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By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Level 35
55 Collins Street
Melbourne Victoria 3000

Attention: Mr Gavin Crooks
Assistant Director, Investigations 3

Dear Mr Crooks,

RE: Dumping investigations – exports of certain aluminium extrusions from Malaysia – Investigations Nos 540 and 541

As you are aware, I also represent Press Metal Aluminium Australia Pty Limited (**PMAA**) in relation to these investigations.

This submission is made in relation to both investigations, that is, in relation to Investigations Nos 540 and 541.

I refer to the submission made by Capral Limited (**Capral**) dated 5 October 2020 in relation to these investigations. In that submission Capral asserts that:

“Any exports to Australia from other PMB affiliated entities would be the subject of the measures at the “All other exporter”: rates of IDD and ICD”.

An interesting assertion but little more than that – an assertion.

Both factually and legally, Press Metal Berhad (**PMB**) is the ‘exporter’ of the aluminium extrusions in question exported from Malaysia and has been since the corporate restructure late last year. No evidence has been referred to or provided to the contrary.

Further, who may be the producer of the goods in question is, in substance, an irrelevant consideration as to who is the ‘exporter’.

Exports of the aluminium extrusions in question from Malaysia by PMB, therefore, are not liable for dumping duty. Any assertion to the contrary is mere speculation to be summarily dismissed as such.

Of more significance is whether the so-called 'all others rate' of dumping duty that Capral refers to in its submission was validly imposed for the reasons set out in the attachment to this letter. This would seem to be a necessary threshold question to be answered before speculating on whether any exports of aluminium extrusions from Malaysia by any particular exporter are liable for dumping duty.

If you have any questions or queries regarding any of the foregoing, please do not hesitate to contact me.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Andrew Percival', with a large, stylized initial 'A' at the start.

Andrew Percival

Principal

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Attachment
Imposition of Antidumping Measures
Certain Aluminium Extrusions Exported from Malaysia

On 22 June 2017, the Minister published a dumping duty notice purportedly imposing antidumping measures on exports of certain aluminium extrusions from Malaysia: see Anti-Dumping Notice No 2017/72.

In that dumping duty notice the Minister declared under section 269TG(2) of the *Customs Act 1901* that section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applied to 'like goods' exported to Australia after the date of the notice. Further, the Minister stated that that declaration applied to all exporters of 'the goods' and 'like goods' from Malaysia excepting the named Malaysian exporters in the notice.

In making this declaration, the Minister stated in the dumping duty notice that he had:

"... considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material questions of fact on which the recommendations are based and the evidence relied on to support those findings in REP 362".

However, there are a number of issues relating to that declaration that indicate that it was not validly made. Some of these are addressed below.

1. Requirements of section 269TG(2) of the *Customs Act 1901*

In order to make the declaration referred to above, section 269TG(2) of the *Customs Act 1901* requires that the Minister be satisfied amongst other things that:

- (i) the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods; and
- (ii) because of that, material injury to an Australian industry producing like goods has been or is being caused or is threatened.

It is unclear from the declaration of how the Minister could be satisfied of these matters or whether he was so satisfied.

In the dumping duty notice, the Minister explained that:

"I am also satisfied that ... the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to an Australian industry producing like goods has been caused". (underlining added)

No doubt this is a correct statement by the Minister of the matters he was satisfied of in making the declaration. However, how could the Minister be satisfied that future exports could have caused material injury. That is, how could a future event that has not occurred (i.e. future exports) have caused a past event that has occurred (i.e. the material injury that had been caused). How can

exports that have not occurred and will not occur until some indeterminate future point in time have caused the material injury that the Minister apparently was satisfied had occurred?

This the Minister does not explain in the dumping duty notice of how or on what findings of fact supported by evidence he was satisfied of these matters. Nor are they addressed in Report No 362 by the Anti-Dumping Commissioner (**Commissioner**) on which the Minister relied in making the declaration.

Query, therefore, precisely what was the Minister satisfied of in making the declaration and on what findings of fact supported by what evidence?

2. Description of the goods on which the measures were purportedly imposed

In the dumping duty notice the Minister stated that the decalaration applied to *“all of the exporters of the goods and and like goods from Malaysia (except for Press Metal Berhad, Superb Aluminium Industries Sbn Bhd, LB Aluminium Berhad, Milleon Extruder Sdn Bhd, Genesis Aluminium Industries Sdn Bhd and Kamco Aluminium Sdn Bhd)”* (underlining added)

The apparent reason why this statement was made was because the description of the goods on which the dumping duty was imposed was deficient. It described ‘the goods’ solely as a physical product, namely, the aluminium extrusions in question. Such a description is deficient. Antidumping measures are not imposed upon a physical product *per se*. They are imposed upon a physical product exported from a particular country or countries by a named exporter or exporters. It is only such actual exports that can relevantly be exported at dumped prices and because of that cause material injury to a domesic industry. Nothing less.

This deficiency in the description of the exports on which the dumping duty was purportedly imposed commenced with the description in Capral’s application for the imposition of antidumping measures and enured throughout the investigation.

This deficiency, therefore, raises the question of whether the investigation, the material findings of fact, the evidence supporting such findings and the recommendations to the Minister were tainted by that deficiency, together with the Minister’s declaration?

3. Malaysian exporters on whom the measures were purportedly imposed

As referred to above, the Minister stated that his declaration applied to ‘all exporters’ of the goods from Malaysia other than those named exporters. This raises the question of who are or were such ‘exporters’? That is:

- (a) were they entities who exported to Australia the aluminium extrusions in question from Malaysia during the investigation period; or
- (b) were they entities who did not export to Australia the aluminium extrusions in question from Malaysia during the investigation period but did so at some later point in time but before the date of the declaration; or

- (c) were they entities who have not exported to Australia the aluminium extrusions in question from Malaysia but could possibly do so in the future, assuming such entities exist, or, if not, come into existence?

It is not apparent to which such entities the Minister was referring to.

It also is unclear to which recommendation of the Commissioner in Report No 362 the Minister may be having regard to in this respect. For example, at Section 12 of Report No 362 the Commissioner recommended that the Minister impose:

“dumping duties on the goods exported to Australia by the category of ‘uncooperative and all other exporters’ from Malaysia”.

Despite stating that he had relied upon the Commissioner’s recommendations, the Minister’s declaration under section 269TG(2) of the *Customs Act 1901*, the Minister’s declaration under that section did not purport to impose dumping duty on exports by ‘uncooperative and all other exporters’ from Malaysia.

It is a fundamental principle of law that the imposition of a tax, such as a dumping duty, must be precise. Here, how does an entity exporting the aluminium extrusions in question from Malaysia know that it is an ‘uncooperative exporter’ or an ‘all other exporter’ and is there a difference if the applicable rate of duty the same? Why distinguish between the two?

Is the the Minister’s statement that his declaration applies to ‘all exporters’ a reference to ‘uncooperative exporters and all other exporters’ and, if so, again, who are they?

At Section 5.14 of Report No 362, the Commissioner stated that:

“As detailed in section 5.4 above, the Commission is treating all exporters of aluminium extrusions from Malaysia ... in the investigation period other than the cooperating exporters and the category of residual exporters from Malaysia, as uncooperative exporters as defined in subsection 269T(1)”.

No mention of ‘all other exporters’. Importantly, it is unclear how the Commissioner could treat ‘all exporters’ of aluminium extrusions from Malaysia other than cooperating exporters and residual exporters as ‘uncooperative exporters’. On what basis? Did all such ‘exporters’ satisfy the statutory definition of ‘uncooperative exporter’, especially if they did not exist at the relevant time or, if they did, had not exported anything to Australia from Malaysia let alone the aluminium extrusions in question?

Presumably, the Commissioner is referring to entities that have actually exported the aluminium extrusions from Malaysia during the investigation period as, one would assume, to be an ‘exporter’ an entity must actually exist at the relevant time and actually have exported the aluminium extrusions to Australia from Malaysia during the investigation period. If not, how could such an entity be an ‘exporter’ for the purposes of the investigation and, consequently, an ‘uncooperative exporter’?

If the reference to 'all exporters' is to 'uncooperative exporters', then these 'uncooperative exporters' were identified by the Commissioner in Report No 362. The 'uncooperative exporters' were identified in Section 5.4 of Report No 362 as Tong Heer, Crystal, Everpress and Alumac. If identified in the Report, why were they not identified in the Minister's declaration imposing the dumping duty, which is a requirement of Article 9.2 of the WTO Anti-Dumping Agreement?

Further, did the Minister intend to extend the application of the imposition of dumping duty beyond 'uncooperative exporters' to 'all other exporters' whomever they might be as it is not clear either from the dumping duty notice or Report No 362 who comprised this category of 'all other exporters'.

If this was the intent of the Minister, on what material findings of fact supported by evidence did the Minister base this extension of the imposition of dumping duty beyond 'uncooperative exporters' and why? What was the purpose of such an extension of the imposition of the dumping duty, especially if it sought to include future exports of the aluminium extrusions in question from Malaysia by entities that may or may not have been in existence at the time of the Minister's declaration?

Further, how could an entity that did not exist provide information on non-existent exports relevant to the investigation or otherwise impede the investigation and, therefore, be determined to be an 'uncooperative exporter' as apparently claimed by the Commissioner? How entities that may not have existed or did not exist could have exported aluminium extrusions in question at dumped prices is unclear. No such exports existed. In addition, because no such exports existed, a non-existent export could not have caused any injury. These matters do not seem to have been addressed in Report No 362.

Consequently, precisely what material findings of fact supported by what evidence did the Minister rely upon in making his declaration?

4. 'Country-wide' antidumping measures

It also is interesting that the Commissioner did not see fit to draw to the Minister's attention that the effect of his recommendations, if adopted by the Minister, would be to impose 'country-wide' antidumping measures in respect of aluminium extrusions exported from Malaysia contrary to section 269TG of the *Customs Act 1901* and the WTO Anti-Dumping Agreement.

That is the extension of the application of the imposition of a dumping duty on exports of the aluminium extrusions in question from Malaysia to 'all exporters' has the effect of imposing a 'country-wide' dumping duty. There was no explicit recommendation by the Commissioner to the Minister, based on a material finding of fact supported by evidence, that the Minister impose such a 'country-wide' dumping duty.

Nor was there any express reference in Report No 362 by the Commissioner that this would be the effect of applying the dumping duty to 'all exporters' or that there were no material findings of fact or supporting evidence to justify such an extension of the imposition of the dumping duty, assuming

such an extension was permissible under section 269TG of the *Customs Act 1901* and the WTO Anti-Dumping Agreement.

Why was this not drawn to the Minister's attention in recommending that he extend the application of the imposition antidumping measures to this effect and the legal basis for such an extension of the imposition of the antidumping measure?

Was it because the deficient description of the goods on which the dumping duty was imposed plus the country-wide application of the dumping duty was a *de facto* protective tariff in breach of obligations under GATT with the individual duty rates for cooperating and residual exporters the exceptions to this protective tariff?