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LAWYERS

2 April 2012

MINTER ELLISON BUILDING
25 NATIONAL CIRCUIT FORREST
GPO BOX 369 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minterellison.com
TELEPHONE +61 2 6225 3000 FACSIMILE +61 2 6225 1000

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Director, Operations 3
International Trade Measures Branch
Australian Customs & Border Protection Service
5 Constitution Avenue
CANBERRA ACT 2600

BY EMAIL – tmops3@customs.gov.au

Dear Sir

Alleged Dumping of Certain Structural Timber from Germany - Statement of Essential Facts (SEF) No. 176.

On behalf of our client, Egger Sägewerk Brilon GmbH (**Egger**), we wish to respond to the above SEF.

We support the CEO's findings that Egger's export sales to Australia have not been dumped and the consequential proposal to terminate the investigation in so far as it relates to exports from Germany. The evidence before the CEO in relation to Egger is inconsistent with any construction other than that, pursuant to s.269TDA(1) of the *Customs Act 1901* (**Act**), the CEO must be satisfied that our client has not exported structural timber to Australia at dumped prices and the investigation must be terminated forthwith.

In preparing the termination report and bringing the investigation to a close we request that the CEO have regard to the following observations and corrections.

Initiation of Investigation

Section 1.2.3 of the SEF summarises the grounds on which the CEO decided not to reject the application to publish a dumping duty notice. The findings in the SEF clearly demonstrate that the claimed levels of normal value and export price set out in the application were in the nature of ambit claims and bore no relationship to reality. In the case of the original allegations relating to Egger some members of the applicant industry had direct knowledge that the alleged export prices were very substantially lower than the actual export prices.[1] In these circumstances we submit that it would be appropriate for CBP to investigate whether there has been any breach of the provisions of Division 2 or 4 of Part XIII of the Act.

[1] Exporter Visit Report – Egger Sägewerk Brilon GmbH: section 3.8

PUBLIC FILE 112

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Dumping

At sections 1.3.4 and 8.1 of the SEF it is incorrectly stated that CBP found that... *there has been dumping of some or all of the structural timber exported to Australia from Germany.* In both cases the words 'or all' should be deleted.

Previous Cases

The statement in section 2.3 that there have been no previous cases is incorrect. In 1931, pursuant to the *Australian Industries Preservation Act* 1906, dumping duties were applied to all timber exported from Russia.

Dumping Investigation

CBP claims in section 6.7 that...*disparities between estimates of dumping submitted by the applicants and information verified with the exporters are principally associated with export prices.* This is certainly not true in relation to Egger where export prices and normal values were grossly understated and overstated respectively and on the basis of available information it appears likely that similar exaggeration applied to estimates of both variable factors in respect of other nominated exporting countries.

Normal Value

In section 6.10.5 the CEO concludes that in constructing Egger's normal value under s.269TAC (2)(c) no amount for profit should be included. While we support the conclusion we submit that the CEO's reasoning fails to engage with the threshold criterion set out in the Act relating to the application of profit margins.

The starting point is not regulation 181A of the *Customs Regulations, 1926 (Cth)* but s.269TAC(13) of the Act which states that:

> *Where because of the operation of section 269TAAD, the normal value of goods is required to be determined under subsection (2), the Minister* ***shall not include*** *in his or her calculation of that normal value any profit component under subparagraph (2)(c)(ii)* [Emphasis added].

If s.269TAAD did not exist the normal value for Egger could be determined under s.269TAC(1) so it is clear that the application of subsection (2) is required *because of the operation of s.269TAAD.* This mandatory requirement to exclude profit from the calculation of normal value is expressed in clear and unambiguous terms and it prohibits, in the present matter, any recourse to the ascertainment of amounts of profit under regulations applying only to circumstances in which a constructed normal value is being determined for reasons other than the operation of s.269TAAD. This interpretation is reinforced by the stipulation in s.269TAC(2)(c)(ii) that a determination of profit by the Minister only applies in circumstances where s.269TAC(13) has not been activated. The further consequence of this stipulation is that s.269TAC(5B) and related customs regulations have no application in circumstances such as the present case where a constructed normal value must be ascertained because of the operation of s. 269TAAD.

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Even if ambiguity existed in the relevant statutory provisions the purpose of s.269TAC(13) is clear from the terms of the Explanatory Memorandum to the Customs Legislation (Anti-Dumping) Bill 1989:

> *The other substantive change proposed in this Bill relates to the amendments proposed in Clause 13, new section 269TAC, relating to the Government's decision on the Anti-Dumping Authority's Report to make provision for the inclusion of a profit margin when the normal value of goods is being constructed. The proposed amendments, in new subsections 269TAC(2)(c)(ii)(B) and (4)(e)(iii) give effect to the Authority's recommendation that when a normal value is being constructed, a profit margin (which may be zero) should be included. The one exception identified by the Authority and endorsed by the Government where a profit margin should not be included in a constructed normal value is where the relevant sales in the country of export have been made at a loss for an extended period of time. This has been given effect to in proposed new subsection 269TAC(13)* [Emphasis added].

The Exporter Visit Report acknowledges that Egger's sales of like goods in Germany ...*have been made at a loss for an extended period of time*... and consequently any proposal to add a profit margin in constructing a normal value would be totally contrary to the expressed intention of Parliament. Any such proposal would offend both common sense and the principle of reasonableness embodied in the *Administrative Decisions (Judicial Review) Act 1977*. As the Anti-Dumping Authority pointed out in 1989 in a report[2] which prompted the Government to introduce s.269TAC(13) into the Act, the main criterion in the 'ordinary course of trade' test is that goods have been sold at a price less than their cost to make and sell (CTMS). That criterion is not satisfied in circumstances where selling prices are exactly equal to the CTMS and such selling prices would be recognised as normal values under s.269TAC(1). Obviously if a selling price that exactly equals CTMS must be accepted as a normal value under s.269TAC(1) it would be illogical to add a profit margin when constructing a normal value under s269TAC(2)(c) for goods because they have been sold at a loss.

We have already set out the reasons why regulation 181A, dealing with the assessment of profit in circumstances where a constructed normal value must be determined for reasons other than the operation of s.269TAAD, has no application in this matter. Nevertheless because the application of the regulation has been the subject of observations by both the CEO and an interested party to the proceedings, the views expressed require a response even though they address an irrelevant, hypothetical issue that cannot arise in relation to Egger under any proper interpretation of the relevant legal provisions.

In addition to irrelevance and an unjustifiable claim for partial redaction, the submission dated 16 February 2012 on behalf of Stora Enso can be disregarded as it is based on incorrect interpretations of the relevant provisions and false inferences. Regulation 181(A)(2) prevails over the immediately following subregulations and could be applied to the evidence before CBP of sales by Egger of like goods in the ordinary course of trade. Those sales yield a miniscule profit margin which when added to the CTMS makes no material difference to the current assessments of normal value and negative dumping margin. Properly constructed, the hypothetical quest for a profit margin under regulation 181(A) ends there.

Some comment is required, however, on the claims made in respect of the application of the criteria contained in regulation 181A(3). Subparagraph (a) of that regulation looks to sales of *the same general category of goods in the domestic market* but does not require such sales to be in the ordinary course of trade. Contrary to the assertion in the submission on behalf of Stora Enso, application of that criterion to Egger's sales of kiln dried dressed timber yields a negative profit margin. Subparagraph (b) of the regulation also has no application because of a ruling[3] of the WTO Appellate Body which pointed out that

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[2] Anti-Dumping Authority: *Inquiry into Material Injury, Profit in Normal Values and Extended Period of Time* – Report No.4, March 1989: p.29

[3] *EC – Bed Linen* – WT/DS141/AB/R – p. 72-77.

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110 FILE

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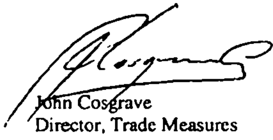
the plural character of 'exporters or producers' and the use of the term 'weighted average' made it clear that the application of the criterion depended on the availability of relevant data from more than one producer. In the present matter only Ilim has provided relevant data.

Yours sincerely
MINTER ELLISON



John Cosgrave
Director, Trade Measures

Contact:: John Cosgrave Direct phone: +61 2 6225 3781 Fax: +61 2 6225 1781
E.mail: john.cosgrave@minterellison.com