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16 October 2013

Mr J. Stockwell
Director, Policy
Anti-Dumping Commission
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

By email

Dear Mr Stockwell

Submission of Chememan Company Limited
Quicklime from Thailand – resumption of investigation

We refer to Anti-Dumping Notice No. 2013/73 ("ADN 2013/73"), which has been issued as a result of the Anti-Dumping Review Panel's report *Quicklime exported from the Kingdom of Thailand – Review of Decisions to Terminate an Investigation to Publish a Dumping Notice*, 8 August 2013 ("the ADRP Report").

Chememan Co., Limited ("Chememan") agrees with the outcome of the previous resumption of the investigation as reported in *International Trade Remedies Termination of Investigation No. 179A – Application for a Dumping Notice – Quicklime Exported from Thailand* ("Termination Report 179A") which was published on on 2 May 2013, and indeed with the outcome of the initial investigation, as reported in *International Trade Remedies Termination of Investigation No. 179 – Application for a Dumping Notice – Quicklime Exported from Thailand* ("Termination Report 179") which was published on 3 April 2012.

Chememan's exports of quicklime did not cause material injury to the domestic industry producing goods said to be "like" Chememan's.

At the outset, we wish to point out that the continuation of the investigation by way of its "resumption" is in direct conflict with Australia's obligations under the WTO *Anti-Dumping Agreement* ("AD Agreement"). Relevantly, Article 5.10 of the AD Agreement provides that:

> *Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.* [our underlining]

Article 5.10 includes both a general rule and an exception to that rule. The general rule is that an investigation should be concluded within one year of its initiation. The exception to that rule is where "special circumstances" prevent such a timely conclusion to the investigation. This exception is subject to an absolute limit: in no case, regardless of the circumstances, should an investigation continue beyond 18 months from its initiation. This limitation is "clear and unequivocal". There is no basis to prolong an investigation beyond 18 months from the date of its initiation.[1]

[1] *Report of the Panel: Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities* WT/DS341/R (4 September 2008), paragraph 7.121. Please note, the Panel was referring to Article 11.11 of the *Subsidy and Countervailing Measures Agreement,* which is identically worded to Article 5.10 of the AD Agreement.

The investigation was initiated on 31 October 2011. As of writing, we are just shy of two years since that date, which is well over the absolute limit stipulated in the AD Agreement.

The continuation of this investigation is in direct conflict with Australia's WTO obligations. Our client therefore requests that the investigation be terminated forthwith. The fact that Chememan continues to participate in this investigation as an interested party is without prejudice to its position that this investigation cannot be maintained.

Nonetheless, Chememan believes that on the basis of the information that the Anti-Dumping Commission ("the Commission") may use – and must only use - in undertaking the resumed investigation, the conclusion will once again be that the domestic industry incurred negligible injury as a result of any quicklime imported from Thailand. In support of this proposition, Chememan will address the following points in this submission:

- reference cannot be had to injury that occurred outside the period of investigation for dumping;
- the "further injury analysis" did not establish that material injury was caused by dumping;
- the evidence on the record does not allow for a finding that material injury was caused by dumping; and
- the "injury" which may have been "suffered" by the domestic industry cannot have been of a "material" nature.

A Reference cannot be had to injury that occurred outside the period of investigation

According to Termination Report 179 the the injury incurred by the domestic industry during the period of investigation for dumping purposes - July 2010 until June 2011 - was negligible. This finding has not been disputed. However, the ADRP's decision to revoke the termination of the investigation was ultimately based upon a consideration, contrary to that stated in Termination Report 179A, that the injury that the domestic industry was found to have suffered over a period of time from March 2010 until June 2011 was material. This particularly finding arose out of a "further injury analysis" in Termination Report 179A.

Chememan strongly refutes the proposition that injury that occurred outside a period of investigation is relevant to a dumping investigation. It is clear from WTO jurisprudence that the period of investigation forms the basis of an objective and unbiased determination by the investigating authority.[2] Upon finding that no material injury was suffered during the established period of investigation, the creation of a new period of investigation to support the domestic industry's injury allegations cannot be considered to be unbiased or objective.

Chememan notes that the "further injury analysis" was undertaken in Termination Report 179A with a view to indicating that even if the investigation took into account a period prior to the period of investigation, negligibility of injury would still be demonstrated, and not materiality. It is clear to Chememan that the primary grounds for termination of the investigation was that the injury suffered by the domestic industry as a result of imports of quicklime from Thailand during the period of investigation was negligible. It is also obvious that Termination Report 179A only considered the "further injury analysis" to satisfy the applicant's near-fanaticism regarding the need to look at injury over a greater period of time. Termination Report 179A reported that even if this was done the outcome would not change. However we now find that the ADRP has decided to revoke the termination of the investigation on the basis of the "further injury analysis" – an analysis which was not called for in the first place.

Chememan submits that under Australian law there is no basis on which to consider information from

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[2] *Report of the Appellate Body – European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/AB/R, 22 July 2003, paragraph 80.

outside the period of investigation.[3] The contrary proposition - that injury from before a period of investigation can be considered as a basis for imposing dumping measures - appears to arise from a misinterpretation of the judgement of the Full Court of the Federal Court of Australia ("the Full Court") in *Pilkington (Australia) Ltd v Minister of State for Justice & Customs*.[4] (*"Pilkington"*)

The ADRP states its position on this point in the following extract from the ADRP Report:

> *…while the Act did not preclude other factors, including data from outside the period of investigation, being taken into account by the Minister, there was no obligation for the Minister to do so.*[5]

However, if this were accurate, it would diminish the main thrust of the Full Court's analysis in *Pilkington*, which was that:

> *…Section 269TACB, and relevantly, in particular, subs 269TACB(1), governs the assessment of the past dumping in pars 269TG(1)(a) and (2)(a).*[6]

Section 269TACB deals with the determination of whether dumping has occurred. Section 269TACB(2) specifically provides that the dumping determination must be based on the investigation period. Thus, logically, events that occurred outside the period of investigation are irrelevant to determining whether anti-dumping duties should be imposed.

The confusion regarding this judgement appears to be based upon a later statement made by the Full Court in *Pilkington* ("the rationale"):

> *Thus, we conclude that, in the circumstances of decisions under s 269TG consequent upon an application under s 269TB, the satisfaction as to the relationship between export prices and normal values in the past called for in pars 269TG(1)(a) and (2)(a) is to be reached by reference to the process laid down by s 269TACB and by reference to the investigation period as called for by subs 269TACB(1). If we are wrong in that conclusion, we are of the view that the provisions of Part XVB are such that it is not obligatory for the Minister to go beyond the CEO's Report prepared conformably with Part XVB in making the decision required of him or her.*[7]

The second sentence of the rationale may be taken to mean that the Minister might take into consideration, but is not obligated to take into consideration, information from outside the period of investigation. However, the second sentence of the rationale needs to be understood in the specific context of the proceedings in the *Pilkington* case.

In *Pilkington* , the Judge at first instance had determined that the Minister was *obliged* not to look outside the CEO's report when determining whether dumping had occurred. This was the basis for the grounds of appeal to the Full Court. During the appeal, the respondents argued that it would be sufficient to dismiss the case if the Full Court concluded that it was not obligatory for the Minister to look beyond the CEO's report. The Full Court agreed with this point, noting:

> *We do not see in the legislation a positive proscription on the Minister informing himself or herself of*

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3 Chememan also notes that the Trade Measures Review Officer considered a new period of investigation could be established by way of the publication of a new notice under Section 269TC(4). Chememan disagrees with this argument, however, as no such notice has been published, Chememan considers it was not the legal basis for the "further injury analysis" and will therefore not address the flaws in the TMRO's position. However, Chememan would commend Chememan's submission to the initial resumed investigation dated 21 August 2012 to the Commission, as it contains a full discussion of this point.

4 [2002] FCAFC 423, paragraph 115.

5 Page 8.

6 *Pilkington*, paragraph 115.

7 *Ibid*., paragraph 127.

matters beyond the CEO's Report[8]

The Full Court's grounds for the dismissal of the appeal are clear. Firstly, the appeal was dismissed because, on a proper reading of the Act, the determination of dumping was required to be decided on the basis of information from the investigation period. Secondly, even if this was not the proper reading of the Act, the appeal would still be dismissed, because the applicant had not established that the judge at first instance was incorrect: ie the applicant did not establish that the Minister was obligated to look outside the CEO's report.[9]

To read the second part of the rationale as actively endorsing the Minister to look beyond the period of investigation conflicts with much of the analysis and reasoning in the judgement. The main point of the judgement in *Pilkington* is that the investigation period is the relevant period for making a determination under Section 269TG, as emphasised by the first part of the rationale.

This has a flow-on effect for the material injury determination. Dumping is only one part of the determination that must be made before anti-dumping duties can be imposed under Sections 269TG(1) and (2) of the Act. Both Sections provide that the dumping – which must be determined based on the period of investigation for dumping – must be found to have caused the material injury. Obviously, for such injury to be caused by dumping, it cannot predate the period of investigation, because as an evidentiary matter it is only in the period of investigation that the existence of dumping is or is not established. To impose anti-dumping measures on the basis of injury that occurred outside the period of investigation would ignore the "causation" requirement expressed in Sections 269TG(1) and (2) of the Act, and would be neither unbiased or objective.

Chememan submits that there is no legal basis upon which the "further injury analysis" can be used to consider whether anti-dumping duties can be imposed. Injury from before the period of investigation is not relevant to such a determination, as it cannot be positively linked to dumping. Chememan submits that the injury finding in Termination Report 179 was the correct finding. Any decision based on injury from outside the period of investigation is not supported by the terms of the Act, nor on the interpretation of the Act by the Full Court as properly understood.

B The "further injury analysis" did not establish that material injury was caused by dumping

As noted in A above, there can be no finding that injury has been caused by dumping in a period before the existence of dumping has been established. This point is supported by the fact that Termination Report 179A made no finding that the injury which the ADRP considered to be material was caused by imports of quicklime from Thailand. A "causation" finding is expressly required by the terms of the Act.

Relevantly, page 14 of Termination Report 179A states:

> *Customs and Border Protection has examined the data predating the investigation period under the assumption that the injury during that period was caused by dumping.*[10]

The ADRP's decision does not reflect that the causative link between the injury and impugned imports was merely an assumption. Rather it appears to have simply accepted that assumption as fact. Chememan submits that, even if it was accepted that a prior period could be considered, and the injury suffered by the domestic industry in this case was material – which Chememan refuses to accept based on its knowledge of the case – there still is no lawful basis upon which to impose anti-dumping duties.

The causation requirements in Sections 269TG(1) and (2) of the Act reflect Australia's implementation of Article VI(6)(a) of the GATT:

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8 *Ibid.,* paragraph 125.

9 *Ibid.*, paragraph 127.

10 Page 14.

> *No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.*

The required "injury determination" is further explained in Article 3 of the AD Agreement. Relevantly, Article 3.1 provides that:

> *A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*

The text of Article 3.1 of the AD Agreement makes it clear that the injury determination, including the causation finding, must be based on "positive evidence". Even on the most generous interpretation of that concept, a bare assumption that injury has been caused by dumping could not be considered to be "positive evidence". In the absence of positive evidence of causation, no dumping duties can be imposed.

As there is no positive evidence to support the conclusion that imports of quicklime from Thailand were (a) dumped before the period of investigation, or (b) caused the alleged injury during that same time, anti-dumping measures cannot be imposed upon such imports under Section 269TG(1) and (2).

C The evidence on the record does not allow for a finding that material injury was caused by dumping

As noted above, Chememan does not consider there is sufficient positive evidence to allow a finding that imports of quicklime from Thailand caused material injury, because there was no "positive evidence" before the ADRP – only an *assumption* of causation was adopted in Investigation Report 179A. This should be a sufficient basis on which to terminate the investigation. Notwithstanding this primary point, Chememan also considers that the available evidence establishes that the injury allegedly suffered by the Australian industry cannot be said to have been caused by Chememan's exports.

Specifically, the injury is summarised in the following extracted paragraphs from Termination Report 179A:

> *An examination of the actual lost revenue incurred by Cockburn Cement during this time shows that Cockburn suffered injury in the amount of [redacted]% as a percentage of revenue and an amount [redacted]% as a percentage of profit. Customs and Border Protection calculated that this resulted in a [redacted]% [less than 1%] loss in revenue for the Australian quicklime industry as a whole. Loss of profit to the industry as a whole cannot be determined due to lack of data.*
>
> *There are three instances of price reductions for which the timing was unknown. In the calculation results noted above, Customs and Border Protection has assumed they occurred in April 2010. However, if they occurred prior to the entry of imports into the market they could therefore not be associated with the dumped product, and the resulting lost revenue would be [redacted]% lost profit [redacted]% and lost revenue to the entire Australian industry would be [redacted]% [less than 1%].*[11]

This injury was calculated on the basis of Cockburn Cement's revenue and profit data between January 2010 and June 2011.[12] This is important for two reasons.

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11 Termination Report 179A, page 14.

12 *Ibid*

Firstly, the ADRP Report does not directly address the findings of fact in Termination Report 179 that the injury suffered by the domestic industry during the period of investigation was negligible. Indeed, with regard to the factors that led to this decision, the ADRP appears to accept the relevant assessment in Termination Report 179.[13] Accordingly, it is only the injury from before the period of investigation – the alleged January to June 2010 injury - that leads to the ADRP's finding that the injury identified in the "further injury analysis" was material.

Secondly, Chememan did not import commercial quantities of its product into Australia until May 2010.[14] Any revenue and profit injuries considered to have occurred between January and April 2010 is not conterminous with the any commercial imports of Chememan's quicklime, and therefore should not be found to have been caused by such imports. There is no evidence that this was taken into account when the "further injury analysis" was undertaken.

Furthermore, as the graph on page 15 of Termination Report 179 indicates, imports of quicklime from Thailand were insignificant. As a matter of fact, the total amount of Chememan quicklime imported in the six month period prior to the period of investigation (January 2010 to June 2010) was **[CONFIDENTIAL TEXT DELETED – NUMBER]** tonnes. During this same period, only **[CONFIDENTIAL TEXT DELETED – NUMBER]** tonnes of quicklime was on-sold to the Australian market by Chememan Australia Pty Ltd, of which only **[CONFIDENTIAL TEXT DELETED – NUMBER]** tonnes was sold to the non-alumina sector. This is relevant because it was only sales to the non-alumina sector that were considered to have caused any injury. Injury that the Australian industry was found to have suffered in the alumina sector was *"caused by factors other than dumped imports"*.[15] As noted above, this finding has been accepted by the ADRP.

Finally, to illustrate the patent absurdity of any potential positive material injury findings, we offer the following observations:

- The Australian market for quicklime is approximately 2.1 million tonnes per annum.[16] In the period between January and June 2010, it could be estimated that the Australian market for quicklime was approximately 1.05 million tonnes. Therefore, during this period, Chememan's quicklime exports amounted to **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 0.05]**% of the quicklime in the Australian market.

- The Applicant claims to supply about 60% of the quicklime produced and sold into the Australian market.[17] Based on the figures quoted above we can assume this was equal to 1,260,000 tonnes a year, and 630,000 tonnes in a six month period. Therefore, in the six months between January 2010 and June 2010, Chememan provided an amount of quicklime equal to **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 0.05]**% of the applicant's production over the same period.

- Based on the information that Chememan submitted in response to the Exporter Questionnaire, the volume of quicklime exported by Chememan into Australia in the period of investigation (July 2010 to June 2011) was **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 0.05]** tonnes. This is equal to **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 1.0]**% of the overall Australian market. On an "extended POI" the total amount of quicklime demanded by the Australian market would be 3.15 million tonnes. Therefore, over the extended POI, Chememan's exports were **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 0.05]**% of the quicklime in the Australian market and **[CONFIDENTIAL TEXT DELETED – NUMBER LESS THAN 1.0]**% of the quicklime produced by Cockburn.

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13 ADRP Report, paragraph 56.

14 Exporter Visit Report, page 9.

15 Termination Report 179, page 42.

16 *Ibid*, page 14.

17 *International Trade Remedies Branch Consideration Report No. 179 – Application for a Dumping Notice – Quicklime Exported from Thailand,* page 18.

In terms of volume, the imports of quicklime over the period were immaterial, insubstantial and insignificant. As a matter of logic, it would be implausible for it to be found that it was these imports that had caused material injury to an industry that produces over [CONFIDENTIAL TEXT DELETED – NUMBER] times the volume of the imported product.

Therefore, Chememan submits that the information does not establish, infer or impute the existence of a causal relationship between imports of Thai quicklime and the injury that the ADRP considers to have been suffered by the Australian industry. There are major discrepancies between when the injury was said to have commenced and the time at which Chememan began exporting commercial quantities of quicklime to Australia. The volume of the quicklime Chememan exported was insignificant. And finally, the small amount of Thai quicklime that was sold into the Australian market in the six months prior to the period of investigation was sold to the alumina sector. It has been established that the domestic industry did not suffer material injury as a result of imports of quicklime from Thailand in the alumina sector.

D The injury suffered by the domestic industry was not material

Ultimately, even if injury which from outside the period of investigation could be considered (which it cannot) and such injury could be linked to imports of quicklime from outside the period of investigation (which it cannot), Chememan does not believe that the injury could be characterised as "material".

Although the scale of the reduction in profit has been redacted in Termination Report 179A and ADRP's Report, it is clear that it was less than 1%. Chememan cannot reconcile this small figure with the ADRP's conclusion that the injury was greater than that which was caused in the normal ebb and flow of business. At paragraph 59, the ADRP explains:

> *However where dumping is found to have caused injury then the existence of a monopoly is not a relevant factor to take into account in assessing the materiality of that injury. Any adverse result occurring to a monopoly arising from dumping cannot be characterised as something related to the ebb and flow of business.*

With respect, this mischaracterises what is required by the *Ministerial Direction on Material Injury 2012* ("the Ministerial Direction"). The Ministerial Direction provides:

> *Consistent with Australia's international obligations…, I would expect it to be shown that the industry is suffering injury, and that the injury caused by dumping or subsidisation is material in degree. The injury must also be greater than that likely to occur in the normal ebb and flow of business.*

In this regard, "the injury" is the injury caused by dumping. If that injury is not greater than that likely to occur in the normal ebb and flow of business then it is negligible. In contrast to what the ADRP considers the position to be, it is clear that the conclusion that the injury has been caused by dumping does not prevent it from being considered to be less than something that occurs in the normal ebb and flow of business. It is correct to say that profit margins, including those of a monopolist, vary due to a number of factors. This general statement is supported in the case of Cockburn by the graphs at page 26 of Termination Report 179, which show a great deal of variation in profit and profitability between 2008 and 2011.

Chememan therefore rejects the ADRP's finding that the injury is material. On a correct reading of the Ministerial Direction it is clear that, even if the injury could be attributed to the imports of quicklime, the injury is not greater than that likely to occur in the normal ebb and flow of business. Therefore it cannot be considered to be material.[18]

[18] For the record, Chememan does not consider that injury that is not negligible must be considered to be material. For example, if in a given matter the Commission was to report to the Minister that the injury found to have

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The persistence of the applicant cannot alter the position that there are no legal grounds on which to consider injury that occurred outside the period of investigation as part of the determination of whether to impose dumping duties as a result of dumping determined to have occurred in the period of investigation. The only relevant injury is that which occurred during the period of investigation. As Termination Report 179 established, that injury was negligible.

The injury which was found to have occurred in the "further injury analysis" in Termination Report 179A has not been linked to dumping, and there is no evidence to suggest it should or can be. What evidence is available for the period prior to the period of investigation indicates that no such causative link can be established.

However, even if a causative link could be established, we do not accept that the ADRP has applied the Ministerial Direction correctly. The injury is not greater than that which is likely to occur in the normal ebb and flow of business, and therefore cannot be considered to be material.

At law, this investigation cannot be maintained and Cockburn Cement has no case. The way in which our client has been pursued by the applicant Cockburn Cement, and the investigation process that has allowed this pursuit to be continued, amounts to trade harassment. Domestically, Cockburn Cement is an almost monopolist that commands the lion's share of the Australian market for contestable sales of quicklime and almost totally dominates that market sector in Western Australia. In contrast, Chememan's exports in the period of investigation for dumping purposes were minimal, and its exports before that period were trivial. In pursuing Chememan as it has, Cockburn Cement signals to its customers that it intends to maintain its high prices and super profits by whatever means are available to it. Chememan's objective has always been to establish a well-run business in Australia, to provide a quality product to its customers, and to compete openly and fairly.[19]

Chememan again requests that the investigation be terminated.

Yours sincerely

Daniel Moulis
Principal

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been caused was not "negligible", it must still be open to the Minister to accept a recommendation by the Commissioner in the same report that the injury was not material and that dumping duties cannot be imposed.

[19] The dominance of Cockburn Cement is well-reported. In debate on the *Cement Works (Cockburn Cement Limited) Agreement Amendment Bill 2010* on 13 October 2010 in the Western Australian Parliament, the Hon Giz Watson commented:

> *Interestingly enough, Cockburn Cement's state agreement act was established to supply cement to the growing infrastructure and economy of Western Australia; it was not struck to provide lime for the alumina or gold industries. However, now, because Cockburn Cement has had this advantage for over 40 or so years it has established itself in such a way that it is the predominant supplier of that resource, and it has shut out other competitors. It is interesting that both the parties in this place are happy to support that kind of anti-competitive arrangement.* (Hansard Western Australia [COUNCIL - Wednesday, 13 October 2010] p7582c-7583a, at [1])

Cockburn Cement has attempted to maintain its dominance of the quicklime market in other ways. Prior to Chememan's market entry, Cockburn had simply acquired Australian competitors such as Westlime, Loongana and Swan Portland. Our client recalls an approach made by Cockburn Cement and Lime Division executives in late 2009, claimed by them to relate to *"business opportunities"*, but which ultimately proved to be an enquiry by them as to whether there was any possibility that Chememan would change its decision to enter the Australian market.