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By Email

Anti-Dumping Commissioner
Anti-Dumping Commission
Level 35
55 Collins Street
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Received 16 March 2021

Attention: Mr Paul Sexton
General Manager, Investigations

Dear Mr Sexton,

RE: Dumping investigations – exports of certain aluminium extrusions from Malaysia – Review No 544 – Deficiencies

I refer to the Anti-Dumping Commissioner's (**Commissioner**) Review No 544 (**Review 544**) of the anti-dumping measures applying to exports of certain aluminium extrusions to Australia from Malaysia (**Anti-Dumping Measures**). The following submissions are made on behalf of PMB Aluminium Sdn Bhd (**PMBA**) and its related entities in relation to Review 544.

Please note that some of the submissions contained herein are also relevant to Investigations 540 and 541.

1. Background

As you would be aware, I recently wrote to the Minister for Industry, Science and Technology (**Minister**) requesting the Minister to direct the Commissioner to undertake a review of the Anti-Dumping Measures as to whether the Anti-Dumping Measures are no longer warranted. I have not yet been advised by the Minister, nor on the Minister's behalf, whether the Minister has decided to issue such a direction.

Nevertheless, you have advised, in connection with my letter to the Minister, that my clients have the statutory right under Division 5 of Part XVB of the *Customs Act 1901* to apply to the Commissioner for a review of the Ant-Dumping Measures to determine whether those measures are no longer warranted and that there is no bar to their making such an application at this time.

This advice appears to have been motivated to clarify and confirm that the right to make that application has not been statute-barred. Presumably, therefore, a direction from the Minister for

the Commissioner to undertake such a review would be unnecessary if such an application were to be made and not rejected by the Commissioner. Your clarification and confirmation of this opportunity is appreciated. Consequently, the making of such an application is under active consideration by my clients.

However, in considering making such an application a number of issues have arisen that, it is considered, need to be drawn to the Commission's attention in the context of Review 544. They may also be relevant to Investigations 540 and 541. Hence the reason for this submission. These matters are addressed below.

2. Scope of the review of the Anti-Dumping Measures in Review 544

A review under Division 5 of Part XVB of the *Customs Act 1901* is a review of 'anti-dumping measures' as they affect an exporter or exporters generally because, as is here relevant, 'one or more of the variable factors relevant to the taking of the measures' may have changed: see s.269ZA(3) of the *Customs Act 1901*. Review 544 was initiated as a result of a direction given by the Minister under this provision for this purpose.

Importantly, it is not a review simply to determine whether the variable factors (i.e. export prices, normal values and/or the non-injurious price) have changed, although this is included in such a review. Rather, it is a review of the 'anti-dumping measures' themselves and as those measures 'affect' exporters.

This is the nature and scope of Review 544, namely, a review of the Anti-Dumping Measures as they affect exporters.

2.1 How do anti-dumping measures 'affect' exporters?

'Anti-dumping measures' are defined in s.269T(1) of the *Customs Act 1901* as the publication of a dumping duty notice pursuant to ss.269TG(1) and (2) of the *Customs Act 1901* in respect of the goods described in the notice. This is the 'anti-dumping measure' to be reviewed in a review under Division 5 of Part XVB of the *Customs Act 1901* initiated on the direction of the Minister and, consequently, in Review 544. That is, the Anti-Dumping Measures comprised in the dumping duty notice published by the then Minister on 27 June 2017 in Investigation 362 are the subject of Review 544.

How anti-dumping measures 'affect' exporters is as follows:

- as noted above, an 'anti-dumping measure' is defined in s. 269T(1) of the *Customs Act 1901* to consist of the publication of a dumping duty notice pursuant to s. 269TG(1) and (2) of the *Customs Act 1901*;
- the effect of a dumping duty notice, pursuant to s.8(3) of the *Customs Tariff (Anti-Dumping) Act 1975*, is to impose a dumping duty, being a special duty of customs, on imports of the goods described in the dumping duty notice at the rate(s) specified in the notice in respect of such goods. That is, anti-dumping measures (i.e. dumping duties) are imposed on the goods described in the dumping duty notice, as opposed to upon a particular entity, with importers of such goods being liable to pay the duty so imposed on the importation of those goods;

- the description of the goods is, or should, consist of three components, namely, (i) the description of the physical good being exported to Australia, (ii) the country or countries from which that good is being exported to Australia, and (iii) the exporter or exporters exporting that good from that country or those countries to Australia. All of these components must be present and, in their entirety, comprise the complete description of the good on which the dumping duties (i.e. anti-dumping measures) are imposed;
- while the special duty of customs may be calculated using a variety of methods having regard to s.8(5BB) of the *Customs Tariff (Anti-Dumping) Act 1975* and the *Customs Tariff (Anti-Dumping) Regulation 2013*, nevertheless the overriding obligation is that the rate at which the dumping duty is imposed cannot exceed the applicable full dumping margin and, if a lesser amount would prevent the injury occasioned by 'dumping', then that lesser amount is to be imposed (see s. 269TACA of the *Customs Act 1901* and Article 9.1 of the WTO Anti-Dumping Agreement);

In other words, an 'anti-dumping measure' is the imposition of a tax in the form of a special customs duty on imports of the good exported to Australia as described in the dumping duty notice at the rate(s) specified in the notice with the object (purpose) of preventing injury to a domestic injury.

The object of the imposition of the anti-dumping measures, therefore, is to either:

(i) dissuading exporters to export the good described in the dumping duty notice at export prices less than the ascertained export price, being the minimum export price necessary to prevent injury, as determined by the Minister; or

(ii) where the export price is less than the ascertained export price, require the payment of a dumping duty (i.e. tax) in an amount equal to the difference between the ascertained export price and the actual export price so as to uplift the latter price, being the 'price' at which the good enters the commerce of the importing country, to a 'non-injurious price' and thereby prevent injury to a domestic industry.

While the anti-dumping measure, that is, the dumping duty is payable by an importer of the good in question, the anti-dumping measure 'affects' an exporter by the exporter being named in the description of the goods in the dumping duty notice. That is, the anti-dumping measure is specifically and individually imposed on exports of the goods in question by that exporter.

The purpose of this is that by imposing anti-dumping measures on exports by an exporter so named in the description of the good in the dumping duty notice, the measure applies (i.e. 'affects') that exporter's exports and, thereby, dissuades that exporter from exporting at a 'dumped' export price so as to prevent injury to a domestic industry by 'dumping'. If the measures do not have that effect, then the tax is imposed (i.e. the dumping duty) to achieve that purpose (i.e. to prevent injury caused by 'dumping').

This is the nature of the Anti-Dumping Measures comprised in the dumping duty notice published by the then Minister on 27 June 2017 that are the subject of review in Review 544 and how they 'affect' exporters. Again, it is not simply an inquiry into whether variable factors have changed.

A change in one or more of the variable factors is relevant only if such change necessitates an alteration of the anti-dumping measures and, as set out in section 2.3 below, this requires consideration of whether and to what extent the measures require alteration to prevent injury to a domestic industry.

2.2 How should a 'non-injurious price' be determined?

Before considering whether and to what extent the Anti-Dumping Measures may require alteration, one of the variable factors comprised in anti-dumping measures is the 'non-injurious price' of goods exported to Australia requires consideration. It is fundamental to establishing the level of any anti-dumping measure.

The 'non-injurious price' is defined in s.269TACA of the *Customs Act 1901* as being the 'minimum price' necessary to prevent the injury being caused or threatened to a domestic industry in the importing country.

The reference to 'price' in this provision is a reference to the 'export price', being the 'price' at which goods are exported to Australia and that would be the price, upon the good entering the commerce of Australia, causing injury, if any, to a domestic industry. The reference to 'minimum price necessary to prevent injury' is a reference to the minimum 'export price' that will prevent injury to a domestic industry. That minimum price is any 'price', whether dumped or un-dumped, that will prevent injury to the Australian industry. If it exceeds the amount of the 'dumped' export price uplifted by an amount equal to the full dumping margin, then that uplifted export price is the level at which the anti-dumping measures are to be set to prevent injury from dumping. Conversely, if that 'price' is less than the amount of a 'dumped' export price uplifted by an amount equal to the full dumping margin, then that lesser 'price' is the level at which the anti-dumping measures are to be set to prevent injury to a domestic industry.

In other words, the anti-dumping measure is to be set at the minimum level that prevents injury to the domestic industry. That level cannot exceed the full dumping margin but, if a lesser level achieves that objective of preventing injury, then the anti-dumping measure must be set at that lesser level. This, obviously, requires an assessment of the injury being incurred by a domestic industry and its causes in order to determine whether and to what extent anti-dumping measures are required to prevent that injury that is attributable to being caused by 'dumping'. If this is not assessed for the relevant period, in this case the 'review period', then what is the minimum price necessary to prevent injury cannot be known because the cause of the injury and the extent of injury being caused and why is not being addressed.

However, in calculating a 'non-injurious price' for this purpose, the Commission's policy and practice is to calculate an 'unsuppressed selling price' (**USP**): see the Commission's Dumping and Subsidy Manual' and Section 6 of the Statement of Essential Facts in Review 544. Based on information in the Australian industry's accounting records, it is calculated by the Commission as an amount representing the Australian industry's cost to make and sell (**CTMS**) the product in question plus a notional amount for profit. The Commission contends that this amount is the 'price' that the Australian industry could reasonably 'expect' to obtain in a market unaffected by dumping.

However:

- an USP is not a 'price' but an artificially constructed amount based on the industry's CTMS plus an amount for profit;
- whether a purchaser in the relevant Australian market is willing to pay the USP for that product and, if so, on what terms is unknown as it is untested. In other words, there is no evidence to support that it being a 'price' that a purchaser is willing to pay or on what terms;

- whether the USP were to be obtained by the domestic industry in the relevant Australian market, this, of itself, would not necessarily prevent injury or be the 'minimum price necessary to prevent injury' because it may not address the causes of the injury through the 'effects' of dumping and it would not be known whether it could do so without an analysis of the 'effects' of dumping on the domestic industry;
- the Commission's calculation does not take into account the market conditions prevailing in the market in question affecting market prices, including the prices of competing products in that market, whether they be imported or locally produced products, or apply market tests such as the cross-elasticity of demand, nor employ any test such as or similar to the 'SSNIP' test; and
- it is an amount that the Commission is of the opinion, unsupported by evidence, that the Australian industry can 'expect' to obtain in the Australian market and, therefore, is merely speculative – conjecture unsupported by evidence.

In this context, it is important to note Article 3.5 of the WTO Anti-Dumping Agreement, which states that:

> "*It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing material injury within the meaning of this Agreement.*"

The Commission's USP calculations do not address this. That is, there is no nexus, supported by evidence, between the Commission's calculation of an USP and the 'effects of dumping causing injury'. That is, how a USP is the minimum export price that addresses the 'effects' of dumping causing injury, especially as it is not a 'price' but an artificial construct. The two are unrelated and, therefore, a USP is of limited relevance, if any, to a 'non-injurious price'. That is, is a USP simply an attempt to reverse engineer a 'non-injurious price' without analysing the causes of injury through the effects of dumping.

In addition, as a USP is seemingly invariably greater than 'dumped' export prices uplifted by the full dumping margin, this inevitably raises the question of what is the cause of injury if the minimum price necessary to prevent injury (i.e. a USP) exceeds 'dumped' export prices uplifted by the full dumping margin? To what extent, therefore, through the effects of dumping, is injury being so caused if measures based on the full dumping margin will not prevent injury, at least according to the USP but must be due to other economic factors as well? Is the source of injury, wholly or partially, something other than 'dumped' imports such as, for example, the un-competitiveness of the Australian industry due to high costs to make and sell?

As set out in the submission dated 22 January 2021 (Doc No 26) on the public file for Review 544, the causal analysis required to determine the 'effects' of dumping (e.g. price depression, price suppression, reduced sales volumes, etc.) must commence with an analysis of the extent by which export prices by being 'dumped' prices undercut the domestic industry's prices. That amount of price undercutting may be equal to the full dumping margin or a lesser amount. In addition, other imports of such products may be undercutting the domestic industry's prices to a greater or lesser extent than the alleged dumped product but, in either case, the 'effects' of such price undercutting cannot be wholly attributable to dumping.

Without such an analysis it is not known and cannot be known what is the 'minimum price necessary to prevent injury', that is, what is the minimum price necessary to prevent injury to the Australian industry being caused by the 'effects' of dumping.

Further, that analysis is required where, as is here, the prices of the locally produced and imported products by the Australian industry are undercutting one another as well as those imported by third parties whether subject to existing antidumping measures or not. Without analysing the 'effects' of such price undercutting on the economic performance of the Australian industry, it is not known and cannot be known whether and to what extent, through the 'effects' of dumping, the product subject to the review is causing injury during the review period and, therefore, what is the minimum price necessary to prevent that injury.

As is evident from the Statement of Essential Facts in Review 544, this analysis has yet to be undertaken.

2.3 What review of the Anti-Dumping Measures is required to be undertaken in Review 544?

In light of the foregoing, it is submitted that the review of the Anti-Dumping Measures' as they affect exports in Review 544 must consist of an assessment of not only whether the variable factors have changed from the time of imposition of the measures but also the 'effect' any such changes may have had relevant to the Anti-Dumping Measures and their consequent 'affect' on exporters.

As is evident from the Statement of Essential Facts published in Review 544, since the imposition of the Anti-Dumping Measures on 27 June 2017 there has been no assessment as to whether the Anti-Dumping Measures have achieved their intended purpose, that is prevented the injury caused or being caused by 'dumping' by exports of the goods in question. Consequently:

(i) it is not known whether in fact the Anti-Dumping Measures have been effective and, if they have or have not, why and to what extent;
(ii) it is not known whether the Anti-Dumping Measures continue to be effective or ineffective, including during the review period, and, if so, to what extent and why;
(iii) it is not known whether, if the Anti-Dumping Measures have not been effective or have ceased to be effective, why they were not effective or have ceased be effective or when they ceased to be effective or to what extent they are ineffective;
(iv) if the Anti-Dumping Measures have ceased be effective because any of the variable factors have changed, which changes to the variable factors rendered the Anti-Dumping Measures ineffective and when; and
(v) having regard to the abovementioned mentioned matters, if any of the variable factors have changed rendering the Anti-Dumping Measures ineffective what alteration to the Anti-Dumping Measures would render those measures effective and how.

Of course, the answers to these questions would need to be supported by evidence. As is evident in the Statement of Essential Facts in Review 544, such assessment has yet to be undertaken.

Absent such an assessment, there is no basis to alter the Anti-Dumping Measures. It would not be known whether alteration of the Anti-Dumping Measures would prevent the injury that the measures are intended to prevent, nor any evidence to support any such alteration. Presumably, a report to the Minister would be that there is no evidence supporting an alteration of the Anti-Dumping Measures and, therefore, none would be recommended.

In this regard, it also is relevant that in Investigations 540 and 541, the Commissioner made a preliminary affirmative determination under s.269TD of the *Customs Act 1901* and, pursuant to that determination, it was determined that it was necessary to take securities on imports of the goods in question to prevent injury while the Investigations continued. However, in the Statements of Essential Facts in those Investigations there was no mention of whether the taking of securities had their intended effect of preventing injury while the Investigations continued and, if not, why not? There seems to have been no assessment by the Commission into what effect, if any, the taking of securities had while the Investigations continued. Consequently, their effect, if any, is unknown, at least at the time of publication of the Statements of Essential Facts in those Investigations.

The effect of taking securities to prevent injury from a preliminary finding of 'dumping' would seem relevant not only to the Commissioner's recommendations to the Minister whether anti-dumping measures be imposed in those Investigations but also whether the Anti-Dumping Measures should be altered. Why recommend the imposition of antidumping measures or the alteration of the Anti-Dumping Measures if their effect is unknown or on what legal and evidentiary basis could such recommendations be made if their effect is unknown?

My clients' concern is that these issues have not been addressed to date in Review 544 as evidenced in the recently published Statement of Essential Facts. Also, to the extent relevant, do not appear to have been addressed in Investigations 540 and 541 as evidenced by the recently published Statement of Essential Facts in those Investigations.

These issues, no doubt, will be addressed by the Commissioner in the Commissioner's report and recommendations to the Minister in Review 544, which recommendations could include a recommendation to extend the review so as to permit the required inquires. Presumably, to the extent relevant, they also will be addressed in the Commissioner's report and recommendations to the Minister in Investigations 540 and 541.

3. Review of the Anti-Dumping Measures as 'no longer being warranted'

In my letter to the Minister requesting that the Minister direct the Commissioner to undertake a review of the Anti-Dumping Measures for their revocation if they are no longer warranted, the grounds for that request included, in summary, that:

- there was no evidence that the Australian industry as a whole[1] had incurred material injury because eight of the nine members of the Australian industry had not participated in any stage of Review 544 or in Investigations 540 or 541 or provided any information or evidence to this effect, as was disclosed in the Statements of Essential Facts;
- injury claimed to have been incurred by the sole member of the Australian industry that provided information and evidence to the Commission, Capral Limited (**Capral**), was because of other economic factors and not because of exports of the product in question at 'dumped' export prices, as has been submitted by interested parties in Investigations 540 and 541 and Review 544 in response to the Statements of Essential Facts, which has not been refuted by Capral; and

[1] Section 269T(4) of the *Customs Act 1901* defines an Australian industry for the purposes of Part XVB as consisting of all persons producing like goods in Australia.

- the Australian industry or, at least, the majority of members of that industry by their conduct, that is, by their non-participation in any stage of Investigations 540 and 541 and Review 544, have clearly indicated that they do not require the Anti-Dumping Measures and, consequently, they are 'no longer warranted' as determined by the industry itself.

In relation to the economic performance of Capral, in its most recent Investor Presentation for Financial Year 2020 (copy **attached**), it is evident that Capral's performance has markedly improved due largely to its increased sales volumes. This, according to the Investor Presentation, was because of improvement in the residential construction market and the completion of certain internal restructuring with its associated costs. In other words, Capral's economic performance since 2016 is reflective of the normal 'ebb and flow of business', nothing more. The **attached** Investor Presentation simply supports that fact, as well as submissions and information previously provided by interested parties in Investigations 540 and 541 and Review 544 on this issue.

Given the matter raised in sections this submission, the matters raised in my letter to the Minister and the economic impost that the Anti-Dumping Measures would be having on all stakeholders, including end-users of aluminium extrusions, as well to the economy in general, it would seem in the interests of all stakeholders, including the Australian industry as a whole, for it to be determined whether the Anti-Dumping Measures are no longer required and, if not, that they be revoked.

As the Minister with Ministerial responsibility for Australian industry, presumably the Minister would be concerned as, no doubt would be the Commissioner, to know whether the Anti-Dumping Measures are no longer required, especially in these economically challenging times. Hence the appropriateness for the Minister to direct the Commissioners to undertake such a review instead of possibly relying on an 'affected party' to make an application for such a review.

It is requested, therefore, that the Commission, or the Commissioner, consider recommending to the Minister that such a direction be given in the interests of all stakeholders.

4. Application of the Anti-Dumping Measures to 'uncooperative and all other exporters' – Part I

Further to the foregoing, in considering whether to make an application pursuant to s.269ZA(1) of the *Customs Act 1901* for a review of as to whether the Anti-Dumping Measures are no longer warranted as they may affect exports of aluminium extrusions by PMBA from Malaysia, the question inevitably arises as to whether the Anti-Dumping Measures do or would apply to such exports by PMBA?

The reason for this question is that at the time the Anti-Dumping Measures were imposed, that is, on 27 June 2017, PMBA did not exist and would not exist until sometime thereafter, let alone commence to produce aluminium extrusions in Malaysia and, subsequently, commence to export such aluminium extrusions to Australia. Consequently, how could antidumping measures be imposed on exports by an entity that did not exist at the time the measures were imposed and, consequently, had not exported anything to the importing country at that time and, further, because nothing had been exported, no injury could thereby have been caused or threatened to a domestic industry in the importing country?

The question, therefore, is to what exports does the category of 'uncooperative and all other exporters' in the Anti-Dumping Measures apply?

Before considering this further, it is important to note that antidumping measures, being a special duty of customs, are imposed on the importation of the goods. Unlike other taxes, they are not imposed upon a particular entity but are imposed upon the goods themselves, that is, upon the goods in question on their importation. They are a charge upon the imported goods that remains with the goods until discharged by payment of the relevant duty. Each successive owner of the goods is jointly and severally liable to pay that duty until it is paid.

The point here being made is that in the case of antidumping measures, they are imposed specifically and individually on the goods described in the dumping duty notice published pursuant to ss. 269TG(1) and (2) of the *Customs Act 1901* as discussed earlier above. That is, as noted earlier above, an accurate description of the product under investigation must specify (i) the physical good(s) that has/have actually been exported to the importing country, (i) the country or countries from which that good is/are being exported from and (iii) the exporter or exporters exporting those goods from that country or those countries. It is upon those goods so described that the anti-dumping measures (i.e. dumping duties) are specifically and individually imposed.

Any description of the product under investigation that goes beyond what product has actually been exported or likely to be exported, from where and by whom is, at best, speculative. This is because such a description goes beyond what has in fact been exported and what is likely to be exported to the importing country in the future by whom and when and, consequently, cannot be causing or threatening to cause injury. It, therefore, offends against the precision required of laws imposing taxes.

Further, a lack of precision in the description of the product under investigation creates inherent uncertainty. For example, simply referring to 'exporters' in the description raises the question of is it a reference to 'exporters' exporting the product in question at the time of imposition of measures and, therefore can be identified as such. Or does it include entities that at some indefinite future time may commence to export the product in question at export prices that may or may not be 'dumped' and that may or may not cause injury even if they are being exported at 'dumped' export prices? Clearly there is uncertainty.

In accordance with the ordinary principles for the interpretation of taxation laws, such uncertainty is to be construed in favour of the taxpayer: *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 and *Anderson v Commissioner of Taxes (Vic)* [1937] HCA 24; (1937) CLR 233. This is because the taxpayer was not responsible for the drafting of the law imposing the tax. In any event, the imposition of a tax on this basis would necessarily be invalid because the factual and evidentiary basis for imposing the tax, that is, that is the matters of which the Minister is required to be satisfied of in order to publish a dumping duty notice would not and could not exist.

Further, why would or should the onus be on exporter who has not previously exported but commences to export after the imposition of the measures to establish that its exports are not at 'dumped' export prices and because of that not causing injury trough the effects of 'dumping'? If such exports are adversely affecting a domestic industry for this reason, then no doubt that industry can avail itself of the remedy afforded by Division 2 of Part XVB of the *Customs Act 1901* and apply to the Commissioner for the imposition of antidumping measures. There is a readily available remedy to the domestic industry in such circumstances. Another reason for a strict approach to the interpretation and application of the Anti-Dumping Measures. Further, that exporter is not, or

should not be, in any different position to any exporter of like goods from another country in respect of which anti-dumping measures have not been imposed. If there is a difference, what is it?

Of relevance here is that the Anti-Dumping Measures purport to impose measures on exports of the goods in question from Malaysia by a category of exporters, namely, 'uncooperative and all other exporters'. It is submitted that this category of 'exporters' may be subdivided into two sub-categories, namely:

(i) uncooperative exporters and other exporters who exported the product in question during the period of investigation or, at least, prior to the imposition of the antidumping measures[2]; and
(ii) other 'exporters' who did not export the product in question at any time prior to the imposition of the antidumping measures either because they did not exist at that time or for some other reason.

This latter sub-category is recognised by the Commission in its Dumping and Subsidy Manual where, at page 158, it refers to 'all other exporters' being 'exporters' who are or were not known to the Commission or who did not exist. In other words, it consists of entities that may or may not exist but, in any event, had not exported the product in question during the investigation period or, presumably, at the time the Commissioner reported to the Minister and the Minister imposed the antidumping measures. How factually could such entities be 'exporters' if they did not exist and/or not exported anything to Australia let alone the product in question?[3]

At Section 5.4 of Report 362 in the original investigation, the Commissioner identified four exporters in Malaysia and Vietnam who it was determined did not cooperate in the investigation and, therefore, were 'uncooperative exporters' as defined in s.269T(1) of the *Customs Act 1901*. Obviously, these 'exporters' would fall within the first sub-category mentioned above.

In addition, the Commissioner stated in that Section of Report 362 that all "*exporters who did not provide a response to the exporter questionnaire*" were also determined to be 'uncooperative exporters as defined in s.269T(1) of the *Customs Act 1901* and as 'non-cooperative entities' pursuant to s.269TAACA of the *Customs Act 1901*. Of course, the reference in this statement to 'exporters' could only be to entities that had actually exported the product in question to Australia during the investigation period. If they had not, then they could not possibly be an 'exporter', that is, an entity that had 'exported' product to Australia. An entity could only complete an exporter if it was an 'exporter' at the relevant time and had 'exported' the product in question during the period under investigation. Obviously, this did not apply to entities that did not exist and/or who had not

[2] Arguably the definition of 'new exporter' refers to an exporter who did not export during the investigation period but did export after the investigation period and before the imposition of the antidumping measures. That entity could be identified as an 'exporter' at the time of imposition of the measures as could its exports to Australia, whereas an entity that commenced to export only after the imposition of the measures would not be an 'exporter' at the time of imposition of the measures and would not be known at that time whether it would commence to export after the imposition of the measures. This would be no different to any other entity that commenced to export the product in question from any other country at any time after the imposition of the measures.

[3] It perhaps should be noted that pursuant to the statutory definitions of 'uncooperative exporters' and 'residual exporters', 'all other exporters' arguably would fall within the definition of 'residual exporters' because, not being exporters during the relevant investigation period, they would fall within the definition of 'residual exporters'.

exported the product in question to Australia during the investigation period. Therefore, these entities (i.e. entities that had exported the product in question during the investigation period) also would fall with the first sub-category mentioned above.

This would indicate that no entities fell within the second sub-category of 'exporters' or, at least, none identified by the Commissioner in Report 362. There does not seem to have been a discussion or consideration of entities falling within this second subcategory in Report 362. Presumably, this may have been because there none.

Another way to consider this issue is by addressing who, based on the available evidence at the time of imposition of the measures, were 'exporters'. Only actual exports from the country in question at 'dumped' export prices by an 'exporter' could cause or threaten to cause injury to a domestic industry. Obviously, such exports would be by an 'exporter' in existence at that time and, presumably, known to the Commission. Evidence of such exports by those exporters would be available from, amongst other sources, Australian Border Force's import data base, to which the Commission has access. That data would identify, directly or indirectly, all entities that had exported the product under investigation during the relevant periods. In other words, the available evidence would identify all 'exporters' of the product under investigation during the relevant period.

Absent evidence identifying other entities as exporting the product under investigation during the relevant period, then such other 'exporters' did not exist, at least not for the purposes of the dumping investigation. Any determination of a dumping margin for such entities must necessarily be a fiction because there are no exports by such entities because they do not exist, at least not for the purposes of the dumping investigation and the best available information supported by evidence attests to this fact. Further, there is no finding of fact supported by evidence in Report 362 to indicate otherwise.

What evidence is there that such entities will come into existence in the exporting country at some future point in time, establish manufacturing operations and commence at some indefinite time in the future after the imposition of the measures at 'dumped' export prices and because of that cause injury to a domestic industry. That is mere speculation. Also, what distinguishes such entities from entities in other countries that commence to export the product in question. Why are they treated differently? Is not the same remedy available to the domestic industry in either case?

It follows, therefore, that the category of 'uncooperative and all other exporters' in the Anti-Dumping Measures applies and can only apply:

(a) to those entities that were determined to be 'uncooperative exporters', that is, entities that had actually exported aluminium extrusions to Australia from Malaysia and Vietnam during the investigation period and who were determined to be 'uncooperative exporters' in accordance with the relevant statutory provisions; and
(b) to those entities who exported after the investigation period but before the imposition of the measures and, therefore, have actually exported the product in question before the imposition of the measures, assuming of course that all other criteria were met in order to impose anti-dumping measures on such exporters.

Consequently, the Anti-Dumping Measures do not apply to entities that did not export the product in question during the investigation period in Investigation 362 or at any time prior to the imposition of those measures. Such entities would not be 'exporters' within the description of goods in the

dumping duty notice as they did not exist at that time and could not reasonably have been foreseen as coming into existence at some future, indefinite point in time. Accordingly, exports by such entities, if and when they came into existence and commenced to export the goods in question to Australia would not be subject to the Anti-Dumping Measures as such exports would not fall within the description of the goods on which the Anti-Dumping Measures were imposed.

Alternatively, if it were contended that the Anti-Dumping Measures did apply to exports of such entities, then, of course, the Anti-Dumping Measures would necessarily be invalid at least to that extent, because the criteria enabling the Minister to impose anti-dumping measures (i.e. publish a dumping duty notice) in respect of such exports did not exist at the time of imposition of the Anti-Dumping Measures or, at least, none was referred to in Report 362.

On this basis, it is submitted that the Anti-Dumping Measures do not apply to aluminium extrusions if and when exported from Malaysia by 'all other exporters', which would include PMBA.

4. Application of the Anti-Dumping Measures to PMBA – Part II

In the Statement of Essential Facts for Review 544, the Commission considered that PMBA was a 'new exporter', that is, an 'exporter who did not export the goods the subject of an application for the imposition of antidumping measures at any time during the investigation period': s.269T(1) of the *Customs Act 1901*. That is correct.

The assumption here is that the Anti-Dumping Measures would apply to exports of aluminium extrusions if and when PMBA commenced to export aluminium extrusions to Australia from Malaysia, being a time subsequent to the imposition of the Anti-Dumping Measures. The issue is whether this assumption is correct, especially in light of the preceding section of this submission. It is submitted that that assumption is not correct for the reasons set out previously in this submission and for the following reasons.

Clearly, at the time the Anti-Dumping Measures were imposed the then Minister could not have been satisfied that at some indefinite future time PMBA would come into existence, establish or acquire an aluminium extrusion manufacturing plant in Malaysia and commence to produce aluminium extrusions in that plant and then, commence to export such aluminium extrusions to Australia. Further, the then Minister could not have been satisfied or foreseen that such exports, if and when they occurred, would be at 'dumped' export prices and because of that cause material injury to an Australian industry. There was no evidence supporting such findings of fact. Such findings of fact would have been contrary to s269TAE(2AA) of the *Customs Act 1901*, which requires findings of material injury caused by dumping 'to be based on facts and not merely on allegations, conjecture or remote possibilities': see also Article 3.7 of the WTO Anti-Dumping Agreement.

On what basis and on what evidence, therefore, could the then Minister be satisfied of the matters he was required to be satisfied of pursuant to ss.269TG(1) and (2) of the *Customs Act 1901* in order to publish a dumping duty notice to impose antidumping measures on exports of an entity, namely, PMBA, that did not exist at that time and, consequently, had not and could not have exported any goods to Australia at that time and, because of that, could not have caused or threatened material injury to any Australian industry? Nor could any of this have been reasonably foreseen that this would occur at some indefinite time in the future at that time of imposition of the Anti-Dumping Measures.

Nevertheless, at Section 12 of Report 362 the Commissioner recommended that the Minister declare that:

> "*in accordance with subsection 269TG(2), by public notice, that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia by the category of 'uncooperative and all other exporters' from Malaysia after the date of publication of the notice*".

In reviewing the Commissioner's Report 362 to the then Minister, it is unclear on what basis the Commissioner could have recommended to the Minister that he be satisfied of the matters stipulated in ss.269TG(2) of the *Customs Act 1901* in order to publish a dumping duty notice making the above declaration in relation to exports by exporters who did not exist and whose future existence and exports were unknown at that time

It is submitted, therefore, that such declaration did not apply to future exports of exporters who did not exist at the time of the declaration or, alternatively, that the declaration is void ab initio because the then Minister could not have been satisfied on the matters required to be satisfied of supported by evidence in order to make such a declaration.

Further, it is doubtful that t would be contended that the then Minister could also make such a declaration in relation to future exports by entities in other countries that did not exist nor have exported the product in question to Australia at the time the Anti-Dumping Measures were imposed. If there is a difference, what is it?

Nevertheless, the following statement made in the dumping duty notice published by the then Minister is noted:

> "*… 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, **because of that, material injury** to an Australian industry producing like goods **has been caused***". (emphasis added)

This reflects the Commissioner's recommendation at Section 12 of Report 362 that the then Minister be satisfied that:

> "*in accordance with subsection 269TG(2) the amount of the export price of the goods that has already been exported to Australia by the category of 'uncooperative and all other exporters' and all exporters from Vietnam is less than the amount of the normal value of those goods, and **the amount of the export price of like goods that may be exported to Australia from Malaysia and Vietnam in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused***" (at page 110) (emphasis added)

Clearly this is speculative based on conjecture and remote possibility and contrary to s,269TAE(2AA) of the *Customs Act 1901* and Article 3.7 of the WTO Anti-Dumping Agreement. In any event, future events which may or may not occur cannot have caused past events.

It, therefore, is unclear whether the Anti-Dumping Measures apply or would apply to PMBA and its exports of aluminium extrusions from Malaysia. If they do not, then there would be no need to apply for a review for consideration of whether the Anti-Dumping Measures are no longer

warranted in relation to PMBA and, if so, should be revoked in so far as they affect PMBA. In addition, the application for the accelerated review made by PMBA would be unnecessary and consideration could be given to its withdrawal.

In this regard, in his report to the Commissioner in Review 544 regarding whether and to what extent, if any, alterations are required to the Anti-Dumping Measures, the Commissioner should clarify to which exports by the category of 'uncooperative and all other exporters' that the Anti-Dumping Measures apply. That is, specifically whether exports by entities that did not exist and/or did not export to Australia the goods in question prior to the imposition of the Anti-Dumping Measures fall within that category and, if so, why so as to enable the Minister to make an informed decision in relation to any alteration to the Anti-Dumping Measures as they affect such 'exporters'.

5. Conclusion

In light of the foregoing, it is submitted that:

(a) the subject matter of Review 544 is the Anti-Dumping Measures as they 'affect' exporters and this requires an assessment of whether and to what extent the Anti-Dumping Measures require alteration if any, to prevent injury caused by the 'effects' of dumping to ensure their effectiveness for this purpose due to a change in one or more variable factors affecting the effectiveness of the measures having regard to conditions prevailing during the review period; and
(b) the report by the Commissioner to the Minister in Review 544 clarify to which exports by the category of 'uncooperative and all other exporters' apply and why so as to enable the Minister to make an informed decision in relation to any alteration to the Anti-Dumping Measures.

In addition, as noted earlier above and for the reasons there set out, consideration be given to recommending to the Minister that the Minister direct the Commissioner to undertake a review of the Anti-Dumping Measures as to whether they are no longer warranted and, if so, should be revoked in relation to exporters generally.

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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