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Mr Michael Kenna
Case Manager, Operations 3
International Trade Remedies Branch
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Mr Kenna

Public File

Trade Measures Inquiry No. 176 - Structural Timber – Comments re Submissions on behalf of Stora Enso Timber Australia Pty Ltd dated 2, 11 & 15 November 2011

1.0 Introduction

I refer to the submissions made on behalf of Stora Enso Timber Australia Pty Ltd ("Stora Enso") dated 2, 11 and 15 November 2011. The applicant companies[1] consider it appropriate to comment on certain matters contained in the submissions and reserve the right to comment further as appropriate.

2.0 Submission of 2 November 2011

Clayton Utz has on behalf of Stora Enso sought to challenge the initiation of the investigation into structural timber exported from Austria, Canada, the Czech Republic, Estonia, Germany, Lithuania, Sweden and the USA. It has been suggested that the Australian industry's application was deficient in specific areas.

The decision to proceed to formal investigation is a decision of the CEO of the Australian Customs and Border Protection Service ("Customs and Border Protection"). S.269TC(1) of the Customs Act provides the powers of the CEO to make a decision in respect of goods the subject of an application received by Customs and Border Protection. In particular, s.269TC(1)(c) provides that where there appear to be reasonable grounds for the publication of a dumping duty notice in respect of the goods the subject of the application, the CEO will decide not to reject the application and proceed to a formal investigation of the allegations contained in the application.

In the current circumstances, the delegate of the CEO was satisfied that reasonable grounds existed for the publication of a dumping duty notice in respect of structural timber exported from the nominated countries. Arguments presented on behalf of Stora Enso do not demonstrate that the CEO of Customs and Border Protection could not be satisfied that reasonable grounds existed for the publication of a dumping duty notice.

In particular the Stora Enso submission to challenge the legitimacy of the application by focusing on material injury to the Australian industry and what Stora Enso perceives as a lack of causal link.

[1] CHH Woodproducts Australia (a subsidiary of BSG), Hyne and Sons, and Gunns Timber.

The applicant companies consider that the Stora Enso submission is a targeted pre-emptive attempt to detract from the key factors relevant to Customs and Border Protection's assessment of material injury and causal link in the structural timber investigation. The applicants anticipate that further attempts will be made to "cloud" the true impact of the dumped exports on the performance of the Australian industry and to obscure the legitimate scope of Customs and Border Protection's assessment.

For example, the Stora Enso submission improperly suggests that that a causality issues arises if Customs and Border Protection considers evidence prior to the period of investigation. Not only is this incorrect as a matter of logic, it disregards s269T(2AD) of the Customs Act. Likewise, while the applicants identified material injury as commencing in 2009/10, this does not suggest any lack of causality between material injury and dumping as calculated during the investigation period.

The Stora Enso submission is intended to divert attention from facts which demonstrate a 20 per cent increase in exports from the nominated countries in 2010/11.

Since 2007/08, exports from the eight countries have increased by 45 per cent in volume terms, contrasted with an almost 20 per cent decline in the Australian industry's sales volumes of the goods under consideration ("GUC"). In 2008/09, the year of the global financial crisis, the Australian industry's sales volumes contracted by approximately 10 per cent, however, the imports from the nominated countries increased by more than 20 per cent.

The Stora Enso submission has not provided any evidence or commentary on the dumping of structural timber exports from its associated companies in Austria, the Czech Republic, Estonia, Lithuania and Sweden during the investigation period.

The Applicants reject the suggestion that the local industry offer is based on poor service and inferior quality product. To the contrary, the Applicants have consistently been recognized for providing superior service by major industry customers and groups (e.g. member voting by Mitre 10 and Danks).

3.0 Submission of 11 November 2011

It is argued on behalf of Stora Enso in the Czech Republic that due to an absence of sales of like goods on the Czech Republic domestic market, Customs and Border Protection must not include a level of profit in a constructed normal value under s.269TAC(2)(c)(ii).

Stora Enso's assertions are inconsistent with the requirements in Customs Regulation 181A and misrepresent both WTO and Customs and Border Protection decisions in respect of profits calculated by reference to the same general category of goods.

The submission claims that the domestic sales of *damaged goods* are not like goods, and that these sales were not profitable and nor were any sales of those goods sold in sufficient quantity.

The applicant companies understand that the Czech Republic Exporter visit report has not been finalized (see Stora Enso submission of 15 November) and therefore it cannot conclude as to whether there is an absence of domestic sales of like goods.

Notwithstanding, it is appropriate to comment on the assertions made on behalf of Stora Enso concerning a constructed normal value and the inclusion of profit.

Stora Enso asserts that, in circumstances where a constructed normal value is calculated, an amount for profit cannot be included due to the alleged non-application of Customs Regulation 181A in these circumstances. The applicants submit that there are good grounds to conclude that an amount for profit should be included in any constructed normal value calculation.

Customs Regulation 181A provides guidance.

Customs Regulation 181A states:

> *(1) For subsection 269TAC(5B) of the Act, this regulation sets out:*
>
> *(a) The manner in which the Minister must, for subparagraph 269TAC(2)(c)(ii) or (4)(e)(ii) of the Act, work out an amount (the amount) to be the profit on the sale of goods; and*
> *(b) Factors that the Minister must take account of for that purpose.*
>
> *(2) For sub regulation (1), the Minister must, if reasonably possible, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.*
> *(3) If the Minister is unable to work out the amount by using the data mentioned in sub regulation (2), the Minister must work out the amount:*
>
> *(a) By identifying the actual amounts realized by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or*
> *(b) By identifying the weighted average of the actual amounts realized by other exporters or producers from the sale of like goods in the domestic market of the country of export; or*
> *(c) Subject to sub regulation (4), by using any other reasonable method having regard to all relevant information.*
>
> *(4) If:*
>
> *(a) The Minister uses a method of calculation under paragraph 3(c) to work out an amount representing the profit of the exporter or producer of the goods; and*
> *(b) The amount worked out exceeds the amount of profit normally realized by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export:*
>
> *the Minister must disregard the amount by which the amount worked out exceeds the amount of profit normally realized by other exporters or producers.*
>
> *(5) For this regulation, the Minister may disregard any information which he or she considers to be unreliable.*
>
> *(6) A word or expression that is defined in Part XVB of the Act and use din this regulation has the meaning given by that Part.*

Relevantly, Regulation 181A (3) provides that a level of profit may be determined by identifying the actual amounts realized by the exporter ***from the same general category of goods in the domestic market of the country of export*** (emphasis added).

The applicants anticipate that Customs and Border Protection has obtained information on other timber products sourced from the same raw materials made at Stora Enso's Plana and Zdirec Mills and sold domestically in the Czech Republic. The applicants consider that timber produced by Stora Enso at its mills in the Czech Republic is timber that is of the same general category of goods to structural timber that is also produced by Stora Enso and sold for export. Timber manufactured by Stora Enso and sold in the Czech republic – whilst not being identical to structural timber exported to Australia – is, nevertheless timber produced by the same sawmill and is of the same general category of goods and is consumed domestically in the Czech Republic.

Stora Enso manufactures and sells structural timber in the Czech Republic (from either the Plana or Zdirec mill, or both) in accordance with European Standards. The European Standards to which timber is produced by Stora Enso may not be of the same specifications as goods exported to Australia based on the Building Code of Australia, however, the timber produced and sold

domestically can be considered to be intended for the same *general application and end-uses* as the product exported to Australia.

In its submission, Stora Enso cites the WTO Panel in *Thailand – Anti- Dumping Duties on Angles, Shapes and Sections of Iron*[2]. The submission seeks to imply that unless a product is practically identical to the like good it is inappropriate to consider profits associated with that product. Such an interpretation runs counter to the terminology used in both the WTO Agreement and in Regulation 181A which refer to 'the same general category of goods'. Furthermore, the implication of the Stora Enso submission does not reflect the facts of the Panel decision. Poland argued that Thailand's calculations needed to include at least, at the narrowest level, products contained in HS7216. Thailand had considered a narrower set of products. The Panel accepted that Thailand's use of the narrower category was permitted under the Anti-Dumping Agreement. It did not conclude that unless there was a practically identical product that it was impermissible to consider any other product as falling within the 'same general category of products'.

Stora Enso also asserts that the situation in respect of its Czech Republic mills stands in 'an identical position to that of the exporter the subject of *Termination Report No. 173(c)*.' An examination of that decision indicates significant factual differences and does not imply any general practice on the part of Customs and Border Protection to not include a profit calculation in considering constructed normal value.

In that investigation, Customs and Border Protection did confirm there was an absence of domestic sales of like goods on the Indonesian market. However, importantly, Customs and Border Protection did not have information from the Indonesian exporter concerning profit achieved on ***goods from the same general category of goods*** sold domestically by the Indonesian exporter. If it had that information a profit figure would have been included. Furthermore, it is clear that Customs and Border Protection's view was that a relatively wide category of goods may be 'in the same general category of goods'. The decision refers to a general category of fruit and vegetable processors in Indonesia.

The applicant companies submit that it would be totally inappropriate to consider timber derivative product manufactured by Stora Enso and sold in the Czech Republic as not of the same general category of goods exported to Australia for the purposes of determining a profit margin to apply to a constructed normal value.

Stora Enso's Czech Republic P&L Statements included in its Financial Accounts[3] detail an operating profit in 2010 (for both Plana and Zdirec Mills). It is the applicant companies' view that domestic sales of timber that are produced and sold by Stora Enso in the Czech Republic are profitable and that the timber produced at the mills can be considered to be of the same general category of goods as structural timber exported to Australia.

The level of profit achieved by Stora Enso on timbers produced and sold domestically that have formed part of the verification process undertaken by Customs and Border Protection can be applied to the constructed normal values for structural timber exported by Stora Enso to Australia under s.269TAC(2)(c)(ii) and in accordance with the requirements of Regulation 181A.

Even if, which it is assumed is not the case, Customs and Border Protection does not have information regarding profit achieved in the same general category of goods in the Czech Republic the Applicants, nevertheless, consider that it would be appropriate to include a value for profit in accordance with Regulation 181A(3)(c).

[2] WT/DS122/R.
[3] Refer Stora Enso Plana & Zdirec Appendix A_4_3c.

4.0 Submission of 15 November 2011

Stora Enso has instructed its representative that it has been notified by Customs and Border Protection that Stora Enso will not be provided with a draft Exporter Visit Report and dumping margin calculation until Customs and Border Protection has completed all of its verifications in other countries.

It is suggested that Stora Enso will be disadvantaged by Customs and Border Protection's to delay the forwarding of the draft Exporter Visit Report in this way. The applicant companies disagree. Stora Enso has exported structural timber from five different European countries (from eight different mills). It is reasonable for Customs and Border Protection to examine whether normal values for related entities include the same general cost and expense categories, given that the subject goods are produced in the same manner across each of the identified mills.

The applicant companies submit that it is prudent for Customs and Border Protection to examine each of the associated entities verified normal values, by country, prior to submitting a draft Exporter Visit Report for review by the exporting entity.

5.0 Concluding Remarks

Following a review of each of the submission on behalf of Stora Enso, the applicant companies:

- Reject Stora Enso's attempts to cloud material injury and causal link suffered by the applicant industry in its application and point, to the substantial increase in export volumes from the nominated countries during 2010/11;
- Submit that Customs and Border Protection can utilize a level of profit obtained from Stora Enso's Czech Republic operations based on timber produced and sold domestically in the Czech Republic that is sourced from the same general category of goods as structural timber exported to Australia; and
- Support Customs and Border Protection's intention to delay the provision of the draft Exporter Visit report to Stora Enso in the Czech Republic until all exporter verifications have been completed.

If you have any questions concerning this submission, please do not hesitate to contact me on (07) 3342 1921.

Yours sincerely

John O'Connor
Director

Cc **Mr Tim Sherry, CHH Woodproducts Australia**
Ms Christine Briggs, Gunns Timber
Mr Chris Robertson, Hyne and Sons.