Percival Legal

Non-Confidential

25 July 2023

By Email

Mr Bradley Armstrong PMC
Anti-Dumping Commissioner
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Dear Commissioner,

RE: Review 609 - review of anti-dumping measures on exports of aluminium extrusion products from the People's Republic of China - Supplementary Submission

I refer to Capral Limited's (**Capral**) submission of 17 July 2023 in response to the 28 June 2023 submission by my clients, Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**KAE**) and Kam Kiu (Hong Kong) Limited **(KHK)** and their related bodies corporate (collectively **Kam Kiu**).

Capral's submission provides a welcome opportunity to address, amongst other things, the scope of Review 609 in response.

Scope of the review of the anti-dumping measures

Capral contends that the subject of a review of anti-dumping measures, such as Review 609, is concerned with '*whether the variable factors have changed and whether the measures are no longer warranted*'. Capral notes that my clients made no assertion that the measures are no longer warranted.

That is not quite correct. Given that the Anti-Dumping Commission (**Commission**) has preliminary found that all actual exports from China have not been dumped with the exception of those by my clients, then this preliminary finding of itself demonstrates that the measures are no longer warranted. It does not require a submission from my clients to assert that fact. My clients did, however, submit that steps should be taken to revoke the measures for this and other reasons.

Importantly, Capral contends that a review of anti-dumping measures includes inquiry into '*whether the measures are no longer warranted*'. My clients concur with that contention.

This is because a review, such as Review 609, is of the '*anti-dumping measures*'. The term '*anti-dumping measures*' is defined in section 269T(1) of the *Customs Act 1901* to mean the publication of a '*dumping duty notice*', being a notice published relevantly here under section 269TG(1) and (2) of

the *Customs Act 1901*. Publication of a notice under those provisions requires the Minister to be satisfied that the goods in question are being exported to Australia at dumped export prices and because of that material injury is being caused to an Australian industry producing like goods.

Hence a review of anti-dumping measures is necessarily a review of the grounds on which the relevant dumping duty notice was published to determine whether alteration of that notice is required. That is, such a review necessarily involves the review of the three key matters that the Minster must be satisfied in order to publish a dumping duty notice – namely, (i) dumping (ii) causing (iii) material injury to a domestic industry producing like goods. Absent one of these key matters, publication of a dumping duty notice is precluded.

Similarly only change in all three of those matters would necessitate a change in the dumping duty notice. For example, a change in the variable factors that has no causal effect on material injury would not entail the necessity for any alteration to a dumping duty notice.

Thus, a review of anti-dumping measures is not confined to whether any of the variable factors have changed. The mere fact that one or more of the variable factors has changed, which would be surprising if that had not occurred over time in the normal ebb and flow of business, would not itself justify the Minister in altering the anti-dumping measures. Any alteration to the anti-dumping measures, that is, to the dumping duty notice, could only be justified if it was determined that one or more of the variable factors had changed and because of that the then current measures were no longer effective in preventing and/or removing the injurious effects of dumping.

However, this would require findings of fact supported by evidence that the current anti-dumping measures were no longer effective in preventing material injury caused by dumping. It does not logically or legally follow that if one or more of the variable factors has changed, this necessarily means that the measures are no longer effective. The measures could still be being effective despite the change in the variable factors or the measures had ceased to be effective notwithstanding any change in the variable factors.

Rather, it would need to be established that why the measures were no longer effective, when they ceased to be effective and the extent to which they were ineffective and, therefore, the extent to which the measures need to be altered to render them effective. Specifically, it would need to be established that the anti-dumping measures had become ineffective because of a change in the variable factors and not due to some other factor.

No such inquiries have been made in Review 609 and no relevant findings of fact supported by evidence have been made in this regard as confirmed by the Statement of Essential Facts.

Consequently, at this time there is no justification for any alteration to the variable factors comprised in the dumping duty notice. That is, there is no reason, supported by evidence, for the alteration of the anti-dumping measures (i.e., dumping duty notice) as being necessary to prevent injurious dumping due to a change in the variable factors or otherwise. There is no evidence of any such necessity. Further, there is nothing in the Statement of Essential Facts to the contrary.

In this context, it is noted that Capral asserts that the anti-dumping measures are no longer effective as demonstrated by the increased volume of export from China. However, no evidence is adduced by Capral in support of that assertion. The increase in the volume of exports could be and is more likely to be attributable to the increased demand in the Australian market for aluminium extrusion products. This is also reflected in:

- the long lead times of six months or more for the domestic industry to fulfill orders; and
- the increased volume of imports from a variety of countries, including Indonesia and Thailand, as well as China.

Nor is there evidence that the demand that is being met by the increased volume of exports from China could be met by Capral of the Australian industry given their limited production capacity of approximately [redacted]tpa for a market demanding approximately [redacted]tpa.

Finally, the increased exports from China that Capral refers to have, of course, been preliminary determined not to be being exported at dumped export prices. The claim that the increase in such exports is evidence that the measures have become ineffective is, therefore, incorrect. Rather, the increase of un-dumped exports from China is evidence that the anti-dumping measures are no longer warranted.

The point is that there is no evidence that the anti-dumping measures are not effective, nor, if they are, why and when they ceased to be effective. It is mere unsubstantiate assertion by Capral, apparently to justify an increase in the variable factors based on out-dated historically high LME aluminium prices and MJP premiums.

Rather, given the preliminary finding that actual exports from China have not been dumped, with the possible exception of those by my clients, the appropriate and necessary action is for steps to be taken to revoke the anti-dumping measures as no longer being warranted. My clients exports, whether dumped or un-dumped, are not of a sufficient volume to cause injury to the Australian industry, assuming, of course, in the unlikely event that such exports compete with domestically produced aluminium products on price (see further below).

Limited scope of Capral submission

The other issue worth commenting on in response to Capral's submission is the fact that it has only responded to my clients' submissions and not to the Commission's preliminary finding that in effect all export from China with the exception of those of my clients have not been dumped. This raises two issues.

First, consistent with Capral's contention that a review of anti-dumping measures includes *whether the measures are no longer warranted*', as effectively all exports from China are un-dumped, then the anti-dumping measures can no longer be warranted. Steps should be taken for their revocation. No doubt as an advocate of 'free and fair trade, Capral would support steps being taken to revoke the measures.

Second, there is the question why would Capral respond to Kam Kiu's submission when it was the only cooperative selected exporter whose exports were preliminary determined to be exported at dumped export prices. Why is Capral concerned with Kam Kiu's exports and not those of any other exporter that were preliminary determined not be being dumped?

It is understood that it is claimed that exports from China hold approximately 40% share of the total Australian market, which apparently is approximately [redacted]tpa. The volume of my clients exports to Australia do not represent a major portion of that market share, but presumably would qualify as being negligible.

So why is Capral concerned with my clients' exports, especially when almost all of the exports from China, with the exception of those of my clients, have been found not to be dumped? My clients exports, given the volume, could not be causing injury and the remainder of exports from China could not be causing material injury due to dumping because such exports have been found not to be dumped.

It also is my clients understanding that aluminium extrusion products Kam Kiu exports to Australian customers are principally products that members of the Australian industry, while capable of producing, have elected not to do so.[1]

[***Confidential Information Redacted – Information concerned commercial-in-confidence information relating to Kam Kiu's exports to Australia, including Confidential Attachment concerning same.***]

It, therefore, seems unlikely that Kam Kiu's exports would be materially affecting the Australian industry. There is no evidence that they do and none advanced by Capral, either in its application or in its submissions, especially when Kam Kiu's exports are the only actual exports preliminary found (erroneously) to be being exported at dumped prices. It, therefore, is not apparent why Capral would be concerned with Kam Kiu's exports. No explanation supported by evidence has been provided by Capral or by any other interested party.

The only open and rational conclusion is that Capral is unconcerned with whether exports from China are found to be dumped or un-dumped so long as the anti-dumping measures are maintained and that the variable factors of the measures are increased to the historically high LME prices and MJP premiums. The proposed recommendations in the Statement of Essential Facts confirms that this is currently what is proposed by the Commission.

If implemented, the effect of what is being proposed would be to exclude exports from China upon the LME prices and MJP premiums falling, which has already occurred. This is because all exports from China would be subject to the anti-dumping measures and the variable factors of those

[1] This presumably could be confirmed by customers of Kam Kiu and presumably was evident during verification.

measures, in particular the 'ascertained export prices', would be increased to levels based on the historically high LME prices and MJP premiums.

Thus, any fall in LME prices and MJP premiums would preclude export prices of exports from China following in the prices of aluminium extrusion products as is the usual practice in the industry with the result that the prices of exports from China would be uncompetitively high. Hence , all exports from China could only enter into the commerce of Australia at export prices at or above the floor price (i.e., ascertained export prices) based on the historically high LME prices and MJP premiums and that presumably would price them out of the Australian market.

The question then is why would Capral seek to exclude exports from China from the Australian market when domestic production capacity, including its own, is insufficient to meet demand and when there is no evidence of exports from China causing material injury because of dumping? That is, when there is no dumping and no injury let alone injurious dumping to be prevented or removed by anti-dumping measures, why increase the variable factors of the anti-dumping measures? What is the benefit to members of the Australian industry in such circumstances?

The only logical and commercially sensible answer to this question is that the proposed variation to the anti-dumping measures is to increase the protectionist tariff barrier so as to exclude or restrict import competition – that is, to exclude from the market import competition from China.

The reduction in exports from China of itself does not confer a benefit because the domestic industry lacks the production capacity to meet demand and increase sales and thereby revenues. Rather the benefit is that the anti-dumping measures create a trade barrier to imports from China and the existence of this barrier of itself increases the value of the businesses of the companies it protects.

In this manner, the proposed variation to increase the level of the measures so as to exclude the increasing volume of exports from China from the Australian market would confer a benefit on the protected companies but not in terms of increased domestic sales due to the limited domestic production capacity. Rather, the benefit would appear to be an increase in the value of the businesses of the protected companies. This is because the industry would be operating behind an 'economic moat' that restricts import competition by, effectively, excluding import competition in this case from one exporting country, China.

Of course to use the anti-dumping regime to that end, to exclude import competition from an exporting country, is to use it for an improper purpose. The regime is not being used to prevent or remove the injurious effects of dumping because there is neither dumping nor injury caused by dumping. The object appears to be an anti-competitive one, namely, to exclude certain competition from the market and thereby confer a benefit on the protected industries. At least, that would appear to be the only rational explanation given the absence of dumping and injury caused by dumping. If so, it is impermissible for Australia's anti-dumping regime to be used for such an improper purpose.

Again, the appropriate course in the circumstances is to take steps to revoke the anti-dumping measures as they are no longer warranted. Restricting competition in a market is not a proper purpose for anti-dumping measures -its purpose is not to restrict competition in a market but to remove or prevent injurious dumping.

Variable factors

In relation to Capral's submissions concerning the variable factors applying to Kam Kiu's exports, those submissions fail to address Kam Kiu's arguments concerning the Commission's determination of those variable factors.

Fundamentally, Capral's submissions fail to address the fact that the dumping determination for Kam Kiu's exports involves a comparison of two artificially constructed amounts, neither of which is an actual amount paid by one entity to another in the purchase and sale of any goods let alone goods for export to Australia. Further, it does not address the fact that if the so-called 'export price' is increased to the constructed normal value, it merely serves to alter the amount of revenue between two related companies that is derived from actual sales to Australian customers without altering the price to those customers. The relevance of this to the price at which the exports in question enter into the commerce of Australia, that is, the price paid by Australian customers has not been demonstrated.

As a counterfactual, exports to Australia could be effected by the producer transacting directly with the Australian customer similar to other selected cooperative exporters without necessarily altering the prices to the Australian customers. The exports would be entering into the commerce of Australia at the same or similar prices. What in substance relevant to the exports entering into the commerce of Australia in relation to price would have changed?

Accordingly, Capral's submissions on these matters are to be disregarded as not relevant. Further, my clients reiterate their previous submissions on these matters, noting that they have yet to be addressed by the Commission.

Specifically, my clients maintain their contention that the prices at which their exports enter into the commerce of Australia, namely, the price paid by the Australian customers, are un-dumped. In addition, there is no evidence and none referred to in the Statement of Essential Facts that the (erroneous) margin of dumping determined by the Commission has flowed through to the prices paid by Australian customers or to the price that those Australian customers have on-sold those products into the Australian market.

Finding (erroneously) that a calculated 'deductive export price' purportedly but not actually paid in an offshore transaction is a dumped price may be of interest but its relevance to the price at which the exports in question enter into the commerce of Australia has yet to be demonstrated.

Please let me know if you have any questions.

Yours sincerely,

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