



J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

PO Box 3026
Manuka, ACT 2603
Mobile: +61 499 056 729
Email: john@jbracic.com.au
Web: www.jbracic.com.au

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The Director - Investigations 1
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

**Expiry review – Aluminium extrusions exported by
East Asia Aluminium from Vietnam**

Dear Director,

This submission is made on behalf of East Asia Aluminum Company Limited (“EAA”) to the expiry review of measures (Case 591) applying to exports of certain aluminium extrusions exported by from Vietnam.

In summary, EAA fully supports the Anti-Dumping Commission’s (“Commission”) findings that the expiration of the measures would **not** lead, or would **not** be likely to lead, to a continuation of, or a recurrence of, the material injury that the anti-dumping measure is intended to prevent.

Expiry of measures

Section 269ZHF(2) of the Customs Act (“the Act”) explicitly requires that the Commissioner:

must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.

The Commission’s Dumping and Subsidy Manual¹ provides further guidance on the threshold test for establishing whether recurrence is ‘likely’. It explains that:

In examining the likelihood of injury as a result of any future dumping or subsidy, the Commission takes guidance from WTO jurisprudence where ‘likely’ has been taken to mean ‘probable’...

¹ Dumping & Subsidy Manual; December 2013, page 153

In *US Drums*², the WTO Dispute Panel found that the continued imposition of measures must be based on ‘positive evidence’. The Panel stated:

Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.

Further, the Appellate Body said of Article 11 in *Corrosion Resistant Carbon Steel*³:

In view of the use of the word “likely” in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.

Finally, in the recently completed review by the Anti-Dumping Review Panel (ADRP)⁴, the ADRP confirmed:

27. Undertaking a continuation inquiry requires a prospective examination of the likelihood of future dumping and material injury. In its reinvestigation report (REP 389) the ADC referred to the decision of the Federal Court in *Siam Polyethylene Co Ltd v Minister for Home Affairs (No.2)*,⁸ where the Court held that the word “likely” in section 269ZHF(2) of the Act was taken to mean “more probable than not”.

[Original emphasis]

Therefore, it is unquestionable that the Act requires the Commissioner to recommend expiry of the measures, unless there is positive evidence to demonstrate that the recurrence of dumping in the future is likely or probable (ie. implying a greater degree of certainty that the event will occur than a finding that the event is not “not likely”).

Established evidence outlined in SEF 591

In reviewing the Commission’s detailed analysis of the industry’s economic condition, it is evident that the Australian industry has flourished under market conditions that continue to present significant barriers to trade to imports. These include documented global supply chain disruptions, ongoing shipping uncertainty and ocean freight cost volatility. These issues have contributed to strong demand for local supply of product, resulting in the

² US Drums – WT/DS99/R; para 6.42, page 139.

³ US – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan – WT/DS244/AB/R; para 111, pages 39-40.

⁴ ADRP Report No. 50 - Food Service and Industrial (FSI) Pineapple exported from the Kingdom of Thailand, pages 8-9.

Australian industry experiencing unprecedented financial and operational performance levels.

This is confirmed by Capral's 2021 Annual Report⁵:

The strong shift to local supply resulting from disruptions to import supply chains and shipping congestion seen at the end of 2020 gathered momentum throughout the year and, combined with Government assistance targeted to the residential construction market through HomeBuilder and other incentives, created unprecedented demand underpinning Capral's strong growth in volumes in 2021.

The Australian industry's record performance is supported by the following facts:

- sharp increase in sales volumes since 2019;
- increasing and dominant share of the market;
- since 2019, the modest reduction in unit selling prices is not consistent with the sharper rate of fall in the unit cost to make and sell. This confirms that the Australian industry has not passed on reduced costs by way of commensurate reductions in selling prices to customers;
- since 2019, the Australian industry's profits have reached record levels.

The improved economic condition of the Australian industry is further evident from the continued expansion in the number of Australian producers of like goods, which has doubled since the industry first sought protection from measures in 2009, and continuing to expand. In these circumstances, it would be nonsensical to suggest that imports from Vietnam would or could, likely lead to a recurrence of material injury.

First, total import volumes from Vietnam have been the lowest of all countries subject to measures, and the corresponding market share has been negligible relative to the total Australian market. Second, EAA has no spare capacity to supply the Australian market without significantly impacting its existing export sales to the [REDACTED] and [REDACTED], which combined account for nearly [REDACTED]% of total capacity.

Third, Capral concedes that pricing in the Australian market is not transparent in terms of the source of price offers, with '*...increasing numbers of unsolicited offers, often sent via email or social media platforms, from traders or overseas aluminium extrusions mills.*' In this circumstance, unsolicited offers from unknown traders cannot be linked to Vietnam without clear evidence. To that point, EAA confirms that no such offers have been or would be made, to unknown customers that do not already have a strong trading relationship.

The Commission cannot and must not make any findings based on simple assumptions or speculation, without clear positive evidence. This would not meet the required threshold for positive evidence.

Further, it appears that Capral are being offered the opportunity to present new information regarding possible price offers linking imports with its own selling prices. Given that Capral

⁵ Capral 2021 Annual Report, Chairman's Report, page 3.

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has been unable to provide any such information to the Commission during the course of this investigation, any new information must be treated with caution at this stage. To ensure transparency and natural justice, any new information attempting to link price offers to EAA or its import customers, must be available for those specific parties to interrogate and confirm its validity and authenticity. This would ensure that the findings are based on facts and not merely on allegations, conjecture or remote possibilities.

Yours sincerely

John Bracic