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MOST URGENT
No. 0310/ 2228

Department of Foreign Trade,
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21 August 2012

Dear Mr. Michael Carmody,

Subject: Resumption of investigation into the alleged dumping of Quicklime exported to Australia from the Kingdom of Thailand

The Department of Foreign Trade ("DFT") wishes to refer to the Australian Customs Dumping Notice No. 2012/38 issued by International Trade Remedies Branch on 3 August 2012 with regard to the above subject matter.

This resumed investigation has arisen from a report issued by the Trade Measures Review Officer ("Review Officer") in his review of your decision to terminate the anti-dumping investigation into quicklime imported from the Kingdom of Thailand ("Thailand").

According to Australian Customs Dumping Notice No.2012/12, your decision to terminate the anti-dumping investigation was based on the findings that:

- there has been, or may be, dumping of some or all of the goods; but
- the injury, if any, to the Australian industry, that has been, or may be caused by that dumping is negligible.

The Review Officer reviewed your decision to terminate the investigation. On 25 June 2012, he claimed to revoke the decision to terminate the anti-dumping investigation, noting that:

> *While I am not empowered to direct how the resumed investigation should be conducted, I so recommend that the CEO either amend the investigation period to cover the period between January and June 2010, or otherwise use the clear power in s269T(2AD) to have regard to that same period and analyse not only injury sustained by the applicant during that period, but also whether such injury was caused by the dumping of quicklime.*

This recommendation is highly unusual in that it represents a very significant departure from the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade ("the Anti-Dumping Agreement"), and the common interpretation and implementation by Members of this Agreement. In the event,

Australia would stand alone in clear breach of its international law obligations should the investigation period be changed in this way, or if conclusions about material injury were now to be made in respect of a period prior to the dumping investigation which is more than two years ago.

Further, the Thai exporter concerned has been advised that your officials would be acting in breach of Australia's own law in carrying out this recommendation.

In this respect, Article 1 of the Anti-Dumping Agreement provides that:

> *An anti dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.*

The periods that an investigation will take into account for the respective purposes of deciding whether dumping has occurred and, if so, whether it has caused material injury, are very important reference points for any investigation under this Article. This importance was acknowledged by the Appellate Body in its report in *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*:[1]

> *As the Panel correctly noted, the POI [period of investigation] 'form[s] the basis for an objective and unbiased determination by the investigating authority.' Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation. We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the Anti-Dumping Agreement, assures the investigating authority and exporters of 'a consistent and reasonable methodology for determining present dumping', which anti-dumping duties are intended to offset.*

The WTO Committee on Anti-Dumping Practices has recommended that as a general rule:

> *the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;*[2]

In line with this recommendation, it is noted that Australian Customs and Border Protection general policy, as stated in the Anti-Dumping and Countervailing Handbook, is to nominate an investigation period 12 months preceding the initiation of an investigation, and that:

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[1] WT/DS219/AB/R, 22 July 2003 (Appellate Body Report), para 80

[2] The Recommendation was made in G/ADP/6 and adopted by the Committee in G/ADP/M/16 at para 83.

The investigation period has a start and end date and events happening outside the investigation period usually not being taken into account in assessing dumping and/or benefit conferred.[3]

The investigation concerning the alleged dumping of quicklime from Thailand was initiated based on a stated investigation period of 12 months. It was that period that our exporter/s and all other interested parties were required to address, and that investigation undertaken by concerned officials. Your decision was based on the information obtained and the findings reached in respect of that period.

It would not be an action of an objective and unbiased investigating authority to now decide to change the investigation period, by going further back in time. The DFT respectfully argue with you that this is not acceptable to conduct an investigation and to have already concluded the case based on positive evidences available, and then to change the rules of an investigation in order to reach a different finding.

Furthermore, the DFT has serious doubts as to whether the extended investigation suggested by the Review Officer could lead to findings based on positive evidence, as is required under Article 3.1 of the Anti-Dumping Agreement.

In Mexico – *Definitive Anti-Dumping Measures on Beef and Rice*[4] the Appellate Body stated that the imposition of dumping duties must be done based on a determination of the *"current situation"*.[5] The term *"positive evidence"* was said to refer to evidence that is *"relevant or pertinent"* to the *"current situation"*.[6]

The revocation of the no-injury finding by the Review Officer - and any renewed investigation - using information which is now over two years old could not be said to be relevant and pertinent to the "current situation". Therefore the revocation itself cannot be said to be a determination based on positive evidence, and no resumed investigation conducted on the basis suggested by the Review Officer could lead to findings based on positive evidence. Changed findings of material injury based on a resumed investigation of the type suggested by the Review Officer would be in breach of Article 3.1 of the Anti-Dumping Agreement.

Moreover, the periods for the investigation were clearly announced in the initiation notice. That notice was required by law to state what the investigation period was to be. The advice given by Australian legal counsel to the concerned exporter is that it would be a breach of Australian statutes and due-process laws to do what the Review Officer has now suggested in the context of this investigation.

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[3] Page 10.

[4] WT/DS295/AB/R, 29 November 2005 (Appellate Body Report)

[5] Para 165

[6] *Ibid.*

The DFT again wishes to express an earnest concern about the Review Officer's decision in this matter. Should the investigation period be changed in an attempt to "cherry-pick" a period as the best chance to protect the domestic industry, the Thai Government would have no choice but to urgently raise this matter to the WTO Committee on Anti-dumping practices as it would represent one of the most serious challenges to date to the fair, impartial and objective implementation of the Agreement.

Of the options set out in the Australian Customs Dumping Notice No. 2012/38, the Australian Anti-dumping and the Agreement would require that CEO's original decision on the length of the investigation period be respected and that the termination of the proceeding be confirmed for the reasons already set out in the Termination Report No. 179.

Your sincerely,

(Mr.Surasak Riangkrul)
Deputy Director - General
For Director - General

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