27 December 2016

Director Operations 2  
Anti-Dumping Commission  
55 Collins Street  
Melbourne  
Victoria 3000

By email

Dear Director

Sonoco Australia Pty Limited (“Sonoco Australia”)  
Composition and status of the Australian TRF industry

On behalf of our client, Sonoco Australia, we write to you in response to the Issues Paper published on the public record of this investigation on 1 December 2016 (“the Issues Paper”).

In that Issues Paper, the Commission has seen fit to undertake a justification of its view that the Australian industry is “not established”. The significance of this is that the application was put forward by Marpac Pty Ltd ("Marpac") on the basis that the dumping it alleged was occurring had materially hindered the establishment of an Australian industry producing like goods to the allegedly dumped goods.

The application was not put forward on the basis that material injury had been caused to an Australian industry producing like goods. No finding of that kind was made by the Commission in its Statement of Essential Facts/Preliminary Affirmative Determination (“SEF 350”).

The need for that justification was because SEF 350 was arrived at on the basis that:

Marpac [was] the only verified manufacturer of TRFs in Australia and therefore the sole member of the Australian industry producing like goods.

However, in the Issues Paper, the Commission states:

Since publishing [SEF 350] on 5 October 2016, the Commission has verified claims that VIP Packaging Pty Ltd (VIP) manufactures resealable can end closures (known as tagger, ring, foil closures or TRFs), for self-supply as a component for producing steel cans.

With respect, we are of the opinion that the argumentation offered in the Issues Paper to maintain the position arrived at in SEF 350 - that the Australian industry was unestablished - is unconvincing.

4  SEF 350 at page 5.
5  Issues Paper at page 1.

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Again with respect, we submit that it is abundantly clear that there was an established industry in place at all relevant times, and that Marpac’s attempts to enter that industry cannot somehow transform the industry into an unestablished one.

A  The concept of material retardation under GATT 1994

The concept that anti-dumping duties are available in circumstances where the establishment of an industry is materially retarded arises from Article VI.1 of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”). Relevantly, that Article provides as follows:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.6

Material retardation of the establishment of an industry is not about injury to an industry. Rather, it is about the holding back of something that is underway but is not yet established. This is confirmed by a pre-WTO GATT panel report, which is referred to as follows in the GATT Analytical Index as published by the WTO:

The 1993 Panel Report on “Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States” examined an injury determination by the Korean authorities:

“… if the conclusion [on injury issues in the Korean determination] were to be interpreted to mean that the KTC had made a finding of injury based simultaneously on all three standards of injury, this would necessarily mean that the KTC’s statement was internally contradictory: the KTC could not logically have found that a domestic industry was being injured by dumped imports (which presumed that such an industry was already established) and at the same time that the establishment of a domestic industry was materially retarded by those imports.”95

95ADP/92, adopted by the Committee on Anti-Dumping Practices on 27 April 1993, para. 222.7

In the instant case, the questions of whether a resealable can end closure (“TRF”) industry is established or not, and of what is actually underway such that it can be retarded, are the key, and inter-related, questions to address.

B  Marpac is a new entrant to an already established industry

With respect, we find the rendition of the facts and the argumentation in the Issues Paper on this point to be contradictory and inconsistent.

The starting point is this:

In its application, Marpac claimed it was the sole manufacturer of TRFs in Australia. The

6 Australia’s implementation of this provision uses the expression “materially hinders” rather than “materially retards”. We suggest that these two terms are different, in the sense that “hinders” connotes a barrier to something to happen in an ab initio context, whereas “retards” connotes the holding back of something that is underway, however that difference is not important for present purposes.

Commission verified that Marpac wholly manufactures and assembles its 73mm TRFs in Australia. The Commission also verified that Marpac has the machinery to manufacture larger TRF sizes, however it would need to obtain the necessary tooling. [footnotes omitted]  

The Commission found this to be wrong, in that another manufacturer, VIP Packaging Pty Ltd (“VIP”), was manufacturing TRFs at the relevant time. This was reported in the Issues Paper as follows:

Since publication of the SEF, the Commission verified the volumes of 73mm, 99mm and 153mm TRFs manufactured by VIP at its Devonport factory and that these TRFs are used as a component of a complete steel can unit sold to one customer based in Tasmania. VIP does not and has never sold individual TRFs to external parties. The Commission considers the volumes manufactured to be insignificant in comparison to Marpac’s volumes. [footnotes omitted]  

On this basis, the Commission reports in the Issues Paper that “the Australian TRF industry consists of two manufacturers of like goods, Marpac and VIP”.  

The Issues Paper then embarks on a consideration of the “exiting” from the industry of a number of TRF manufacturers before the period of investigation (“POI”). The Issues Paper states:

Although the Commission has not assessed the status of this potential Australian TRF industry, it considers that even if there was an established Australian TRF industry, that industry largely ceased when can-manufacturers moved to importing TRFs.  

If one was to remove the word “largely” from this sentence, it would be wrong. It would be wrong because the Commission has established that the industry had not ceased. If the industry had not ceased then there cannot now be a situation of hindrance to its establishment. The word “largely” is a description of degree which is irrelevant to the question of whether the industry was established or was not established.

The TRF industry was either established or unestablished. Having discovered that a manufacturer was in place and was manufacturing TRFs that Marpac claims to have been hindered in manufacturing itself, the Commission should decide that Marpac’s application is about its plans to enter the industry rather than being an instance of the hindering of the establishment of an industry.

The Issues Paper then expresses the following opinion:

The fact that VIP continued manufacturing an insignificant volume of TRFs solely for self-supply and for entry in the downstream TRF market indicates that the industry became unestablished and was unestablished when Marpac commenced TRF manufacture.  

We do not understand this proposition. The test in the legislation is whether the establishment of an industry has been materially hindered, and not whether an industry has become unestablished. Even then, what is it about the continuation of TRF manufacture by one manufacturer that contradicts the proposition that there is an established industry? VIP was established, it was the sole manufacturer, and it manufactured the range of the like goods. Thus, there was an established industry. A smaller industry is not unestablished simply because it was once bigger.
In our mind the Issues Paper attempts to turn “black” (the established nature of VIP’s manufacture of the like goods) into “white” (an industry whose establishment could be hindered). The Issues Paper says:

Therefore, section 269TG supports the publication of a dumping duty notice with respect to an industry that has performed some production but may not yet be established. In this particular case, the fact that VIP maintained manufacture of an insignificant volume of TRFs solely for internal transfer prior to Marpac commencing production does not preclude a finding that the Australian TRF industry is an unestablished industry.13

We do not cavil with the proposition in the first sentence, which is that Section 269TG allows publication of a dumping duty notice where an industry has performed some production but is not yet established. However the first sentence gives no support for the second sentence. We discern no link between the two sentences at all. Indeed, accurately written, the second sentence should say:

In this particular case, the fact that VIP maintained manufacture of the TRFs in respect of which Marpac claimed to be hindered in manufacturing prior to Marpac commencing production precludes a finding that the Australian TRF industry is an unestablished industry.

With respect, the evaluation in the Issues Paper which follows - of the so-called “five indicators” of whether an industry is unestablished - appears to us to lack objectivity and to be tilted in favour of the proposition that there was not an established TRF industry. In its evaluation of some of the factors, the Commission excludes consideration of VIP (indicators two, three and four) and in another case it includes consideration of VIP (indicator five). In each case the exclusion or the inclusion bolsters the support expressed in the Issues Paper for the proposition that the industry was unestablished.

In this submission we would not intend to go through the discussion of each of those indicators in detail. It seems to us that most of them should have been concluded against the proposition that there was an unestablished industry, and that the other indicators posed questions that were loaded towards the proposition that the industry was unestablished.

Ultimately, all of the argumentation in the Issues Paper founders on one central fact – which is that Marpac was and is an entrant to an established industry constituted by VIP’s manufacture of TRFs. As inconvenient as that conclusion may be for Marpac, it must be recognised. This fact “undoes” the findings in SEF 350, which may be uncomfortable for the Commission but which is plainly the correct outcome.

In SEF 350, the Commission states:

The verified evidence at this stage suggests, at the time of Marpac commencing manufacture, there was no Australian manufacture of TRFs and hence Marpac cannot logically be rendered a late entrant in an established domestic industry. Therefore, the Commission considers that during the investigation period (and for approximately a decade prior to this period), there was no Australian industry (that was established or being established) as defined in subsection 269T(4).14

In line with this statement, the verified evidence at this stage, now that the true facts about VIP have emerged, are that:

- there was Australian manufacture of TRFs at the time of Marpac commencing manufacture;

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13 ibid., page 4.
14 SEF 350 at page 16

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• Marpac is indeed an entrant in an established domestic industry; and
• there was an Australian industry prior to and during the investigation period.

Having now verified evidence that directly opposes the factual proposition that was presented in SEF 350, the opposite conclusion should now be drawn. Quite simply, Marpac commenced manufacture of one kind of TRF at a time when the industry consisted of another manufacturer already making three types of TRFs. Its application was put forward on the basis – and only on the basis - that the establishment of an industry was being materially hindered by imports. That basis is unsustainable.

Whether or not Marpac’s application could have been successful on the basis that the Australian industry had been caused material injury is moot, because that is not how the application was put forward.15 All that the Issues Paper is saying is that the industry could be bigger, and not that it was unestablished. Wanting a bigger industry and higher volumes of production is the standard want of any applicant that alleges that imports have caused it material injury. Just because that is what Marpac wants does not make it and VIP an unestablished industry.

C The Australian TRF industry has not been caused material injury

Given that there was an established industry at the relevant time, Marpac’s application must fail. It was put forward on the contrary basis, and the preliminary findings in SEF 350 relate only to the allegation that an industry was materially hindered in its establishment.

Notwithstanding that, our client does wish to draw attention to the Commission’s finding that Marpac was profitable in its manufacture of 73mm TRFs throughout the investigation period, and that it did not and could not manufacture 99mm, 127mm and 154mm TRFs in that period.

[CONFIDENTIAL TEXT DELETED – commercial considerations relating to Sonoco’s sourcing of TRFs]

The path suggested by the Issues Paper is misguided and should be averted. Marpac entered an industry in which VIP was already manufacturing TRFs. It manufactured 99mm TRFs in the investigation period profitably. In advance of manufacturing larger sizes, it has requested protection from imports for those TRFs and for the TRFs it is currently manufacturing. This is an entirely unprincipled attempt to call upon the anti-dumping laws for protection, and we submit that it would be unlawful for it to be rewarded.

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In closing, we note the time limits to which the Commission is subject in this investigation. Nonetheless, we also note that Genpacco Inc was allowed until 22 December (one working day ago) to make submissions in relation to cost allocation matters, and that this submission does not make factual assertions that are relevant to the question raised by the Issues Paper. In that context we hope and expect that the Commission will not consider that the consideration of this submission would prevent the timely completion of the investigation.

Noting that the Commission has found:
The Commission considers that during the investigation period, Marpac maintained consistent profits and therefore consistently exceeded the “break-even” point. Issues Paper, page 8.

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Should you require any further details in relation to this submission please do not hesitate to contact the writer or Patrick Polis of this office.

Yours sincerely

[Signature]

Daniel Moulis
Principal Partner