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19 December 2011

Mr John Bracic
Director Operations 1
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

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commercial international

By email

Dear John

Alleged dumping of quicklime from Thailand - ACDN 2011/53
No injury nor threat from quicklime exported from Thailand

I refer to my letter dated 1 December 2011.

That letter explained the differences between the calcium oxide product exported to Australia by our client Chememan Co., Ltd ("Chememan"), and that produced by the applicant in this matter.

Likeness is not judged by competitive interaction. Likeness is judged by assessing the characteristics of two products side by side, to determine whether they are identical or have characteristics closely resembling each other. Substitutability can be evidence which goes to the question of whether the products do have characteristics closely resembling each other.

The trite but instructive example that is often used to explain that substitutability of function does not equate to product likeness for anti-dumping purposes is that of a broom and a vacuum cleaner. They are substitutable but could not be said to be like each other, because their characteristics do not closely resemble each other. Our client's quicklime can be used for the same application, in general terms, as that of the applicant. However its characteristics – its originating raw material, appearance, composition, effectiveness, performance and after effects - are entirely different. These differences arise because the quicklime produced by Chememan does not have characteristics which have the required degree of closeness to satisfy a reasonable application of the like goods test.

As yet we have not heard back from Australian Customs in relation to our request that the question of likeness be handled as a preliminary matter, and that consideration be given to the termination of this investigation on the basis of the facts that we have made known to you.

The submissions in this letter are not intended to detract from our client's position on likeness, which is that its product is so different that it cannot be considered to be a "like good" to the applicant's product. However we do wish to place the following equally important submissions – on the questions of "injury" and "threat" – on the record as well.

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In this regard we ask Australian Customs to pay careful attention to these matters.

1 There has been no material injury caused to the applicant by Chememan's imports of quicklime. The initiation report in this matter appears to conclude that there is, or might have been. However nothing that is said by the applicant, and which is reflected in that report, appears to support the applicant's contention. In summary:

(a) the applicant's lost sales are *"immaterial"*;

(b) *"imports from Thailand accounted for less than 2% of quicklime sold into the market"* over a recent six month period (which is of course much less if total Australian industry production, and full year statistics, are considered);

(c) *"the revenue lost [by the applicant] up to the end of June 2011 was relatively minor"*;

(d) the applicant's *"capital investment, return on investment, capacity utilisation, employment and productivity were relatively constant"* over the past 2.5 years.

2 We think there can be no doubt that the miniscule export activity of our client has not caused material injury to the applicant. Such a finding would render the material injury test a nullity.[1]

3 It appears that the applicant's argument in relation to "materiality" can be stated like this:

(a) Cockburn Cement tried to get a really high price increase from a major customer;

(b) that major customer is actively seeking to reduce cost increases, and it negotiated a lower price increase against the backdrop of the availability of commercial quantities of an alternative supply which it was then testing;

(c) the price finally agreed between Cockburn Cement and that customer was not as high as Cockburn initially demanded, but is still higher than the customer was previously paying;

(d) because Cockburn is going to make more money from its sales to that customer, but not as much money as it wants to make, that constitutes material injury.[2] [3]

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[1] Chememan's export volumes to Australia during the POI represents just under [CONFIDENTIAL TEXT DELETED]% of total annual Australian production of 2,100,000 MT. Source – *Securing a Clean Energy Future*, submission of the National Lime Association of Australia to Department of Climate Change & Energy Efficiency concerning the *Clean Energy Bill 2011* Exposure Draft, dated 22 August 2011.

[2] On 26 October 2011, Adelaide Brighton Limited Managing Director and CEO, Mark Chellew, told the Citi Australia and New Zealand Investment Conference that 2011 earnings *"were expected to be higher than the first half boosted by increased prices to a major lime customer in WA"*. How is it that in that forum the new contract price is celebrated because of its effect on higher earnings, but in this forum the same price is said to be materially injurious?

[3] Even more recently, in Investor Meetings conducted by Mr Chellew on 7 and 8 December 2011, Adelaide Brighton has advised the market that *"[l]ime price increases to a major alumina customer in*

4 With respect, such reasoning cannot meet the threshold requirements of materiality of injury caused by "dumping". The Australian industry is highly profitable, and continues to be profitable. It did not have to reduce its price to its major customer: rather, it had to reduce its price increase to that customer. It cannot be that the "price" of Chememan's quicklime was the reason for the outcome of that negotiation, because that customer is in a testing stage and does not have a long term contract with Chememan. Therefore it cannot know what the "price" might be. Further more, the Australian industry's costs – on its own admission and as reflected in the initiation report – have remained the same. As per footnotes 3 and 4, the applicant continues to advise the market that it expects higher earnings on the back of even higher prices than before.

5 We now turn to the question of "threat" of injury. The first thing to note is that the applicant has not alleged that there is a threat of material injury in its application. All that is said by the applicant with regard to what might happen in the future is this:

> *Because the price reductions in attachment A-9.2 apply to term contracts with the customers involved, Cockburn's annual revenue and profit loss attributable to dumped imports will continue in the foreseeable future.*

This, it must be acknowledged, is not a threat argument. If material injury has been caused by dumping, then what might happen in the future is irrelevant to the imposition of dumping measures. Threat or continuing material injury do not need to be established. The threat that material injury might be caused by dumping is a separate ground for the imposition of dumping measures, with its own considerations and tests. The applicant does not deal with any of those considerations in its application, nor does the fact situation meet those tests.[4]

6 Australian Customs acknowledges that the WTO Agreements call for "special care" with respect to cases where the application of measures is being considered on the basis of an alleged threat. Australian Customs refers to the tests for determining whether material injury is threatened by dumped imports as being "stringent".[5]

7 It is important to understand what is involved in making a determination of threat of material injury. According to Article 3.7 of the WTO Anti-Dumping Agreement, it must be based on facts and not merely on allegation, conjecture or remote possibility. The

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Western Australia, effective from 1 July 2011, are expected to improve 2H2011 EBIT by $6 million compared to 2H2010 EBIT. 2012 EBIT will be $8-$12 million better than 2010 subject to volume and import competition". Australian Customs should ask to see the Heads of Agreement and the volume and pricing terms it contains. Chememan maintains that the applicant's suggestion that Chememan import competition, from its present low base, could somehow strip the applicant of an $8 to $12 million increase in EBIT over the next six months, is neither realistic not credible

[4] It is a matter of concern to Chememan to find that an alleged justification for investigating whether there is a possible threat was a reference to a statement on the Chememan website. This was not mentioned in the application and the document in which that information was presented to Australian Customs by the applicant does not appear in any attachments to the application nor is it on the electronic public record.

[5] *Dumping and Subsidy Manual*, Australian Customs and Border Protection Service, June 2009 at page 16

change in circumstances that would create the situation in which dumping would cause injury must be clearly foreseen and imminent. A key WTO authority on the considerations required to arrive at such a determination states this:

> *[T]he text of [Article 3.7] makes explicit that in a threat of injury investigation, the central question is whether there will be a "change in circumstances" that would cause the dumping to begin to injure the domestic industry. Solely as a matter of logic, it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset. For example, if an industry is increasing its production, sales, employment, etc., and is earning a record level of profits, even if dumped imports are increasing rapidly, presumably it would be more difficult for an investigating authority to conclude that it is threatened with imminent injury than if its production, sales, employment, profits and other indicators are low and/or declining.*[6] (underlining supplied)

8 All of the available literature about the Australian industry– including that which has been disseminated by the applicant itself – points towards increasing production, sales, and profits. In that context any finding of threat of future material injury would directly contradict that WTO authority.

9 Quite apart from that, there are other important factors which prevent any proper finding of "threat".

(a) First, the capacity at Chememan Australia's handling facility at Henderson in Western Australia is constrained by its small size. Even running at full capacity, the throughput at Henderson would be [CONFIDENTIAL TEXT DELETED]. Current sales volume does not come anywhere near these levels. At its highest, that throughput would constitute less than [CONFIDENTIAL TEXT DELETED]% of the total Australian annual production of 2,100,000 MT.[7]

(b) Secondly, any increase in the number of Chememan's distribution centres in Australia (ie more than one) cannot be considered to be either "foreseeable" or "imminent". An increase in Chememan's fixed distribution abilities could only ever be a medium to long term goal. Chememan would need to be generate an appropriate level of profitability on its Australian sales, and be satisfied that this would continue, before committing to such an expensive and risky expansion. Chememan Australia could not presently justify the type of investment needed to establish a multiple number of distribution centres.

Furthermore, the planning required for the establishment of a distribution centre – land acquisition, approvals, construction, commissioning and staffing – is time consuming. For example, Chememan Australia was incorporated in November 2008; construction approvals were obtained a year later, in November 2009; the lease of the land for the Henderson facility commenced in December 2009; and

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6 Panel Report on *Egypt - Steel Rebar*, para. 7.91.

7 Source – see footnote 1

the facility was commissioned in May 2010. The facility is still running at only low volumes, some three years after planning commenced.

Needless to say, Chememan has no plans or processes underway for any additional facility or facilities.

(c) Thirdly, unlike the applicant, Chememan Thailand does not have any long term supply contracts in place with any Australian customers. [CONFIDENTIAL TEXT DELETED] There have been no price negotiations for long term supply, and one might accurately predict that that end user – in fact no end user – would engage in any contractual negotiations during the pendency of this investigation given the commercial uncertainty it creates

(d) Fourthly, as was advised at the importer verification, since the end of the POI Chememan Australia has become engaged in discussions with [CONFIDENTIAL TEXT DELETED] prospective additional customers, [CONFIDENTIAL TEXT DELETED] And in any case, the latter has advised that it would not yet be ready to accept any supply from Chememan Australia, because [CONFIDENTIAL TEXT DELETED].

(e) Fifthly, Chememan Thailand is running at high levels of capacity utilisation, and the Australian market is not considered to be a high profit market. Factors which militate against any large or rapid expansion of Chememan's export sales to Australia include high costs in Australia (wharfage charges, stevedoring costs, low port efficiencies), the distance of the Australian market from Thailand; delays in the containerised shipping route; and logistical problems of containerised sales. Bulk shipments would require long term contracts for sales into the Australian market, and Chememan does not have any such contracts.

(f) Sixthly, it will not have gone unnoticed by Australian Customs that imports of quicklime have entered Australia from an alternative country source [CONFIDENTIAL TEXT DELETED].

10 For all of these reasons, we submit that no finding of a "threat of material injury" is possible in the circumstances of this case.

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Our client would be happy to provide clarification, and to further discuss these matters with you.

Yours sincerely

Daniel Moulis
Principal