CLAYTON UTZ

Ms Lydia Cooke
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Australian Customs and Border Protection Service
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CANBERRA ACT 2600

2 February 2012

Our ref 11276/80126545

Dear Ms Cooke

Quicklime exported from Thailand

We act for Alcoa of Australia Limited (**Alcoa**) and refer to the Australian Customs and Border Protection Service (**Customs**) investigation into alleged dumping of quicklime exported from Thailand following an application lodged by Cockburn Cement Limited (**Cockburn**), a domestic manufacturer of quicklime.

The purpose of this submission is to address Issues Paper 2012/179 in which Customs stated that it had formed the view that the "*goods were dumped by a margin of 21.4%*" but that "*the dumped imports ha[d] caused negligible injury*" for at least 5 main reasons:

- Imports from Thailand accounted for a very small proportion of the market;
- Imports were sold for product testing;
- None of the Cockburn's existing customers are in negotiations to purchase product from Chememan;
- Cockburn has experienced a negligible loss of sales; and
- Cockburn negotiated price to its Alumina customers have increased significantly over previous price

In the normal course, the above findings would have led to the termination of the investigation. Customs has however indicated in the Issues Paper that it wishes to address the question of threat of material injury. Customs notes that where there is insufficient evidence to be satisfied that the industry has suffered past or present material injury, Customs is not precluded from considering the issue of threat. In justification of this position, reference is made to the provisions of section 269TDA(13)(ii) of the *Customs Act 1901* (**Act**) which requires the CEO to be satisfied that "*injury, if any, to an Australian industry...that has been, or **may be** caused by that dumping is negligible*" (original emphasis).

Our client, Alcoa, in responding to the Issues Paper will address whether:

(a) Customs can legally consider the question of threat and if so is there a lawful procedure; and

(b) even if Customs was to proceed to consider the question, there is no case of threat of material injury.

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By way of preliminary submission however, we consider that an applicant who seeks to make good a threat of material injury case carries a very heavy burden and, to our knowledge, Customs has not ever made a finding and imposed measures based on a case of threat of material injury.

1. **The Application filed does not plead a case of threat of material injury**

1.1 Cockburn's consultant in his letter dated 4 January 2012 to Customs concedes that the only claim made related to actual material injury but says *"inherent"* in a dumping case is the likelihood of threat and for that reason his client did not complete that part of the form. We submit that there is no assumption that a case of actual threat of material injury inheres one of threat. Indeed, it is patent that the Applicant never raised a threat of material injury - the matter was advanced on the basis of actual material injury. Additionally, there was nothing in the application form which prevented the applicant from also completing the section on threat of material injury as an alternative argument to its main claim[1].

1.2 In the *Certain Mobile Garbage Bins and to Consideration Report and to the Termination Report No 130* (**MGB case**) the applicant made a claim for both actual material injury and threat of material injury in the one application. Customs correctly considered the question of actual material injury first and it was only after there was no such finding did it proceed to consider a case of threat of material injury. Customs stated in the Termination Report[2] that it requested the applicant to further clarify **and substantiate** its claim in the application in relation to the question of threat of material injury. The report went on to say that:

> *"After the applicants lodged a submission in response to Customs request, Customs wrote to interested parties and invited submissions on the question of threat of material injury".*

1.3 The MGB case establishes that:

(a) an applicant can choose to claim both actual material injury and a threat of material injury at time of initiation, contrary to what has been asserted in this case;

(b) the applicant is required to so do if s/he wants to rely on threat of material injury (the application form so specifies);

(c) Customs will in certain circumstances consider a case of actual material injury and only if this is not found will it then consider a case of threat of material injury;

(d) the applicant is required to make submissions and substantiate a threat case first; and

(e) other interested parties can then respond the applicant's submissions or purported substantiation of the threat.

1.4 As is evident, Customs' approach of requesting the applicant first to make submissions and then the interested parties replying is in accord with procedural fairness - the interested parties must be given the opportunity to know what the applicants case is before responding. We submit that

[1] The application is a statutory instrument, not a general administration form, and requires an applicant to make an election on whether the claim being made out is for actual material injury or a case of threat of material injury.

[2] Termination Report Certain Mobile Garbage Bins Exported from Thailand at page 38.

it would have been preferable, as a matter of administrative law, for the same procedure to have been adopted in this case.

1.5 We submit that:

(a) in the absence of both an express claim of threat by the applicant, and proper completion of the application form which would provide some guidance to our client as to what is being alleged or put in support of a threat claim, it would be irregular and difficult for any responding party to make any purposeful submission. So it is with this case; and

(b) neither the Dumping Manual nor any other document or explanatory material published by Customs supports a claim than an actual material injury case can be transmogrified into a threat case even when a finding of negligible injury has been made.[3]

2. **Grounds for threat of material injury**

2.1 The evidential burden and satisfaction of the required test for establishing a case of threat of material injury is stringent, as illustrated by the following passage in the Dumping Manual:

> *"The WTO Agreements provide that with respect to cases where injury is threatened by dumped or subsidised imports, the application of measures shall be considered and decided with special care. A determination of threat of material injury* ***is thus subject to stringent tests****. A totality of factors must lead to the conclusion that because of the exportation of dumped or subsidised goods is imminent, a change in circumstances makes the threat of injury foreseeable and the injury threatened is material."*[4]

2.2 Further, as noted at page 16 of the Dumping Manual, is the following:

> *"Consideration of the factors referred to in Article 3.4 of the Anti-Dumping Agreement is necessary in order to establish a background against which an evaluation of whether imminent further dumped imports will affect the industry's condition in such a manner than material injury would occur unless dumping or countervailing measures were imposed.*
>
> *The requirement of both the anti dumping agreement and section 269TAE(2B) is that the Minister must take account of only such changed circumstances, including the changes of the kind determined by the Minister as would make that injury foreseeable and imminent."*

2.3 The Issues Paper has given helpful context to the meaning of the words *foreseeable and imminent* and confined it to a 12 month future period. Customs does not consider that events beyond this period to be imminent or clearly foreseeable.

[3] If that were the case, every Customs investigation and all Statement of Essential Facts and Reports to the Minister would have to address the issue of threat (whether formally or by way of dismissing it in the report).

[4] Page 16 of Dumping Manual.

2.4 It is assumed, given the investigation period in this case ended on 30 June 2011, and the statement in the Issues Paper that "*dumped imports have caused negligible injury over the investigation period*", that the threat of material injury being considered commenced from the end of the current investigation period. This means that the question of what is considered foreseeable and imminent is confined to the period ending on 1 July 2012.

2.5 Even if we have mistaken the period and Customs intended that the words imminent or clearly foreseeable encompassed the whole of the 2012 calendar year, for the reasons set out below our client still submits that there is no support for any finding of threat of material injury.

2.6 In our client's submission dated 9 December 2011, our client considered and addressed the specific matters listed in Article 3.7 of the WTO anti dumping agreement. Alcoa will address, further below, the factors listed in the Issues Paper as derived from Article 3.4 of that agreement as it provides the background to carry out the evaluation under Article 3.7.

2.7 The Issues Paper makes the following points:

(a) Customs did not agree that Cockburn suffered a potential loss of revenue of 2.9% as it was satisfied that, given the level of impurities in the quicklime provided by Cockburn, it could not achieve its desired price even in a market absent of imports;

(b) Imports from Thailand account for a very small proportion of the market;

(c) All imports from Thailand during the investigation period were sold for product testing;

(d) None of Cockburn's existing customers are currently in contract to purchase product from Chememan Australia;

(e) Cockburn has experienced a negligible loss of sales volumes;

(f) Cockburn's negotiated prices with its alumina customers have significantly increased over the previous negotiated price; and

(g) Customs compared the prices of quicklime supplied to the non alumina sector by Cockburn and Chememan Australia during the investigation period and, on a monthly weighted average basis overwhelmingly the position was that the price offered by Chememan was higher[5].

2.8 Although not expressly stated in the report, it is clear that there is no evidence, and certainly no finding was made by Customs to support a claim of,

(a) price depression;

(b) price suppression; or

(c) price undercutting.

[5] With the exception of two customers, which accounted respectively for 1% and 0.5% of Cockburn Cement non alumina sales, Chememan's prices were higher.

2.9 Similarly, there is no evidence of injury in relation to other injury factors which include:

(a) Capacity utilisation;

(b) Level of profit and profitability;

(c) Level of return on investment;

(d) Cash flow;

(e) Number of people employed in the industry;

(f) Share of the market;

(g) Ability of the applicant to raise capital; and

(h) Investment in the industry.

2.10 Given the findings expressed in the Issues Paper, it must be inferred that there is an acceptance by Customs that the injury factors cannot be demonstrated. In any event, in our client's submission to Customs dated 9 December 2011, we addressed the issue of price undercutting (Part 6 of submission) and the injury factors (Parts 5 and 7 of submission) referred to above. We would respectfully refer and rely on them for the purposes of our reply to the Issues Paper. We also previously set out in some detail our submission on the contract negotiations between our client and Cockburn (see Part 10 of submission). As will have been evident from our client's submission, the real issue has always been that Cockburn required our client to purchase 100% of its quicklime requirement from it and no other company. This was unacceptable to Alcoa for the reasons spelled out in Part 11 of our submission headed "Supply Risk and Plurality of Supplier Choice".

3. **Legal standard to be applied in determining a threat of material injury**

3.1 In our submission dated 9 December 2011 we noted at paragraph 12(a) and 12(f) that any determination of threat of material injury must be "*based on facts and not merely conjecture or remote possibility*" and that a threat case must be considered and decided with "*special care*". It follows that the question of changed circumstances which would make injury foreseeable and imminent must be assessed within that framework and a finding of threat of material injury is higher (or harder) than that for making a finding of actual material injury.

3.2 In *United States- Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada AB 2006-01* the appellate body considered the statement made by the panel in that case where the panel stated:

> *"The possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts. That is to say, while a determination of threat of material injury must be based on the facts, and not merely on allegation, conjecture, or remote possibility, predictions based on the observed facts may be less susceptible to being found, on review by a panel, to be outside the range of conclusions that might be*

reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given. [6]

3.3 In analysing the statement the Appellate Body stated, inter alia, that:

> *"Of somewhat greater concern, however, is the Panel's statement that the "possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts." [7] We are not persuaded that, in making this observation, the Panel intended to express the view that a threat of injury determination must be upheld if the investigating authority's report discloses the occurrence of injury as one reasonable prediction within the possible range of future occurrences. If this were the Panel's view, then it would be erroneous.*
>
> *In other words you cannot in making a determination of threat of material injury, simply put forward a proposition that within a range of reasonable predictions that injury may be one outcome."*

3.4 The test for making a finding of threat of material injury is therefore a higher one than that required to make a finding of actual material injury.

4. **The particular factors to be considering in threat of material injury**

5. The Issues Paper sets out 4 themes that Customs wishes the parties to address in its consideration of a threat case as follows:

- A significant rate of increase of dumped imports into the domestic market.
- A sufficient freely disposable, or imminent substantial increase in the capacity of the exporter, indicating the likelihood of a substantial increase in dumped goods.
- Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports.
- Whether inventories of product being investigated have increased.

5.1 We presume that the above factors were chosen because of Customs' assessment that, since the purpose of the imports during the investigation period was to test the product with a view to establishing a longer term contract, the goods imported during the investigation period do not reflect the potential future growth of import volumes for quicklime. If we are correct in our assumption, then we will seek to address the 4 themes to the extent that we can as some of the matters are more appropriately dealt with by the importer.

[6] Panel Report, para 7.13.

[7] Panel Report, para 7.13. (emphasis added)

Significant rate of increase of imports

5.2 The question of significant rate of increase in dumped imports is, respectfully, answered as follows:

(a) first, our client has entered into a long term supply contract with Cockburn for the supply of quicklime Commercial in Confidence, contract terms [redacted] The details of that commercial arrangement were fully spelled out in Part 10 of our client's submission dated 9 December 2011;

(b) second, Commercial in Confidence, business affairs information respecting ALCOA [redacted] Having regard to this fact, it cannot be said that there will be a significant increase of dumped imports in the Australian market;

(c) third, Commercial in Confidence, business affairs information respecting ALCOA it must follow that any claim of actual or threatened material injury to Cockburn *vis a vis* cash flow, market share, profit level, capacity utilisation and the like is not maintainable;

(d) fourth, Commercial in Confidence, business affairs information respecting ALCOA [redacted] and

(e) fifth, during the 12 month period to be considered by Customs, Commercial in Confidence, business affairs information respecting ALCOA [redacted] fall into the description aptly coined by the applicant's parent company, Adelaide Brighton, in its investor report of 26 October 2011 of "**small scale lime imports**".[9]

5.3 For the above reasons it is evident that, Commercial in Confidence, business affairs information respecting ALCOA [redacted], there is no proper or genuine basis for any claim that there will be a significant increase of dumped imports into the domestic market.

Exporters Capacity

5.4 We submit that both the capacity of the importer and Cockburn should be addressed and not merely the exporter.[10]

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[8] See 10.10(c) of our submission dated 9 December 2011.

[9] See also 11.6(a) of submission dated 9 December 2011.

[10] See 12.7 of our submission dated 9 December 2011.

5.5 Dealing with Cockburn's capacity to meet the market, we note that in the 2010 Annual Report of its parent company, quicklime kiln capacity was said to be operating at full capacity,[11] that there is strong demand in the Western Australian market and such demand is resulting in full capacity in all of its major lime plants.

5.6 In respect of the importer, Chememan, it is said at page 14 of Customs' Consideration Report that its distribution facility is capable of handling 100mt per annum. [redacted] Commercial in Confidence, business affairs information respecting ALCOA Cement. In this way, [redacted], it is hardly relevant that Chememan has a 100mt distribution facility. Further, the distribution facility has been in existence since March 2010. There is no evidence that it has been fully utilised or at maximum capacity. We submit that it would be wrong to look at the fact that Chememan has such a facility and immediately conclude that it will utilise all of that 100mt capacity. It would also be wrong to conclude that it will fill that capacity with dumped imports. [redacted] Commercial in Confidence, business affairs information respecting ALCOA [redacted]

Pricing Issues (suppression and depression and testing continues)

5.7 [redacted] Commercial in Confidence, business affairs information respecting ALCOA including contractual arrangements and terms [redacted]

5.8 [redacted] Commercial in Confidence, business affairs information respecting ALCOA including contractual arrangements and terms [redacted]

5.9 [redacted] Commercial in Confidence, business affairs information respecting ALCOA including contractual arrangements and terms [redacted]

5.10 [redacted] Commercial in Confidence, pricing issues [redacted]

[11] See 11.6 of our submission dated 9 December 2011.

[12] See 10.8 of submission dated 9 December 2011.

Commercial in Confidence, pricing issues

5.11 Clearly, the price paid Commercial in Confidence, contract issues is higher such that there can be no credible threat of material injury.

5.12 Under the present contractual arrangements between our client and Cockburn, Commercial in confidence, contract issues

5.13 Our client's actual spend with Cockburn has Commercial in Confidence, contract and pricing issues In terms of a forecast for potential sales during the 12 month period, Alcoa would estimate that it will spend in the first half of this year and it forecasts that its spend for 2012 will be

5.14 For completeness, and as stated by our client during the Customs visit, our client is still trialling small volumes of Chememan product in its plant Commercial in Confidence, business affairs information respecting ALCOA

5.15 Our client, noting that the quicklime from Chememan has certain qualitative advantages, Commercial in Confidence, business affairs information respecting ALCOA

[13]

Inventory Levels

5.16 This is an issue for parties other than our client to address. However, focussing on Cockburn alone for the moment and given its public disclosures that its kiln capacity is fully utilised, it must follow that its inventory levels could not have increased appreciably because of any dumping of quicklime.

6. **Conclusion**

6.1 We submit that in order for Customs to make a finding of threat of material injury, it would have to make good various assumptions, not based on any probative evidence, that:

(a) during the new investigation period (1 July 2011 to 30 June 2012), our client's trial would successfully conclude;

(b) contract negotiations would take place that would conclude within that period; and

(c) orders would be placed and significant shipments would be exported to Australia from Thailand at a price that undercut Cockburn's current price.

6.2 For the reasons specified above, each of those assumptions has proved incapable of being made good. Commercial in Confidence, business affairs information respecting ALCOA [redacted]

6.3 Further, although Cockburn would clearly like to supply the whole of our client's quicklime needs, the fact that it has not achieved its aim does not mean that a finding of threat of material injury ensues. All the current indicators show that there is no material injury [redacted] there is no *threat* of material injury.

6.4 We submit that all the evidence (and the weight of it) points clearly against any threat of material injury. We consider that neither the *stringent tests* referred to in the Dumping Manual or even a very lax and liberal one can be satisfied on the facts of this case. In consequence we consider that the matter ought to be terminated.

6.5 In the event you wish to discuss this submission with us and our client please let us know so that a suitable time, date and arrangement can be made.

Yours sincerely

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