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25 June 2014

Ms K Farrant
National Manager, Policy and Assistance Branch
Anti-Dumping Commission
Customs House
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

By email

Dear Ms Farrant

Chememan Company Limited
Resumed investigation concerning quicklime from Thailand

We refer to the most recent previous submission of Chememan Company Limited ("Chememan") in this matter, dated 16 October 2013.

In that submission, Chememan outlined the following reasons why the investigation should once again be terminated. To summarise:

- the duration of the investigation had exceeded the absolute time limit of 18 months, as clearly imposed by Article 5.10 of the WTO Anti-Dumping Agreement, and as clearly supported by WTO authority;
- reference cannot be had to injury alleged to have occurred outside of the investigation period;
- there is no evidence that quicklime imported prior to the period of investigation was dumped, or that any injury that was suffered by the Australia industry prior to the period of investigation was caused by imports of quicklime; and
- the evidence on the public record precludes a finding that material injury was caused by dumping.

We note that another eight months have passed since that submission. The investigation was initiated over 960 days ago. As of 31 October 2014 it will have been three years since the investigation was initiated - double the absolute duration for an investigation imposed by Article 5.10 of the Anti-Dumping Agreement.

Chememan appreciates that the predecessor to the Anti-Dumping Commission – the International Trade Remedies Branch of the Australian Customs and Border Protection Service – correctly decided to terminate this investigation on two occasions under Section 269TDA(13) of the *Customs Act* 1901 ("the Act"), because imports of quicklime produced by Chememan had not caused material injury to the Australian industry. The point of contention that appears to remain (and we make this observation without detracting from our position that no material injury was caused at any time) is whether the Parliamentary Secretary can have regard to material injury that occurred prior to the period of investigation, when determining whether dumping has caused material injury.

In this submission, Chememan again hopes to settle that question conclusively, so that the investigation can once again be terminated for good.

Before Chememan addresses that point, Chememan would once again reiterate that there is no evidence to support the contention that Chememan quicklime imported at any time, whether prior to or during the investigation period, caused any injury to the Australian industry. In fact, the evidence on the public record would preclude such a finding. Thus, even if the Commission were to consider it could look at information from a previous period, the investigation would need to be terminated again.

The major authority that has been said to support the proposition that the Parliamentary Secretary can have regard to injury that occurred outside of the period of investigation is *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* ("Pilkington").[1] In its earlier submissions, Chememan explained how the interpretation of Pilkington that supports this proposition is deeply flawed and that, when given a proper reading, the Pilkington judgement is an authority for the position that material injury that has occurred prior to the period of investigation is irrelevant to determining whether dumping duties should be imposed.

Australian legal precedent continues to support Chememan's position. In this regard, we refer to *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* ("Panasia").[2] At paragraph 139 of his judgement, Nicholas J made the following point:

> *When s 269TG is read as a whole, it is apparent that subs (3) refers to the goods the subject of a declaration under subss (1) or (2). In particular, the references in subs (3)(c) of s 269TG to "the goods to which the declaration relates" and in subs (3)(d) and (e) to "those goods" indicate that the goods referred to are the same goods as those the subject of the declaration made under subss (1) or (2) and that they will have the same dumping margin as that calculated pursuant to s 269TACB. In my opinion, if a declaration is made under subss (1) or (2) in respect of goods then subs (3) requires that, along with the relevant declaration, the public notice set out details of the ascertained variable factors that led to the declaration. The ascertained normal values and export prices will each be the same single figure (usually expressed as a percentage) referable to a particular exporter that was used to determine, in accordance with the requirements of s 269TACB, whether dumping occurred and, if so, at what margin.*

Essentially, what his Honour is saying is that a declaration under Section 269TG(1) or (2) must relate to goods that are found to have been dumped in accordance with Section 269TACB. This accords with the view of Full Federal Court in Pilkington, as Chememan has explained in its previous submissions dated 16 October 2013 and 21 August 2012. As noted in the most recent of those submissions, the ultimate finding in Pilkington was:

> *… 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).*[3]

We consider that were the Anti-Dumping Review Panel ("ADRP") to have had the benefit of the judgement in Panasia when reviewing the most recent termination decision in this matter, it would also have been satisfied that injury that has occurred prior to a period of investigation is irrelevant to the determination of whether dumping duties can be imposed.

To fully understand the implications of the Panasia judgement, we must consider the relationship between Section 269TACB and Section 269TG of the Act. Section 269TACB provides:

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1 [2002] FCAFC 423
2 [2013] FCA 870
3 Paragraph 127.

> *(1) If:*
>
> > *(a) application is made for a dumping duty notice; and*
> >
> > *(b) export prices in respect of goods the subject of the application exported to Australia during the investigation period have been established in accordance with section 269TAB; and*
> >
> > *(c) corresponding normal values in respect of like goods during that period have been established in accordance with section 269TAC;*
>
> *the Minister must determine, by comparison of those export prices with those normal values, whether dumping has occurred.* [our emphasis]

Under Section 269TACB the only relevant export prices are the export prices for goods exported to Australia during the investigation period, and the only relevant normal values are those that "correspond" to the export prices. Clearly Section 269TACB limits the determination of whether dumping has occurred to the investigation period. However, it also limits when injury must be found to have occurred, because a declaration for the imposition of anti-dumping duties can only be made under Sections 269TG(1) and/or (2) when the amount of the export price for the relevant goods is less than the amount of the normal value for those goods – which, according to His Honour, must be determined to have occurred during the period of investigation – and, *because of that* dumping, material injury to the Australian industry producing like goods has been or is being caused.

The use of the conjunction "because" in Sections 269TG(1) and (2) clearly creates a causative connection between the dumping – which much be established under Section 269TACB – and the material injury to the Australian industry. Injury that occurs before the period of investigation cannot be found to have been caused *because of* dumping that was found to have occurred during the period of investigation. Resultantly, any injury suffered prior to the period of investigation is irrelevant to the question of whether a declaration can be made under Sections 269TG(1) and (2).[4]

Chememan would also emphasise that the Act does not require the Commission to consider any injury that has occurred prior to the period of investigation. Section 269TAE of the Act, the Section that establishes the basis on which a material injury determination can be made, states that the material injury determination is to be undertaken "*for the purposes of Section 269TG".* Therefore, injury that occurred prior to the period of investigation, is, for all intents and purposes, irrelevant to the decision to impose dumping duties by way of a declaration under Sections 269TG(1) and/or (2) of the Act.

The only relevance of periods prior to the period of investigation is in raised in Section 269T(2AD), which states as follows:

> *(2AD) The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry or to an industry of a third country.*

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[4] This embodies the requirement of Article 3.1 of the Anti-Dumping Agreement, which provides:

> *3.1 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.*

Chememan notes that a finding that injury suffered prior to the period of investigation was caused by dumped imports cannot be based on "positive evidence".

Chememan considers that the examination of previous periods is necessary to consider whether material injury has occurred during the period of investigation, because it provides the Commission with context in which to evaluate the performance of the Australian industry. This assists in order to accurately determine whether the importation of dumped product *during the period of investigation* was materially injurious. Section 269T(2AD) cannot be read as allowing the Minister to impose dumping duties because of injury that has occurred prior to the period of investigation. Such an interpretation would seriously conflict with the architecture of Australian anti-dumping law, as discussed throughout this letter.

Further, we note that the position we have stated accords with the Commission's policy as per the December 2013 version of the *Dumping and Subsidy Manual*:

> *It is the Commission's view that s. 269T(2AD) allows the examination of material injury indicators before the investigation period, but it cannot support an inference or presumption that material injury identified as occurring before the investigation period can be attributed to dumped imports.*
>
> *A causal link between dumped imports and material injury may be established only in circumstances where indicators of material injury are identified as being present during an investigation period in which dumped goods are found have been exported to Australia. There can be no presumption that goods exported to Australia before the commencement of the investigation period are dumped goods.*[5]

Resultantly, Chememan submits that any injury that was suffered by Cockburn Cement Limited prior to the period of investigation is irrelevant to the question of whether dumping duties should be imposed. Therefore, the correct finding for the Commission to make is the same decision that the International Trade Remedies Branch made twice before , which is that the investigation should be terminated under Section 269TDA(13) of the Act.

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In view of the clear jurisprudential, legislative and policy guidance cited above, Chememan respectfully requests that the Commission once again terminate the investigation under Section 269TDA(13) of the Act.

We note that the Australian industry would again be given the opportunity to appeal the termination decision to the Anti-Dumping Review Panel. In order to fully address any grounds on which a further appeal could be based, we respectfully request that the termination be accompanied with a statement that explains in clear and unequivocal terms:

(a) that, based on the judgement in Panasia, the Commission is legislatively precluded from attributing injury that occurred outside the period of investigation to imports of dumped products during the period of investigation;

(b) that any injury that was suffered by the Australian industry prior to the period of investigation is irrelevant to the Parliamentary Secretary's decision to impose dumping duties;

(c) that any injury caused by dumped imports of quicklime during the period of investigation was negligible; and

[5] Page 120.

(d) that even if the injury determination was not restricted to the period of investigation, there is no evidence on the public record that would allow the Commission to find that any injury suffered by the Australian industry prior to the investigation period was caused by imports of Chememan produced quicklime.

Yours sincerely

Alistair Bridges
Solicitor