PUBLIC VERSION

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18 August 2020

The Director - Investigations 4
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

Review of aluminium extrusions exported from China – Review 543

Dear Director,

This submission is on behalf of PanAsia Aluminium (China) Limited (PanAsia China), OPAL (Macao Commercial Offshore) Limited (OPAL) and PanAsia Aluminium Pty Ltd (PA Australia), in response to the Anti-Dumping Commission's (the Commission) preliminary findings set out in Statement of Essential Facts 543 (SEF 543). In reviewing the preliminary calculations, it is apparent that the Commission has not applied its own stated policy consistently in calculating the deductive export price. In addition, a number of other errors have been identified which has resulted in PanAsia's dumping margin being overstated.

It is important to note that Panasia does not contest the Commission's preliminary finding that anti-dumping measures should be continued. This is despite the fact that substantial exports that are not subject to anti-dumping measures from Malaysia, Indonesia, the Middle East and China, exist in the Australian market at prices significantly below exports from China that are subject to anti-dumping measures.

It is also important to note the lack of cooperation to the expiry review from Australian industry members. As highlighted in SEF 543, there are nine local producers of like goods, and despite requesting information from each of them, completed responses were only provided by Capral Limited (Capral) and G. James Extrusion Co Pty Ltd (G.James).

The lack of cooperation by other local producers should be of particular concern to the Commission as it may be indicative of an agreed strategy amongst industry members, to present information only from those producers that are able to demonstrate injury. What is overlooked in the situation where other industry members do not provide necessary and relevant information is:

- an accurate picture of the economic condition of the Australian industry as a whole; and
- whether injury suffered by Capral and G.James was actually caused by the other Australian producers.

This is particularly relevant given the market knowledge that a large number of Capral's previous customers are now sourcing the majority of their extrusion needs from [redacted]. This includes [redacted], [redacted], and a number of other large customers.

There is an obvious sign that the industry may be engaging in strategic cooperation by the fact that other local producers have merely offered letters of support, but no actual sales or costing information. At the very least, the Commission should have requested total production and sales volumes over the injury analysis period to establish whether Capral continues to be the largest local producer, and if so, whether its share of local production is sufficient to be considered representative of the total Australian industry.

By simply allowing Australian industry members to opt out of cooperating with the inquiry, the Commission has allowed the industry to present injury and causal link arguments that may have otherwise been easily refuted by sales information available to the non-cooperating industry members. Due to the lack of cooperation by local producers, the preliminary material injury findings set out in SEF 543 are dubious at best and unsound at worst.

Deductive export price – Deduction of dumping and countervailing duties

On 2 October 2019, PA Australia lodged an application for a refund of interim dumping and countervailing duties paid on its imports of aluminium extrusions from China (DA0174). This application was made months prior to the initiation of expiry review 543 in February 2020. An additional duty assessment application was lodged on 6 April 2020 (DA0186).

The importation periods covered by the two duty assessments, and the review period for expiry review 543 substantially overlapped. DA0174 related to imports from 28 October 2018 to 27 April 2019, whilst DA0186 covered imports from 28 April 2019 to 27 October 2019. Therefore, the duty assessments covered ten months of the calendar 2019 review period for Review 543.

On 15 January 2020, the Commission advised via email correspondence:

> [redacted] *[Explanation of concurrent administration of expiry review and duty assessments]*

The Commission also informed Panasia that submissions to Review 543 would be considered and treated as submissions to the duty assessments given the commonality between the inquiries. Therefore, it was understood and accepted that the expiry review and duty assessments would be run concurrently to ensure the findings were consistent.

In SEF 543, DA0174 and DA0186, the Commission has determined deductive export prices pursuant to subsection 269TAB(1)(b) of the *Customs Act 1901* (the Act). It is important to note however that the duty assessment provisions (section 269X of the Act) require that interim duty **not** be deducted.

> (5A) Subsection (5B) of this section applies if the Commissioner proposes to ascertain provisionally, for the purposes of paragraph (5)(a) of this section, the export price of goods (under paragraph 269TAB(1)(b) or otherwise) as the difference between:
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> (a) the price at which the importer of the goods sold them, in the condition in which they were imported, to someone who was not an associate of the importer; and

(b) the prescribed deductions (as defined in subsection 269TAB(2)) relating to the goods.

(5B) In provisionally ascertaining the export price of goods as described in subsection (5A), the Commissioner must:

(a) take account of the following in relation to the goods:

(i) any change in normal value;
(ii) any change in costs incurred between importation and resale;
(iii) any movement in resale price which is duly reflected in subsequent selling prices; and

(b) despite paragraph 269TAB(1)(b), not deduct the amount of interim duty if the Commissioner has conclusive evidence of the things mentioned in subparagraphs (a)(i), (ii) and (iii) of this subsection.

In the circumstance then where an importer receives or is likely to receive a partial or full refund of the interim duties paid on its import consignments, this is undoubtedly relevant information that the Commission must have regard to in assessing arms-length transactions and determining the deductive export price for those same consignments within the context of a concurrent review.

This interpretation and understanding was confirmed by the Commission in the expiry review of power transformers from Taiwan (Review 504). In Report 504[1], the Commission expressed its policy interpretation in considering the similar circumstances relevant to the Taiwanese exporter Fortune Electric (Fortune):

> *Fortune lodged a duty assessment under section 269V, in regards to a number of exports the subject of this continuation inquiry. The deductions relevant to Fortune's export price were revised following the SEF, to take into account all relevant information available to the Commission. In this instance, the Commission considers that the likely final duties payable based on the preliminary calculations for the duty assessment should be taken into account in determining the export price for Fortune. This is considered necessary because the Minister is required to have regard to all the circumstances of the exportation (one of the circumstances being the duty assessment which is almost complete).*

The interpretation by the Commission outlined in Report 504 is both reasonable and correct. The dumping duties are considered 'interim' as they remain subject to a final assessment of duties if applied for within the statutory application timeframes. That is, interim duties cannot be treated as an 'actual' expense in those circumstances where an application for final assessment leads to, or is likely to lead to, a full or partial refund of the interim dumping duty.

Put simply, if an importer incurs and pays $20,000 in interim dumping duty, and the Commission establishes that the final amount payable was zero which results in a full refund of the interim dumping duty paid, the importer has in effect incurred no dumping duty expense. This is despite the fact that the importer may be refunded the duties some months after the importation.

[1] Report No. 504, footnote 33, page 37.

It is noted that a similar issue was raised on appeal with the Anti-Dumping Review Panel (ADRP). In its ground for review, the importer CITIC Australia (CITIC), challenged the Commission's decision to rely on the interim duty paid in assessing the profitability of its imported goods. CITIC argued '*that it is the final likely dumping duty that must be accounted for. CITIC notes that interim dumping duty is merely a security pending the outcome of an assessment and as such cannot be considered to be an actual cost.*'[2]

In considering the issue, the ADRP agreed with CITIC[3]:

> *At the time of the submission of the Commission's report and recommendations to the Minister, the Commission was aware that it was probable that CITIC would receive a refund of interim dumping duty. Given the circumstances, the Minister ought to have given greater weight to the likely impact of the outcome of the duty assessment application in exercising his discretionary powers under section 269TAA notwithstanding that the refunds may not be paid within a 12 month period.*

It is assumed that the ADRP's findings in November 2017 informed and influenced the Commission's policy interpretation outlined in Report 504.

In applying the correct and preferred interpretation to PA Australia's circumstances, PA Australia had applied for refund of duties prior to the initiation of Review 543, and as noted by the Commission in its correspondence of 15 January 2020, the duty assessment would be incorporated into the expiry review for reasons of efficiency and consistency. In addition, the Commission also noted the benefits from verification during the expiry review on PA Australia's subsequent duty assessment.

Therefore, there can be no reasonable justification for the Commission to now ignore and dismiss the probable findings of PA Australia's duty assessments in determining export prices within the context of Review 543. The findings are considered probable as the Commission has completed its verification and gathered all relevant information to finalise the calculations of the duty assessments. The Commission must now know the likely amount of dumping and countervailing duties that are payable by PA Australia, such that the excess amount paid is due to be refunded.

The amounts of duty payable and paid is relevant to the amount of duty to be deducted in calculating Panasia's export price. Subsection 269TAB(2)(a) specifies that the prescribed deductions include '*any duties of Customs or sales tax paid or payable on the goods*'. It is clear that the deduction for duty would be based on the amount of interim duty paid in circumstances where no application for a duty assessment was made, as it is likely that the interim duties would be final duties.

However, in the situation where a refund of duties was made by the importer and the Commission has undertaken the duty assessment and review concurrently to ensure consistency, the deduction is required to be based on the duty payable, as this would more accurately reflect the actual final duty expense incurred by the importer.

Applying this to Panasia's situation, it is noted that the largest item included in the deductive export price relates to interim dumping and countervailing duties, representing approximately [redacted]% of the verified selling prices by PA Australia. As required by subsection 269X(5B) of the Act,

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[2] ADRP Report No. 58, para 36, pages 10-11.

[3] Ibid., para 54, page 14.

those interim duties must not be deducted in provisionally ascertaining export prices determined pursuant to subsection 269TAB(1)(b) of the Act.

Applying the revised deductive export prices (excluding the deduction for interim duties) and the ascertained normal values from Review 543 to PA Australia's submitted duty assessment calculations, shows a substantially lower amount of dumping and countervailing duties payable. This leads to a significant likely refund of interim dumping and countervailing duties paid by PA Australia.

Therefore, in calculating the deductive export price for Review 543, the Commission must only have regard to the likely amount of duty payable, and not the full amount of interim duty paid which ignores the amount of interim duty likely to be refunded to PA Australia.

If the Commission simply ignores the likely refunded interim duties in calculating the deductive export price in Review 543, there is no scope for Panasia to meaningfully reduce its dumping margin. The only items in the deductive export price that are within its control are PA Australia's selling prices to its customers. To reduce its dumping margin then, PA Australia would have to adjust its selling prices to accommodate double the interim duties. This highlights the absurdity of the decision to ignore the probable refund of interim duties by PA Australia.

Finally, it is also worth noting that the Commission has encountered similar circumstances with respect to imports of [redacted] by [redacted]. It is noted that the Commission did not deduct interim duties in Expiry Review [redacted] and Review [redacted], as there were duty assessments underway at the time of those reviews which were likely to lead to a full or partial refund of duties.

In conclusion, it is apparent that the Commission has overlooked its own policy interpretation as outlined in Report 504 and confirmed by the ADRP in ADRP Report 58. The Commission must have regard to the circumstances and probable findings of PA Australia's duty assessments in deciding the amount of interim duty **payable** to be deducted for the purposes of calculating the deductive export price. As noted by the ADRP, in these circumstances, '*the Minister ought to have given greater weight to the likely impact of the outcome of the duty assessment application*' in assessing arms-length and as a consequence, the calculation of the deductive export prices.

Normal Value – credit adjustment PanAsia China to OPAL

The Commission has incorrectly made an upward adjustment for credit terms on sales made between PanAsia China and OPAL. No such adjustment is required as this reflects an inter-company expense that is already reflected in OPAL's export price. That is, the credit terms offered by OPAL to PA Australia encompass the credit terms offered by PanAsia China to OPAL. This allows for OPAL to make payment to PanAsia China upon receiving payment from PA Australia.

By contrast, the Commission's normal value calculation suggests that OPAL's export price to PA Australia reflects the [redacted] credit extended by PanAsia China, plus an [redacted] credit extended by OPAL to PA Australia. This is clearly not the case. The Commission's calculations confirm that the export price from OPAL to PA Australia included an [redacted]. The adjustment for export credit should only be based on this amount.

No further adjustment is required for export credit as no further credit is included in the export price.

Normal value – Export VAT adjustment

The Commission has erred by applying the export VAT adjustment after all OPAL related adjustments have been made. As the Commission is aware, the export VAT is applied on the free-on-board price of the exported goods, ex-China. In this case, the export VAT is incurred and paid by PanAsia China, and calculated on its FOB sales price to OPAL.

In selling the goods to Australia, OPAL does not incur any export VAT.

Therefore, in calculating the constructed normal value, the Commission is required to apply the export VAT adjustment after the direct selling expense adjustment, as this accurately reflects the FOB price that the export VAT is based upon.

Impact of imposing unreasonable duties

Panasia wishes to highlight the likely impact of imposing an unreasonable and excessive level of duties on its exports.

Firstly, Panasia China's exports are already subject to the highest duty rates amongst all cooperating exporters from all exporting countries. Despite this, Panasia continues to sell its products to Australian customers that are unable to source comparable products locally at competitive prices. This is due either to [redacted] or [redacted]. In both cases, local industry is either unwilling or uninterested in supplying these products.

As these downstream fabricators also form part of the broader Australian industry, these is a real prospect of these Australian businesses becoming even less competitive against imports of the comparable fabricated goods. As a consequence, there is direct impact of imposing excessive level of duties on the direct local jobs employed within these businesses.

Likewise, PA Australia currently employs approximately [redacted] local jobs and these are also at very real risk of being lost as the local importing entity simply cannot sustain the increase in its costs without a detrimental impact on sales. The duties to date have already impacted PA Australia's operations with its [redacted], as a result of the closure, [redacted] full-time positions unfortunately were made redundant.

Therefore, we urge the Commission to consider that the imposition of an excessive duty on Panasia China's exports would not benefit the local industry as our end-user customers in Australia would only be forced to seek import replacement options.

Yours sincerely

John Bracic