CLAYTON UTZ

Confidential

Mr Michael Kenna
Manager Trade Measures Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

11 November 2011

Our ref 11276/80125566

Dear Mr Kenna

Investigation into Alleged Dumping - ITRB Report No 176 Certain Structural Timber Exported from Austria, Canada, Czech Republic, Estonia, Germany, Lithuania, Sweden and USA

As you know we act for Stora Enso.

The purpose of this letter is to address an issue raised by "Australian Industry" in its comments paper to the effect that normal value should include "*the profit achieved on the domestic sales of other timber products manufactured at the Plana mill*".

We submit that Customs should not add any profit component as to do so would be contrary the provisions of both the Anti-Dumping Agreement, the *Customs Act 1901* (Cth) and prior Customs practice.

1. **Determination of Normal Value in the Czech Republic**

1.1 Customs would have established, following its verification visit to the Czech Republic, that there are no sales in the Czech domestic market that can be used to determine normal value.

1.2 As Stora Enso demonstrated during those visits and which Customs would have verified, the product sold into the Czech domestic market and the sale price for those *damaged* goods cannot be considered "like goods" to those exported to Australia. Moreover, none of the sales are profitable and nor are sales of those goods sold in sufficient quantity.

1.3 Additionally, it is the fact that:

(a) the investigation is only concerned with the export of structural timber by Stora Enso;

(b) no other seller is the subject of investigation of alleged dumping of structural timber from the Czech Republic;

(c) following the verification visit by Customs, the mills in the Czech Republic are export focused and have been established for this purpose rather than supplying the domestic market;

(d) the limited product that is sold on the Czech domestic market is not sold at a profit, but a loss - namely because it is not suitable for export nor is it of export grade.

2. **Constructed normal value**

2.1 Once it is accepted that there are no domestic sales of the like product on the Czech market it is not open to Customs to use a domestic selling price to establish a normal value. In consequence, the next legally available option is for Customs to establish a normal value based on a constructed cost to make and sell. The issue in this case therefore is whether Customs, in determining a normal value, can include a profit component.

2.2 Ordinarily, an amount of profit is included where the domestic selling price of the alleged dumped export is sold at a profit in the home market. The anterior question therefore is what is the domestic selling price in the domestic home market. If there is no domestic selling price, then additional questions arise which are dealt with further below.

2.3 However, in the circumstances of this case, where the sales price of a like good has been shown not to have been sold at profit, then no profit should (or indeed) can be included in a constructed normal value because to do so would result in a sales price which is not representative of, mismatched with, and has not be obtained by reference to the domestic selling price.

2.4 Significantly, there is nothing in the Anti-Dumping Agreement or the *Customs Act* which would support the inclusion of a level of profit in such circumstances.

3. **Legislation**

3.1 The Customs Act provides that where a constructed normal value is to be used, the amount of profit is to be determined in accordance with the *Customs Regulations*.[1]

3.2 Customs Regulation 181A provides:

(1) For subsection 269TAC(5B) of the Act, this regulation sets out:
- (a) the manner in which the Minister must, for subparagraph 269TAC(2)(c)(ii) or (4)(c)(ii) of the Act, work out an amount (the ***amount***) to be the profit on the sale of goods; and
- (b) factors that the Minister must take account of for that purpose.

(2) For sub regulation (1), the Minister must, if reasonably possible, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.

(3) If the Minister is unable to work out the amount by using the data mentioned in sub regulation (2), the Minister must work out the amount:
- (a) by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or
- (b) by identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or
- (c) subject to sub regulation (4), by using any other reasonable method and having regard to all relevant information.

(4) If:
- (a) the Minister uses a method of calculation under paragraph (3)(c) to work out an amount representing the profit of the exporter or producer of the goods; and

[1] Section 269TAC(5B) of the Customs Act

(b) the amount worked out exceeds the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export;

the Minister must disregard the amount by which the amount worked out exceeds the amount of profit normally realised by other exporters or producers

(5) For this regulation, the Minister may disregard any information that he or she considers to be unreliable.

(6) A word or expression that is defined in Part XVB of the Act and used in this regulation has the meaning given by that Part.

3.3 As stated above in 1.3(b) & (d) and 2.3 above:

(a) there is no actual profit that accrues to Stora Enso on the sale of 'like' goods which can be used. In this way Regulation 181A(2) does not operate.

(b) there are no sellers of like goods in the Czech Republic whose profit figures can be used. In this way Regulation 181A(3)(b) does not operate.

3.4 This leaves then the potential application of Regulation 181A(3)(a) & (c).

3.5 The Panel in *Thailand – Anti Dumping Duties on Angles, Shapes and Sections of Iron Or Non Alloy Steel and H Beams form Poland*[2] made it clear that the expression "*the same general category of products*" (an expression reflected in Reg 181A(3)(a)) should be interpreted narrowly[3] and that it only includes profit obtained from goods "*that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country*"

3.6 In this case it is not possible to find a product that approximates as closely as possible to a like product, nor is there a product which is in fact sold from which a profit margin can be determined. It must follow therefore that there is no basis for using any other *reasonable methodology* (see Reg 181A(3)(c)) to obtain a profit when in fact in the relevant market there is no profit obtained.

3.7 Similarly, information that may be used must reflect what profit should be obtained on the domestic market in the Czech Republic. Given that there are no profitable sales, Customs cannot use profit obtained from an investigation of structural timber in another country, and apply it to a constructed normal value for a sale price in the Czech Republic.

4. **Australian Practice**

4.1 In *Termination Report No 173c, Termination of an Investigation into the Alleged Dumping of Consumer Pineapple Exported from Indonesia*, Customs acknowledged that the exporter did not

[2] WT/DS 122/R (28 September 2000)

[3] See appendix A which relevantly sets out what the Panel decided and said in paragraphs 7.112 to 7.115 of the decision.

have any domestic sales of either 'like goods or a similar category of goods'. Customs did not have available to it information from any other Indonesian exporter. In consequence it applied 'zero' profit in its constructed normal value analysis.

4.2 Customs correctly determined that when there is no profit on either the sale of the like goods or similar category of goods, and in the absence of information from other sellers in the relevant exporting country, it could not determine a profit under either Regulation 181A(3)(a) or 181A(3)(b).

4.3 In respect of Regulation 181(3)(c), which allows any reasonable method to be used to determine a profit having regard to all relevant information, Customs considered whether regard could be had to profit obtained in another country (Philippines), but rejected that approach in that case for at least the following reasons:

(a) there was no evidence that the Philippines market was an appropriate comparator for the domestic market in Indonesia;

(b) the volume and nature of the market in the 2 countries differed substantially; and

(c) other categories of goods could not be used as it was uncertain, the information would have been unverified and it could not be determined if the amounts were relevant to domestic sales only.

4.4 Australian industry raised a number of objections in that case as to why profit should be included, even though no sales were profitable. Those objections included claims that it would be inconsistent with the legislative intent of the Customs Act and that it was commercially unrealistic not to include a profit. One suggestion was that Customs could use the level of profit obtained by the company for its overall business for sales during the investigation period.

4.5 With respect, Customs correctly pointed out that Australian legislation recognises that in certain cases profit can not be added and more generally that sales below cost might be in the ordinary course of trade and normal business practice. Customs likewise correctly determined that to rely on overall sales or the EBITA of the company as a basis for determining a profit was not open when, the company's revenue is determined almost entirely by export sales.

4.6 We contend that Stora Enso stands in an identical position to that of the exporter the subject of *Termination Report No 173c*.

5. **EC Practice**

5.1 In the Judgment of the Court (Fifth Chamber) in *Minolta Camera Co. Ltd v Council of the European Communities. - Anti-dumping duties on plain paper photocopiers originating in Japan*,[1] the Court stated:

> "*The aim of constructing the normal value is to establish a normal value which comes as close as possible to the selling price that the product in question would have if it*

[1] European Court reports 1992 Page I-01577 - *Case C-178/87 dated 10 March 1992.*

were sold in the country of origin or exporting country in the ordinary course of trade".

5.2 The Court found that a dumping authority may take into account either the profit margin realised on sales of the manufacturers or profit realised by another company, or could have recourse to the average profit realised by other exporters sold during the investigation period on that market.

5.3 However the Court made it clear that a dumping authority could not take a profit margin and apply it where there was no profit on the sales used to determine a normal value as to do so would be to establish a normal value which did not correspond to the price obtained in the ordinary course of trade.

6. **Conclusion**

6.1 Customs should not include a profit component in this case and, we respectfully contend that to do so would run counter to the Anti-Dumping Agreement, the *Customs Act* and the recently established practice of Customs.

Yours sincerely

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Appendix A

"We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however. In particular, we note that, in general, Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price 'of the like product in the ordinary course of trade in the domestic market of the exporting country' when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use actual data of the exporter or producer under investigation for the like product. Where this is not possible, subparagraph(i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

This context indicates to us that the use under subparagraph (i) of a narrower rather than a broader 'same general category of products' certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."

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Additional contextual support can be found in Article 3.6 (a provision related to data concerning injury), which provides that when available data on 'criteria such as the production process, producers' sales and profits' do not permit the separate identification of production of the like product, 'the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided' (emphasis supplied). Although this provision concerns information relevant to injury rather than dumping, and although we do not mean to suggest that use of the narrowest possible category including the like product is required under Article 2.2.2 (i), in our view Article 3.6 provides contextual support for the conclusion that use of a narrow rather than a broader category is permitted.

We note Poland's argument that a broader category is more likely than a narrower one to yield 'representative' results (by which we presume Poland to mean representative of the price of the like product in the ordinary course of trade in the domestic market of the exporting country), but we believe that as a matter of logic the opposite more often is likely to be true. The broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. We therefore disagree with Poland that Article 2.2.2 (i) requires the use of broader rather than narrower categories, and believe to the contrary that the use even of the narrowest general category that includes the like product is permitted"

(our emphasis)