

Non-Confidential

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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 – Non-Injurious Price

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

In particular, this submission is made in relation to the determination of non-injurious prices in the SEFs. It is submitted that the methodology employed to determine non-injurious prices is inappropriate and flawed. It does not produce a non-injurious price.

An alternative methodology should be employed, is available and would produce a non-injurious price, which, incidentally, supports the contention that the Investigations should be terminated and the 'floor price' for the variable factors the subject of the Review, they should be based on the prevailing market prices in the Australian aluminium extrusion market.

The reasons for this are set out below.

1. What is a 'non-injurious price'?

As you would be aware, section 269TACA of the *Customs Act 1901* defines a 'non-injurious price' as being the 'minimum price' necessary to prevent the injury to, or a recurrence of the injury to, or to remove the hindrance of the establishment of, an Australian industry being caused or threatened by the product under investigation entering the commerce of Australia at allegedly 'dumped' export prices.

The key aspects to the definition of non-injurious price are that it is a 'minimum price' that is 'necessary' to 'prevent' material injury being caused by exports of the product under investigation entering the commerce of the importing country, Australia in this case, at allegedly 'dumped' export prices. Specifically, the focus is on the prevention of injury being caused by 'dumping' through the mechanism of a minimum price (i.e., minimum export price).

That 'minimum price' is the export price uplifted by an amount less than the full dumping margin that is necessary to prevent material injury to the Australian industry being caused by 'dumping'.

Obviously, this requires an assessment of the material injury being incurred by the Australian industry and how and to what extent it is caused by the allegedly 'dumped' export prices of the product under investigation. Such assessment is necessary to determine what 'minimum export price' of the product under investigation will prevent the injury being caused by dumping.

Nevertheless, the focus is on the prevention of injury through the mechanism of a minimum price. To do this, the 'cause' of the injury must be addressed by the minimum price.

This is examined below.

2. What is the Commission's methodology in determining a non-injurious price (NIP)?

In SEFs 540 and 541, the Commission states that its methodology in determining a non-injurious price is as follows:

"The Commissioner generally derives the NIP by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping."

At the outset, this methodology is obviously flawed for several fundamental reasons, namely:

- (i) the objective of a non-injurious price is not to speculate on what price the Australian industry might obtain but, rather, to prevent the injury being caused by 'dumping' – they are completely different issues;
- (ii) what 'price' the Australian industry might reasonably expect to achieve in the market is a 'free-into-store' price, whereas a non-injurious price must be a minimum export price as it is the export price(s) that require adjustment to prevent injury from dumping, not some subsequent price in the Australian market; and
- (iii) it is not possible to determine or predict with any certainty what price a product being sold will obtain in any market as is evidenced in, for example, a real estate market, a share market, etc. – that is the nature of a 'market' – and, hence, it is not possible to predict with any certainty what 'price' the Australian industry could achieve.

The above methodology referred to by the Commission fails to recognise this. Consequently, it is speculative in nature, which is impermissible under antidumping rules.

In addition, this methodology obviously requires the Commission to assess whether the Australian market for the product under investigation, in this case, aluminium extrusions of certain finishes, is affected by dumping and, if so, to what extent. It also requires an assessment of whether the Australian industry has been able to vary its prices, including increase its prices, in that market and, if so, to what extent. Again, the nature of such assessment is speculative and does not address the objective of a non-injurious price, which is to prevent injury caused by dumping.

It also requires an assessment of what conditions would prevail in the market, in this case, the Australian aluminium extrusions market, during the period under investigation in the absence of imports at 'dumped' export prices and whether the Australian industry taken as a whole could increase its prices in that market, for what reasons and to what extent. Such an assessment would need to take place at the point of competition, which in this case is the 'free-into-store' (FIS) level of trade, which may or may not be related to the export price at which the product under investigation enters into the commerce of Australia.

In this context, it also must be noted that it is common knowledge that to increase the price of a commodity product such as aluminium extrusions in any market (i.e. whether affected or unaffected by dumping) is, at best, difficult:

"Commodity businesses lack an important feature common to the extraordinary businesses ... They are unable to regularly raise prices and so are denied a valuable comparative advantage."¹

Whether and to what extent and in what circumstances could the Australian industry expect to be able to raise its prices for aluminium extrusions would need to be established. It cannot simply be assumed that in the absence of dumping, if occurring, that the Australian industry could automatically raise its prices and could do so to any extent it desired, especially without adding value to the commodity product for which customers would be prepared to pay an increased price in an open, competitive market.

Finally, an assessment of the market, the ability of the Australian industry to raise prices in that market and the minimum price necessary to prevent injury, all must be undertaken for the period under investigation or review. That is, it must be contemporaneous with the period the subject of investigation or review if it is to prevent injury being caused by dumping. Historical conditions in a market are irrelevant unless there is evidence that they continue to prevail during the period in question.

3. Has the Commission undertaken the required assessment?

Has the Commission undertaken the required assessment as indicated above? Clearly it appears not in relation to either Investigation or the Review, as evidenced by the SEFs.

Rather, in SEFs 540 and 541, the Commission referred to Investigation 362 and stated that:

¹ Roger Montgomery, 'Valuable', Ed 2nd, My 2 Cents Worth Publishing, Melbourne, 2010, p.62.

“The Commission considers that the circumstances outlined in REP 362 are similar to those in the investigation period here. In REP 362 the Commission considered that in a market unaffected by goods from Malaysia at dumped prices, it is reasonable to expect that the Australian industry would be able to achieve as a minimum, selling prices that reflected un-dumped import prices from Malaysia.

For the same reasons as those set out in REP 362, it is not practicable to determine a NIP based on a time when the Australian industry’s prices were not affected by dumping, because the goods have been found to be dumped by a number of different countries over a sustained and lengthy period of time.” (footnotes omitted)

The period of investigation in Investigation 362 was 1 July 2015 to 30 June 2016, some considerable time ago and obviously no longer current. In that investigation, the Anti-Dumping Commissioner (**Commissioner**) terminated the investigation into exports from Malaysia in June 2017 because such exports were not at ‘dumped’ prices by those Malaysian exporters who were investigated. The market at that time, therefore, was unaffected by ‘dumped’ exports from Malaysia, this being the majority if not all of the exports from Malaysia.

Further, as the export prices of aluminium extrusions exported from Malaysia at that time were ‘un-dumped’ export prices as determined by the Commissioner, then, as contended by the Commission in the above extract, *“it is reasonable to expect that the Australian industry would be able to achieve, as a minimum, selling prices that reflected”* those ‘un-dumped prices’.

Consequently, the issue presumably is was the Australian industry ‘able to achieve as a minimum, selling prices that reflected ‘un-dumped’ import prices from Malaysia’ at that time or following the termination of the investigation in relation to investigated Malaysian exporters and, if not, why not? This does not appear to have been examined although the Commission did preliminary find that all imports, including those from Malaysia, undercut the prices of the Australian industry. Presumably, therefore, the Australian industry did not achieve selling prices that reflected the ‘un-dumped’ export prices from Malaysia.

However, the Commission did find that in each year between 2016 and 2017, Capral was able to increase its prices for aluminium extrusions consistently with its increases in its cost to make and sell (**CTMS**). This is reflected in Capral’s Annual Reports for its financial years 2016 to 2018, which are available on its website. Clearly, there was no impediment to Capral increasing its selling prices in a market unaffected by ‘dumped’ exports from Malaysia during and following the termination of Investigation 362 by the Commissioner.

It may be argued that while prices could be increased in line with increases in CTMS, it was not possible to increase profit margins during this period presumably because of the presence of dumped imports in the market during this period. This would seem to be part of Capral’s contention in its Annual Reports and Investor Presentations for this period. However, why could it be expected that an industry could increase its profit margins in any market at the expense of its customers regardless of prevailing market conditions and regardless of the fact that what is being sold is a commodity product? Why would a customer agree to pay an increased profit margin for no apparent reason?

Further, Capral estimates that its share of the Australian aluminium extrusions market to have been 29% in 2016, falling to 26% in 2019, whereas the market share of imports fell from an estimated 40% to 34% over the same period. The balance, therefore, presumably was held by the other members of the Australian industry, giving the Australian industry an estimated total market share of over 60%. If, as contended by the Commission, Capral's economic performance was a reasonable indicator of the Australian industry's performance, then the Australian industry with a market share of approximately 60% or more was able to increase or should have been able to increase its prices during the period 2016 to 2018, notably being a period unaffected by 'dumped' exports from Malaysia. Presumably it did so consistent with Capral's economic performance during this period, that is, Capral increased its prices during this period.

The Commission also asserts in the above extract that it is not practicable to determine a non-injurious price because aluminium extrusions "*have been found to be dumped by a number of different countries over a sustained and lengthy period of time*". No details or explanation were provided for this statement. However, antidumping measures have been in place on exports of aluminium extrusions from China since 2010, from Vietnam since 2017, and from Thailand and Taiwan since 2018.

Given the existence of antidumping measures in place for a not inconsiderable period of time to remove and prevent the injurious effects of 'dumped' exports from these countries, what 'dumped' exports were affecting the Australian aluminium extrusion market during the injury period and/or the period of investigation or review? Why then are prices in that market not competitive market prices unaffected by dumping? It would be reasonable to conclude that the antidumping measures achieve their objective of removing the injurious effects of dumping from the market or, at least, there is no evidence to the contrary.

If it is being contended that these antidumping measures somehow have become ineffective, that is an issue that must be addressed in the context of those antidumping measures. It cannot be addressed by penalising exports from other countries for the shortcomings of existing antidumping measures. It is the responsibility of those imposing antidumping measures and those obtaining the benefit of such measures to ensure that they are and remain effective and achieve their intended purpose. However, no evidence has been advanced that the antidumping measures in force have somehow become ineffective.

Finally, to what extent are members of the Australian industry importing aluminium extrusions such as from, for example, Indonesia and/or Malaysia, and, if so, at what export prices? Clearly, if members of the Australian industry are importing aluminium extrusions, such as from Malaysia or Indonesia, they would not be importing them at export prices that cause injury to the Australian industry. Presumably identifying such export prices would assist in the determination of non-injurious prices.

It is evident from the foregoing that the Commission's methodology for determining a non-injurious price is flawed. It fails to assess whether the Australian aluminium extrusion market is affected or has been affected during the period under investigation and/or the injury period by exports of aluminium extrusions at 'dumped' export prices and, if so, to what extent. It also is evident that the Commission has failed to assess whether the Australian industry was able to increase its prices in that market during that period or

periods and, if it did so, to what extent, nor whether the Australian industry itself imported aluminium extrusions and, if it did, at what prices.

More fundamentally, it fails to assess what is the minimum price necessary to prevent injury caused by dumping. This is because it fails to address the 'cause' of the injury, that is, the magnitude of price undercutting attributed to 'dumped' export prices of the product under investigation that needs to be reduced to prevent the injury resulting from it. Absent such an assessment, it is not possible to determine a non-injurious price.

4. What non-injurious price does the Commission propose to recommend to the Minister?

On the basis of its flawed methodology, the Commission proposes to recommend to the Minister for the purposes of Investigations 540 and 541 a non-injurious price for both Investigations and for the Review as being an amount "*equal to the normal value in relation to each exporter ... found to be dumping*".

Effectively, therefore, the Commission is proposing to recommend to the Minister that the non-injurious price for each exporter found to be 'dumping' is its normal value or, in other words, its export price plus the interim dumping duty applicable to its exports at the full dumping margin. That is, it will be recommending that the full dumping margin be applied because that will eliminate 'dumping' and any injury caused thereby.

Whether that will eliminate the injury purportedly caused by 'dumping' is not known. It is not known because, as submitted, this has not been properly determined. It has not been demonstrated what has caused injury to the Australian industry or, for that matter, whether the Australian industry as a whole has incurred any injury.

In addition, it has not been demonstrated whether and, if so, to what extent export prices of the products under investigation if 'dumped' have flowed through to the FIS prices at which they compete with the prices of the Australian industry. For example, if the product under investigation is being exported at a 'dumped' export price with a 3.3% dumping margin, to what extent has that dumping margin flowed through, if at all, into the FIS price of that product enabling it to undercut the prices of the Australian industry and to what extent? It is that portion of the 'dumped' export price flowing through to the FIS price that necessarily must be addressed by the 'minimum price' so as to prevent the injury caused by that amount flowing through into the FIS prices.

Absent that analysis it is not known whether 'dumping' is causing injury to the Australian industry and to what extent and, if it is, what is the necessary minimum export price to prevent that injury.

While eliminating 'dumping' will eliminate any injury caused by 'dumping', that is not the issue. The purpose of the non-injurious price is whether an increase to a 'dumped' export price less than the full dumping margin will prevent the injury caused by the 'dumping'. That requires an assessment of how a 'dumped' export price causes injury at an FIS level of trade and to what extent. That causal link has not been demonstrated, if there is one.

Consequently, there is no basis for the Commission to recommend to the Minister that the non-injurious price be based on an exporter's normal value. It is not a finding of fact

supported by evidence that such a 'price' is the minimum price at which that exporter's export prices will not cause material injury to the Australian industry.

5. What alternate methodology is there for determining a non-injurious price?

In determining a non-injurious price, the Commission typically will calculate an 'unsuppressed selling price' or 'USP'.

An 'unsuppressed selling price' essentially consists of an amount equal to the Australian industry's cost to make and sell the product in question plus an amount for profit. It, therefore, is an amount that covers all of the Australian industry's cost to make and sell the product in question plus an amount for profit. The assumption is that the Australian industry could sell its products for this amount in the relevant market assuming that market were unaffected by dumping.

Several points need only be made in relation to 'unsuppressed selling prices', namely:

- (i) a USP despite its name is not a 'price'. It is an amount that has been calculated. It has not been subjected to competitive market conditions. It is not known whether a buyer in the market would be prepared to pay that price for the product in question in an open, competitive market and, if so, on what terms and conditions. Whatever it might be, it is not a 'price';
- (ii) to determine whether an USP could be achieved in a competitive market unaffected by dumping would require assessing to what extent that market had been affected by dumping and also identify and hold constant all other competitive market conditions in that market and, as set out earlier above, predict that that USP would be achievable in that market; and
- (iii) assuming that it was possible to obtain a USP in such a market, to what extent, if at all, and how has the Australian industry been precluded from selling its products at that 'price' by the 'dumped' product, if at all in the prevailing market conditions.

However, as the Commission is not proposing to recommend to the Minister a non-injurious price based on an unsuppressed selling price, it is not necessary to consider this further.

6. What should the Commission recommend to the Minister as being the non-injurious price?

As noted at the outset, a non-injurious price is the minimum price necessary to prevent the injury caused by dumping. The assumption in a non-injurious price is that an export price increased by an amount equal to the full dumping margin will eliminate 'dumping' and thereby any injury caused by dumping but a lesser increase to the export price than the full dumping margin may prevent that injury.

This obviously requires an assessment of whether and to what extent that 'dumped' export prices are causing injury. It is only through such an assessment is it possible to determine whether a lesser increase to an export price than the full dumping margin will suffice to remove or prevent the injury.

Because, as is here the case, the point of competition between the product under investigation and the product produced by the Australian industry is at the free-into-store

(FIS) level of trade, this assessment requires determining whether and to what extent the amount by which the export price is a 'dumped' price flows through to the FIS price of the product under investigation and because of that causes injury to the Australian industry and, if so, whether the extent of that injury is material.

However, such an assessment is not required in the present circumstances predominantly for two reasons, namely:

- (i) due to the non-participation of eight of the nine members of the Australian industry in the Investigations or in the Review, the Commission is precluded from making any finding of fact that the Australian industry as a whole has incurred material injury or, if it did, whether it was caused by the product under investigation at 'dumped' export prices; and
- (ii) the injury incurred by the only member that provided information and evidence relevant to the Investigations and the Review (i.e. Capral) was not because of allegedly 'dumped' export prices of the products under investigation but due to other economic factors,

as has been submitted in separate submissions in response to the SEFS. For these reasons, it has been submitted that the Investigations must be terminated, in which case there is no need to determine non-injurious prices for the Investigations. The position regarding the non-injurious price for the Review is addressed below.

If, on the other hand, the Investigations are not terminated, then it is submitted that the non-injurious prices for the Investigations should be the prevailing competitive market prices in the Australian aluminium extrusion market. This is because, as indicated earlier above, those prices are unaffected by 'dumping' or, at least, there is no evidence that they are and no evidence that those prices are causing injury to the Australian industry as a whole.

Obviously, such a 'price', being an FIS price would need to have deducted from it all costs and expenses incurred after export of the product under investigation from the country of export to arrive at a minimum export price. As noted earlier above, it is the minimum export price to prevent injury that must be determined and not some subsequent price in the Australian market such as an FIS price.

7. What is the position regarding the non-injurious price for the Review?

The position regarding the non-injurious price for the Review is different to in the Investigations, although the recommendation to the Minister that the Commission proposes making is the same. That is, the Commission proposes recommending to the Minister that the non-injurious price be an amount equal to the normal value.

The difference between the Review and the Investigations lies in the methodology. In this regard, the Commission stated in SEF 544 that:

"In the original investigation, in REP 362, the Commissioner considered that, in a market unaffected by goods from Malaysia at dumped and subsidised prices and from Vietnam at dumped prices, it is reasonable to expect that the Australian

industry would be able to achieve as a minimum, selling prices that reflected un-dumped and un-subsidised import prices from Malaysia and un-dumped import prices from Vietnam. It was on this basis that the Commission calculated the NIP for each exporter be a price equal to an un-dumped and un-subsidised price.

...

The Commission continues to consider that, in a market unaffected by goods from Malaysia at dumped and subsidised prices and from Vietnam at dumped prices, it is reasonable to expect that the Australian industry would be able to achieve as a minimum, selling prices that reflected un-dumped and un-subsidised import prices from Malaysia and un-dumped import prices from Vietnam.” (footnotes omitted)

The issue here is, again, whether and, if so, to what extent has the Australian market been affected by ‘dumped’ exports by ‘uncooperative exporters’ and/or by ‘all other exporters’. Uncooperative and all other exporters was the only category of ‘exporters’ in Malaysia remaining after termination of Investigation 362 in relation to investigated Malaysia exporters in June 2017.

Consequently, what volume of aluminium extrusions were exported to Australia from Malaysia by ‘uncooperative and all other exporters’ during the period of review or injury period in the Review at allegedly ‘dumped’ export prices that thereby affected the Australian aluminium extrusion market.²

According to the SEF there was only one uncooperative exporter. Further, no indication was given as to the volume of exports of the product under review by that ‘uncooperative exporter’ or by ‘all other exporters’. In the latter case, according to the Commission’s Dumping and Subsidy Manual, ‘all other exporters’ either are unknown to the Commission or do not exist and, as such, it is reasonable to conclude the volume of exports by that category of ‘exporters’ is zero.³

In such circumstances, a negligible volume of exports, whether at dumped or un-dumped prices, could not conceivably have an effect on the prices in a market either of themselves or if cumulated with those from Vietnam, assuming the latter to be ‘dumped’. Also, it must be noted, an assessment of whether and to what extent the Australian market for aluminium extrusions was affected, if at all, by exports from Malaysia by uncooperative exporters and all other exporters was not undertaken nor any assessment of whether such exports, if at dumped prices, were causing material injury to the Australian industry in circumstances where the Australian industry held a market share estimated to be in excess of 60%.

In any event, while a review under Division 5 of Part XVB of the *Customs Act 1901* is confined to a review of the ‘variable factors’, namely, export prices, normal values and non-injurious prices, the review of the non-injurious price necessarily requires an assessment of prevailing market conditions during the period under review, as well as whether exports of the product

² Note: it is assumed that any exports from Malaysia by ‘uncooperative and/or all other exporters’ were not imported by members of the Australian industry. No doubt the Commission, with its access to the Australian Border Force database can determine whether and to what extent this was the case.

³ Dumping and Subsidy Manual, Anti-Dumping Commission, November 2018, p.158

under review at 'dumped' export prices will cause or threaten to cause material injury to the Australian industry and, if so, to what extent. Absent such an assessment it is not possible to determine a non-injurious price.

Conditions prevailing in the Australian aluminium extrusion during the period of investigation in Investigation 362 would likely no longer exist in the period under review in the Review. Rather, different market conditions would exist. An assessment of what would constitute the minimum price to prevent material injury to the Australian industry in such changed conditions (i.e., what are the prevailing market conditions in the Australian aluminium extrusion market) would necessarily need to be undertaken as a precondition to determining a non-injurious price. As no such assessment has been undertaken in relation to the Review, it is not possible to determine a non-injurious price for the purposes of the Review.

Again the methodology for determining a non-injurious price is deficient. Consequently, there is no basis for the proposed recommendation of a non-injurious price equal to the normal value. It is not a non-injurious price. It is simply applying the full dumping margin without undertaking the necessary investigation to determine a non-injurious price for exports that either do not exist or whose volumes are *de minimis*. It is unclear what injury to the Australian industry is or would be prevented by applying the full dumping margin to exports that do not exist or whose volumes are *de minimis*.

Is not the non-injurious price in such circumstances a minimum price of zero as there is no injury being caused by such exports or, more correctly, an interim dumping duty rate of zero for exports of aluminium extrusions from Malaysia by uncooperative and all other exporters because such exports are not causing and have not been found to be causing material injury to the Australian industry as a whole during the review period? There is no injury being caused by such exports to be prevented.

7. Conclusion

In light of the foregoing, it is submitted, based on the Commission's preliminary findings and proposed recommendations to the Minister in relation to non-injurious prices, that:

- the Commission's methodology in determining non-injurious prices as set out in the SEFs is flawed and does not properly assess the minimum price necessary to prevent injury from being caused by the products under investigation at allegedly 'dumped' export prices;
- no non-injurious prices are required for the Investigations as they must be terminated but, if they are not, then the non-injurious prices should be the prevailing prices for aluminium extrusions in the Australian market being an open, competitive market unaffected by dumping less all costs and expenses incurred after exportation from the country of export to determine a 'minimum export price'; and
- the non-injurious price for the Review for exports from Malaysia by uncooperative exporters and all other exporters should be set at a 'Nil', that is, no non-injurious price and a interim dumping duty rate of 'zero' because no injury requiring prevention is being caused by such 'exports' due to their *de minimis* volumes.

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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