping, Customs has provided no basis for its conclusion that it is appropriate to apply the said policy in the particular circumstances of this case. Customs has provided no reasons for disregarding the TMRO's consideration that –

- *the particular circumstances of this case are such that it would have been appropriate for the CEO of Customs to have revisited and amended the investigation period when it became apparent that the bulk of any injury claimed to be suffered by the applicant was sustained in the 3 month period immediately preceding the investigation period.*

In submissions to the resumed investigations we have outlined a number of particular circumstances which make it appropriate for Customs to amend the investigation period to include January-June 2010, but Customs has similarly provided no reasons for disregarding these circumstances. That the investigation period was set *in line with existing policy and procedures and in accordance with WTO accepted policies* does not explain why, in the particular circumstances of this case, it is not appropriate to amend the investigation period to include January-June 2010, as recommended by the TMRO.

In brief summary, **Customs has provided no reasonable grounds for not changing the investigation period as recommended by the TMRO.**

Customs further injury analysis

Customs' bias and subjectivity comes through in paragraph 8.1 of the SEF when it opens its further injury analysis report with the statement that *there is no requirement for Customs to consider data outside the investigation period when determining whether dumping has caused injury.* The unbiased and objective consideration is whether the particular circumstances of this case are such that it is appropriate for Customs to amend the

investigation period to ensure that it properly examines whether the domestic industry has sustained material injury because of dumped imports, **when it is open for it to do so.**

Customs' preliminary finding per section 3.1 of the SEF that –

- *even if injury from an earlier period was taken into account, and dumping was found for that earlier period, the dumped exports would have caused negligible injury to the Australian industry,*

is not supported by facts established by investigation no. 179 or the resumed investigation. It was established by investigation no. 179 that Cockburn experienced material injury in the form of **substantial profit reduction because of imports of quicklime from Thailand** – refer to the above sections re SEF 179 and TER 179.

It is a further indication of Customs' bias in the resumed investigation that, being unable to sustain its consideration per TER 179 that injury sustained by Cockburn between March and June 2010 cannot be attributed to dumping because it was outside the investigation period, Customs has now sought to revise its previous findings per SEF 179 and TER 179 that the Australian industry has been materially injured by imports from Thailand by –

(a) erroneously claiming that the material injury found to have been experienced by Cockburn because of dumped imports from Thailand does not constitute material injury to the **Australian industry as a whole;** and

(b) erroneously claiming that the volume of imports of quicklime from Thailand has declined since they commenced in 2010 and the prices of these imports has increased.

Concerning (a) above, the injury sustained by Cockburn because of imports into Western Australia is to be considered injury to the Australian industry as a whole. The Ministerial Direction of the Hon. Jason Clare cited in section 8.5 of the SEF is to the effect that injury experienced by a part of Australian industry located in a particular region of Australia into which dumped imports are entering, **may be judged to be injury to the Australian industry as a whole.** This Ministerial Direction is a reiteration of a memo from the Minister for Injury Technology and Commerce to the Comptroller-General of Customs on 16 December 1991 and has its origin in Article 4.1(ii) of the WTO Anti-Dumping Agreement in which it is stated

- *the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.*

In accordance with the said Ministerial Direction, the particular circumstances of this case are such that the injury sustained by Cockburn because of imports of quicklime from Thailand into Western Australia should be considered injury to the Australian industry producing quicklime.

It is obviously open for Customs to consider the injury experienced by Cockburn because of imports from Thailand into Western Australia injury to the Australian industry producing quicklime in the particular circumstances of this case, and Customs has provided no grounds for its consideration of the level of injury experienced by members of the industry other than Cockburn in assessing the materiality of injury to the Australian industry for the purpose of this preliminary determination. It is interesting that the consideration that the material injury

experienced by Cockburn does not constitute the material injury to the Australian industry as a whole has not been made by Customs at any other stage of this process.

With regard to (b) above, section 8.7 of the SEF misrepresents the actual trend of imports of quicklime from Thailand into Western Australia which are the cause of material injury to Cockburn. Customs' graphs illustrate reducing volumes of these imports at increasing unit prices. The fact is that, since the commencement of imports into Western Australia in 2010, annual volumes have increased and unit prices have decreased. The factual position in respect of import volumes and unit prices of quicklime from Thailand from 2010 is, according to ABS import statistics, as follows:

Year	Quantity (mt)	Value (AUD)	Unit price (AUD/mt)
2010	5,573.76	693,254.98	124.38
2011	10,066.13	1,227,652.51	121.96
2012	14,645.43	1,778,896.97	121.46
Jan-Feb, 2013	2,920.00*	314,692.65	107.77

Source: ABS statistics per attachment 1
*Annualised: 17,520 mt

Please note that 2013 export prices, which are the same as those in the fourth quarter of 2012, are significantly below prices in 2010 and 2011. Cockburn submitted to the resumed investigation that FOB export prices of quicklime from Thailand during the fourth quarter of 2010 were well below such prices during the investigation period. This is matter of fact and is also the case in the first quarter of 2013.

As submitted to the resumed investigations, Chememan Australia Ltd, the importer of the dumped quicklime from Thailand, continues to be active in the Western Australia non-alumina market sector and in 2012 was successful in achieving supply contracts with long-term Cockburn customers and caused Cockburn to sell its quicklime into that market sector at prices which would have been higher **but for the dumped imports.**

It is of important note that Customs' statement in section 8.5 of the SEF that *since competition (dumped imports from Thailand) entered the market Cockburn Cement has established its position and continued to trade at a profitable level* fails to mention the paramount fact that **Cockburn's annual profit levels are $[redacted] million less than they would be but for dumped imports from Thailand** which caused its reduction of prices in its term contracts between March and June 2010. It is likely that further such price reductions will be necessary in future if anti-dumping measures are not imposed.

Being unable to sustain its fundamental ground for termination of investigation 179 that Cockburn's material injury in the form of sustainable profit reduction by reason of price depression in response to dumped imports from Cockburn between March and June 2010 could not be attributed to dumping because the investigation period is July 2010 to June 2011, Customs has introduced the following unsustainable grounds for its intended termination of the resumed investigation:

- Material injury experienced by Cockburn because of imports of quicklime from Thailand into Western Australia is not material injury to the Australian industry producing quicklime;
- Cockburn held a monopoly share in the Western Australian market before the entry of the imports from Thailand;

- Since the entry of the imports from Thailand Cockburn has continued to trade at a profitable level; and
- Since they commenced in 2010, the volume of imports from Thailand has decreased and their unit prices have increased.

The abovementioned grounds are unsustainable for reasons provided in this submission. It is demonstrated by this submission that there are no sustainable grounds for Customs' finding per section 3.1 of the SEF that –

– *even if injury from an earlier period was taken into account, and dumping was found for that earlier period, the dumped exports would have caused negligible injury to the Australian industry.*

Conclusion

It is demonstrated by this submission that there are no grounds for not amending the investigation period to include January to June 2010 as recommended by the TMRO.

It is also demonstrated by this submission that there are no valid grounds for overturning the finding of investigation no. 179 that **Cockburn suffered material injury in the form of substantial profit reduction because of reduction of its prices in response to imports from Thailand undercutting its prices in the non-alumina sector.**

Consequent upon the foregoing, there are no valid grounds for termination of the resumed investigation. Rather, there are strong grounds for determination of the dumping status of imports from Thailand between January and June 2010 in order to determine whether the injury sustained by Cockburn between March and June 2010 was caused by dumped imports from Thailand, as recommended by the TMRO.

Yours sincerely,

Roger Simpson