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By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Level 35
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Received 22 January 2021

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 & Review No 544 – Statements of Essential Facts – Scope of Review – Exporter

I refer to the Anti-Dumping Commission's (**Commission**) Statements of Essential Facts dated 9 December 2020 (**SEFs**) in relation to Review No 544 (**Review**) and Investigations Nos 540 and 541 (**Investigations**).

The following submissions are made in relation to those SEFs. In particular, this submission is made in relation to the Commission's erroneous preliminary finding that PMB Aluminium Sdn Bhd (**PMBA**), not Press Metal Berhad (**PMB**), has been the Press Metal exporter of aluminium extrusions from Malaysia since November 2019 following a corporate reorganisation. Consequently, the Commission has calculated a dumping margin for what it considers are PMBA's exports to Australia based on information submitted to the Commission in the Investigations by PMB.

1. Implications for the Investigations

The obvious implication of the Commission's preliminary finding that PMBA, not PMB, is the exporter of aluminium extrusions produced in Malaysia by PMBA following the corporate reorganisation, is that the Investigations must be terminated in relation to PMB.

Based on this preliminary finding of the Commission, if correct, then PMB ceased to export aluminium extrusions from Malaysia on and from November 2019 and ceased to be an exporter for the purposes of the Investigations. Further, based on the verified information

and evidence provided to the Commission, there is no likelihood of PMB re-commencing exporting aluminium extrusions at some indefinite time in the future.

Consequently, the Commissioner must terminate the Investigations in relation to PMB pursuant to s.269TDA(3) of the *Customs Act 1901*.

Either the Commission's preliminary finding in this regard is correct, in which case the Investigations in relation to PMB must be terminated, or, if the preliminary finding is incorrect, that preliminary finding must be withdrawn together with the dumping margin calculation for PMBA.

2. Scope of the Review

As stated in SEF No 544, the purpose of the Review is to review the 'variable factors' applying to exports of the products under review resulting from the imposition of antidumping measures on such products in Investigation No 362.

The term 'variable factors' is defined in s.269T(4D) of the *Customs Act 1901* to mean the normal value of the goods, the export price of the goods and the non-injurious price of the goods. The purpose of the Review is to determine whether there have been changes to those variable factors.

In so far as PMBA is concerned, in the event that the preliminary finding that it is an exporter of the goods under review is correct, the relevant variable factors are the normal value and export price in the antidumping measure imposed on the category of exporters referred to as 'all other exporters'. This is because PMBA did not exist at the time of the original investigation (i.e., investigation no 362) and did not exist until 2019.

Consequently, any aluminium extrusions exported by PMBA from Malaysia would be subject to the 'all other exporters' rate of dumping duty of 16.2% (see **attached** copy of the Commission's Dumping Commodity Register). The variable factors relevant to PMBA's exports would be the variable factors applying that rate of dumping duty.

It is unclear on what legal basis the Commission determined different variable factors for PMBA (i.e., variable factors unique to PMBA). PMBA has not yet applied for an accelerated review under Division 6 of Part XVB of the *Customs Act 1901*. There has been no separate dumping investigation into exports of aluminium extrusions from Malaysia by PMBA to warrant the imposition of antidumping measures on its exports as is required by Article 1 of the WTO Anti-Dumping Agreement.

It is unclear, therefore, on what legal basis the Commission can unilaterally and arbitrarily impose separate antidumping measures on exports by PMBA. There has been no dumping investigation into whether exports by that exporter, upon entering the commerce of Australia, are at allegedly 'dumped' export prices and because of that causing or threatening material injury to the Australian industry producing like goods taken as a whole.¹

¹ *Corinthian Industries (Syd) Pty Ltd v Comptroller-General of Customs & Others* (1989) Federal Court of Australia No.125/89, 7 April 1989, Davies J.

This is especially the case when the exporter in question, here, PMBA, has not previously exported any goods to Australia. What evidence is there that its exports to Australia upon entering the commerce of Australia are or will be at allegedly 'dumped' export prices and because of that causing or threatening material injury to the Australian industry producing like goods taken as a whole? Further, it assumes that the antidumping measures imposed on 'all other exporters', being exporters who either were not known to the Commission or who did not exist at the time of the original investigation², were validly imposed, which is unlikely to have been the case, as previously submitted³.

It is submitted that there is no lawful basis for the Commission to have calculated a separate dumping margin for exports by PMBA, that is, to purportedly unilaterally and arbitrarily impose separate antidumping measures on exports by PMBA without a dumping investigation into exports, if any, by PMBA of the relevant products to Australia.

Further, it is submitted that there was no lawful basis on which the Commission could use information, being sensitive, confidential commercial information provided to it by PMB for the purposes of Investigations at the request of the Commission and as expressly stated by the Commission for this purpose in the Exporter Questionnaire. This is not to suggest that the Commission did this otherwise than in good faith, on the misplaced desire to provide PMBA with separate variable factors and dumping margin appropriate for its circumstances. However, that is a matter for decision by PMBA, not the Commission, and the Commission should have raised the option of an accelerated review directly with PMBA for its consideration.

As the Commission is aware, PMBA has been considering applying for an accelerated review and is likely to do so shortly. This would enable the determination of variable factors and dumping margin unique to PMBA based on review period of 12 months consistent with the Commission's express practice and policy, as opposed to the extremely short, unrepresentative 6-week period in the preliminary dumping margin calculated by the Commission.

The preliminary dumping margin calculated by the Commission is solely the product of the data being used relating to an extremely short period with small volumes of exports in question. That is, it is the product of an unrepresentative sample (i.e., the methodology) and not any material change in prices or costs before, during and after November 2019 in respect of the aluminium extrusions produced by PMBA and exported from Malaysia. As there was no material change, there could not be any material difference in the dumping margins for exports before and after November 2019 otherwise than as a result of the unrepresentative, small sample of data used for exports in November-December 2019.

Hence the need for an accelerated review.

3. Is PMBA an 'exporter' of aluminium extrusions from Malaysia?

As noted earlier above, in SEF No 544 the Commission has made a preliminary finding that PMBA, not PMB, is the exporter of aluminium extrusions produced by PMBA in Malaysia and

² Dumping and Subsidy Manual, Anti-Dumping Commission, November 2018, p.158

³ See submission dated 16 October 2020.

became the exporter of such aluminium extrusions in November 2019 following the corporate re-organisation: see Section 4.7 of SEF No 544.

Before examining the reasons given by the Commission for this preliminary finding, it is useful to set out what determines who is an ‘exporter’ of a good from a country. This is addressed below.

3.1 What is the criteria for determining who is an ‘exporter’?

Exportation is the act of removing a good from a country for transport to a place outside of that country regardless of whether that ‘place’ is another country or somewhere else.

An ‘exporter’, therefore, is the person who causes the removal of that good from that country for transportation to the place outside of that country. Essentially it is a factual question.

A carrier, such as a shipping company, is not an exporter. This is because it has no control over or involvement in which goods are removed from the country and transported to a designated place outside of that country. It, as the carrier, transports the goods in question in accordance with the person who has contracted for it to transport the goods for this purpose.

The question of identifying the “exporter” was considered by the Federal Court in *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority*⁴ (**Celpav**). The Full Federal Court noted that the term ‘exporter’ was not defined in the *Customs Act 1901* but that the term had been considered by the Federal Court in *Henty v Bainbridge-Hawker* (**Henty**)⁵ In *Celpav*, the Full Federal Court cited the following extract from *Henty*:

*“For the purposes of this case it is sufficient to say that if, in the case of an f.o.b. contract with an overseas buyer, the seller places the goods sold on board a ship bound for foreign parts and engages with the shipowner to carry them to the overseas buyer and the goods are carried overseas, the seller has, in my opinion, exported the goods within the meaning of the Customs Act.”*⁶

In other words, the ‘exporter’ is the entity who causes the removal of that good from that country for transportation to the place outside of that country. As indicated earlier above, this is a factual question.

3.2 Commission’s preliminary finding that PMBA is the ‘exporter’.

The Commission’s reasoning for its preliminary finding that PMBA is an exporter is set out in Section 4.7 of SEF No 544.

⁴ Before a single judge of the Federal Court: *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and others* (1996) 42 ALD 7; and, before the Full Court of the Federal Court: *Companhia Votorantim de Cellulose e Papel v Anti-Dumping Authority and others* (1996) 141 ALR 297

⁵ *Henty v Bainbridge-Hawker* (1963) 36 ALJR 354.

⁶ *Celpav*, p.356.

At Section 4.7.1 of the SEF for Review No 544, the Commission stated that:

“As will be demonstrated below, the goods exported to Australia were produced by PMBA who then sold those goods to PMB prior to their exportation to Australia. PMB then resold the goods to the Australian customer.

The question before the Commission is, therefore, whether:

- *PMB is an exporter for the purposes of section 269TAB(1)(a); or*
- *PMBA is the exporter for the purposes of section 269TAB(1)(c).*

The Commission acknowledges that PMB has represented that it was the exporter of the goods for the purpose of any anti-dumping measures. This is clear from PMB’s submission, dated 16 October 2020, where PMB argues it is and continues to be the exporter of the goods to Australia.”

Following setting out its understanding of the facts, the Commission then stated that:

“Having regard for the information set out above, the Commission was satisfied that:

- *PMBA was the producer and seller of the goods and like goods;*
- *PMB did not produce the goods and like goods;*
- *for the goods produced and sold by PMBA for the Australian market, PMB was an intermediary party in the transaction.”*

It also stated that:

“Having regard for the available information about the arrangement between PMB and PMBA in respect of the export of the goods to Australia from 22 November 2019, the Commission established the following:

- *PMBA arranges and pays for the inland transport to the port of export;*
- *PMBA arranges and pays for the port handling charges at the port of export;*
- *PMBA arranges and pays for the ocean freight and marine insurance;*
- *the goods were not warehoused by PMB or held in inventory by PMB after being purchased from PMBA;*
- *PMBA maintains inventory of the goods;*
- *PMBA was aware that the goods were being exported to Australia due to the presence of the Australian importer’s (PMAA) delivery address, or PMAA’s customer,*

and purchase order references on PMBA's commercial invoices for the sale of the goods to PMB;

- *PMB produces a certificate of origin which facilitates the exemption of Australian import duty pursuant to the AANZFTA Free Trade Agreement;*
- *although PMB owned the goods at the time of their exportation (having purchased them from PMBA), it is not considered to be the principal agent in the transaction for reasons to follow."*

The reasons why PMB was not considered to be the 'principal agent in the transaction' (whatever that means) were:

"The available information about PMB's role in the sales of the goods to Australia indicates that PMB's function could at best be defined as 'records based' or 'on paper'. As confirmed by PMB during verification, documents issued in PMB's name were generated by staff at PMBA and PMB staff are not involved in the administration of the sale and manufacture of the goods exported to Australia under its name.

When identifying the exporter of the goods, the Commission examines the roles of the parties in the transactions, their functions and their responsibilities. While PMB was the owner of the goods at the time of their exportation, the Manual notes that

"the exporter must have been the owner of the goods at one time but...ownership at the time the goods left for Australia is not treated as conclusive when identifying the exporter." [Manual, p.29]

The Manual also contemplates the role of intermediaries who undertake a range of services or functions and how these activities are taken into consideration when establishing the identity of the exporter of the goods. On balance, the Commission considers that PMB's ownership of the goods from 22 November 2019 and prior to their exportation does not override its limited role in the ongoing export of the goods, or the finding that PMBA was the manufacturer of the goods and as a principal, knowingly sent the goods for export to any destination."

Based on this reasoning, the Commission concluded it was satisfied that:

- PMB was the manufacturer of the goods, and as a principal, knowingly sent the goods for export to Australia prior to 22 November 2019; and
- PMBA was the manufacturer of the goods and as a principal, knowingly sent the goods for export to Australia from 22 November 2019.

These findings are not supported by the available information or evidence or at law.

3.3 Why the Commission's preliminary finding is incorrect.

The Commission's preliminary finding that PMBA became the exporter of the aluminium extrusions that it produced in Malaysia on and from November 2019 following the corporate reorganization is incorrect for the following reasons.

At no time, either before November 2019 or since then, has PMBA caused any aluminium extrusions that it has produced in Malaysia to be exported from Malaysia to Australia. There is no evidence that it has and none referred to by the Commission in its reasoning in SEF 544.

As the Commission acknowledges in its reasons, PMB purchases the aluminium extrusions in question from PMBA. This has the effect that title to the aluminium extrusions passes from PMBA to PMB. That is, all property rights subsisting in the aluminium extrusions passes to PMB. Those property rights include the sole and exclusive right to possess and dispose of those products. Consequently, as a result of the sale of the aluminium extrusions produced by PMBA to PMB, PMBA ceased to have any property rights in those goods including the rights of possession and disposition as well as title to those goods. PMB solely and exclusively held those property rights as a result of the sale.

No evidence is identified by the Commission in its reasons that PMBA retained any property rights in the aluminium extrusions let alone any right to dispose or direct PMB as to the disposal of the products, including to whom, where, when and how. The entity that made those decisions was PMB through its employees. PMBA had no power to do so and in the absence of any contractual agreement to the contrary had no legal right to direct the manner of disposal of those products and did not do so.

The Commission refers in its reasoning to the role of 'intermediaries' in transactions involving the exportation of one country to another. Precisely, what the Commission means by an 'intermediary' is unclear and not explained. That is, is it referring to an entity that is operating as principal by purchasing goods from a manufacturer and on-selling it to its customers or is it referring to an entity that is an agent of the manufacturer (i.e., the principal) in the transactions involving the sale of the manufacturer's products to customers so that the contracts are legally between the principal and the customer?

If PMB is acting as agent of PMBA, what is the scope of its authority as agent - in what agency agreement is it set out - to what extent are its acts binding on the principal, does it have a right of indemnity from the principal, etc. In other words, what are the indicia of an entity acting as an agent of another and did PMB possess such indicia identifying it as an agent of PMBA? None is referred to by the Commission. This is because PMB has not at any time been acting as the agent of PMBA.

Clearly, therefore, PMB has not been acting as agent of PMBA. However, even if it were, that would not preclude PMB, as opposed to PMBA, being the exporter of the aluminium extrusions. As agent PMB could still be causing the aluminium extrusions in question to be removed from Malaysia to a place outside of Malaysia, and not PMBA. Being an agent does not of itself preclude that entity from being the 'exporter'.

The key to the Commission's reasoning lies in the following statement, namely, *'the finding that PMBA was the manufacturer of the goods and as a principal, knowingly sent the goods for export to any destination'*. The fact that PMBA was or is the manufacturer of the

aluminium extrusions is an irrelevant consideration – being a manufacturer of a product has no relevance to being an exporter of that product.

Further, whether or not PMBA was ‘principal’ in sending the product to a port also is an irrelevant consideration, as is whether it knew the aluminium extrusions were destined for export. Export of a product is not physically effected (i.e., caused) by ‘knowing’ that is what will ultimately occur in relation to the product. Knowing where any of the products manufactured by it does not somehow render a manufacturer an exporter.

Another way of viewing the transactions between PMB and PMBA is that PMBA is manufacturing aluminium extrusions at the behest of PMB. PMB engages with its customers in Australia and enters into contracts for the supply of which particular aluminium extrusions to those customers, in what quantities, when, on what commercial terms and conditions and at what price. PMBA has no involvement in or control over the settling of the commercial terms for the supply of aluminium extrusions from Malaysia to those customers. Consequently, PMB enters into commercial arrangements with PMBA for PMBA to supply it on separate commercial terms and conditions with the aluminium extrusions it requires to satisfy its contractual arrangements with its Australian customers. Effectively, PMBA is manufacturing to PMB’s order, not the other way around.⁷

PMBA did not cause the aluminium extrusions to be exported from Malaysia, that is, cause those goods to be removed from Malaysia for transport to a destination outside of Malaysia. That was the responsibility of PMB and, being the owner of the goods, was the only entity with the legal property rights to effect the disposition of the goods in that manner. Precisely how PMB effected this in practice is a commercial decision for it and it is not the role of the Commission to second guess commercial decisions of interested parties.

Finally the extensive reasoning of the Commission is telling. It is a simple factual question – which entity caused the aluminium extrusions to be physically removed from Malaysia for a destination outside of Malaysia. Factually, it was and is PMB, not PMBA, and there is no evidence to the contrary. Had there been any evidence to the contrary, no doubt the Commission would have referred to it.

4. Further considerations

While, as submitted above, PMBA did not become the ‘exporter’ of the aluminium extrusions produced by it following the corporate re-organisation, replacing PMB, on and from November 2019, it is not a question of “if” PMBA becomes the exporter but, rather, “when” it becomes the exporter.

As has previously been indicated to the Commission, it is anticipated that PMBA will become the exporter of the aluminium extrusions exported to Australia early in this calendar year following satisfaction of various regulatory requirements in Malaysia. At that time it will replace PMB as the exporter, as will be clear from the commercial arrangements that will then take effect, and PMB will cease exporting aluminium extrusions to Australia with no foreseeable likelihood of it resuming being the exporter. There would be no commercial

⁷ Note: to avoid any confusion, as the Commission has verified, there are no ‘tolling’ arrangements between PMB and PMBA.

reason for PMB to do so. Hence, the reason for PMBA considering applying for an accelerated review and the likelihood of it doing so.

5. Conclusion

In light of the foregoing:

- PMBA did not replace PMB as the 'exporter' of aluminium extrusions produced by it on and from November 2019 as a question of fact and law;
- PMB was then and continued to be the exporter of such aluminium extrusions from Malaysia to Australia;
- there was no lawful basis for the Commission to calculate separate variable factors unique to PMBA and to do so based on minimal, unrepresentative information supplied by PMB for the purposes of the Investigations and not for the Review;
- PMBA will become the 'exporter' of aluminium extrusions produced by it exported from Malaysia to Australia early this calendar year following satisfaction of certain regulatory requirements in Malaysia, replacing PMB in this regard; and
- because it will become the exporter, PMBA will likely shortly be applying for an accelerated review and issues concerning which entity is the 'exporter' will become redundant.

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

Yours faithfully,



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