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By Email

Dr Bradley Armstrong PSM
Anti-Dumping Commissioner
Anti-Dumping Commission
Melbourne VIC 3000

Dear Commissioner,

RE: Continuation Inquiry 591 – Exports of Certain Aluminium Extrusions from Malaysia and Vietnam – Statement of Essential Facts 591 – Supplementary Submission

I refer to the Statement of Essential Facts 591 (**SEF**) and to the submission made on behalf of my clients, Press Metal Aluminium (Australia) Pty Ltd (**PMAA**) and its related bodies corporate, Press Metal Berhad (**PMB**) and PMB Aluminium Sdn Bhd (**PMBA**) on 7 April 2022 concerning, amongst other things, the required level of trade adjustment for the proper comparison of normal value with the export price of PMBA's exports in the dumping margin calculation (**Submission1**).

Preliminary findings and proposed recommendations

In summary, in the SEF you:

1. considered that future exports of aluminium extrusions from Malaysia and Vietnam are 'likely to continue … and are likely to be dumped';
2. do not consider that 'the evidence is sufficient to support a finding that material injury … is likely to be caused by future exports at dumped prices in the absence of measures'; and
3. propose to recommend to the Minister that 'the [anti-dumping] notices … be allowed to expire on the specified date'.

Our clients do not agree with your preliminary findings that PMBA's exports are being dumped or that its future exports are likely to be at dumped. Our clients have provided evidence in support of its claims in previous submissions to the Anti-Dumping Commission and reiterates those submissions in the comments below.

Our clients do, however, concur with your preliminary finding that the evidence does not support a finding that material injury is likely to be caused by future exports at dumped prices in the absence of the anti-dumping measures and supports your proposed recommendation to the Minister that

the continuation of the anti-dumping notices not be secured but be allowed to expire on the due expiry date.

In the preliminary findings in the SEF, the following adjustments were not made in connection with the normal value determination of PMBA's exports:

1. level of trade adjustment between retail and distributor sales in the domestic market;
2. domestic credit for sales by PMBA's division, JB; and
3. a specification adjustment for the alloy used to produce MCC PBS-6D-TI.

This resulted in an erroneous calculation of a dumping margin and the publication of an incorrect verification report and SEF concerning PMBA's exports. Each of these matters are expanded upon below.

Level of trade adjustment - methodology

A reason given in the SEF for not making the level of trade adjustment was because the difference in prices between sales to retailers and distributors by PMBA was not considered to be 'material'.

As you would be aware from Submission1 and the confidential calculations accompanying the submission, if the adjustment is made, as required, it results in a dumping margin of <2% - that is, no 'dumping'. Presumably, this outcome, of itself, demonstrates that the difference in prices between the level of trade is 'material' and the necessity for the adjustment to ensure a 'proper comparison'. If it was not material, then it would have no effect on the dumping margin and whether the adjustment is made or not would be of no consequence to the dumping margin.

In addition, there are residual concerns with the manner in which that adjustment is made when it has been made. It is understood that the erroneous application of that adjustment to 'profits' and not, as require, to 'prices' in Accelerated Review 577 was acknowledged and corrected. However, the percentage adjustment correctly applied as a downwards adjustment to retail prices was calculated as a proportion of retail prices when it should have been as a proportion of distribution prices.

That is, the downwards adjustment was undertaken by reference to a percentage calculated by dividing the difference between the weighted average OCOT unit prices of domestic retail and domestic distributor sales by the weighted average OCOT unit price of domestic retail sales. The correct approach, however, we contend, is to divide that difference instead by the OCOT unit price of domestic distributor sales. The reason for this is because the margin between retail and distributor prices is being confused with the mark-up on the distributor price required in order for the distributor and retailer both to be competitive in the market.

In other words, the calculation adopted is not consistent with a "producer's approach", that is, PMBA in this case, in order to derive a selling price. Confidential Appendix 3 of the verification report (Confidential Appendix D-2 in the EQ Response) lists all domestic sales by PMBA to its customers who are at different levels of trade. Some are distributors and some are retailers. For

simplicity of explanation, putting aside market influences, volume discounts, being a price taker, etc., when negotiating prices PMBA looks at its fixed and variable costs and a mark-up to determine at what price it will sell to each of its customers, retailers and distributors. That must be a price that is acceptable to its customers so that the customers can be competitive in their respective markets and achieve a profit.

Prices are not determined by looking at a higher price level, that is, a retail price and deduct from that a percentage to arrive at a lower price level, that is, a distributor price. However, that is the effect of the Commission's methodology that has been applied in making this adjustment.

In other words, retailers do not compete with distributors at the distribution level of trade, but distributors compete with retailers at the retail level of trade. Hence from a producer's perspective in supplying distributors and retailers, it is the price to the distributor that the producer needs to ensure enables the distributor to compete with retailers on price, not the other way around.

The correct approach, therefore, is to calculate the percentage mark-up of the distributor price in order to derive the retail price, as opposed to the margin between the retail and distributor price. In Confidential Appendix 3 the individual sales to distributors are not directly comparable to the individual sales to retailers. The prices at each level are prices that have been marked-up by PMBA to arrive at an agreed selling price to its customers. To achieve a fair comparison, a unit weighted average percentage mark-up of the 'distributor price' is required to be calculated and that percentage mark-up be deducted from the retail price to arrive at a 'fair' level of trade adjustment.

The adjustment made on this basis results in a fair comparison of prices between retail and distributor levels of trade. In this inquiry, the application of the correct methodology results in a negative dumping margin. WE submit that this is the correct methodology but note that whichever method is used, it results in a finding of no dumping for PMBA's exports.

Level of trade adjustment – WTO jurisprudence

Separately, in Submission1 reference was made to the fact that WTO jurisprudence supported the making of the level of trade adjustment. For completeness, **Attachment A** to this submission sets out relevant extracts from such WTO jurisprudence in the event it was uncertain what jurisprudence was being referred to in Submission1. That jurisprudence is to the effect that if there is a difference such as a difference in prices between levels of trade, an adjustment is required to ensure a proper comparison. Sone arbitrary determination of whether a difference is 'material' is not a relevant consideration.

Level of trade adjustment – JB customers

Finally, regarding the assertion that PMBA did not indicate to the verification team that the customers of PMBA's division JB were 'retailers', this was evident from the documentation provided by PMBA in response to the exporter questionnaire and during verification, including relevant spreadsheets and source documents. There was no suggestion otherwise from such documentation.

Neither the sufficiency of such documentation, nor what additional information or documentation may be required was raised with PMBA, either during or since verification. Hence, there was no basis for the above assertion.

Had this been a concern during verification, it should have been raised then so that the concern could and would have been addressed. As there is no evidence and none referred to that suggests that sales by PMBA through its division JB were other than to 'retailers', then that is mere unsubstantiated speculation.

In any event, all such customers are in fact retailers as was previously verified and accepted by you, the Commission and the Minister in Accelerated Review 577. Indeed, they are the same customers given the six-month overlap in review periods in Accelerated Review 577 and this inquiry. There has been no change in JB's customers in this regard, being solely retailers.

Other adjustments

Two other adjustments that were required to be made, but were not, are:

(i) **credit**: an adjustment for differences in credit terms between domestic sales by JB and export sales was not made because, apparently, "*Based on the source documents provided for the sample domestic sales, the verification team found that a number of sales invoice payment terms had "payable immediately" for sales made via the Johor Bahru warehouse."* We have reviewed such source documents, including those provided to the verification team, and did not find that they contained terms of 'payable immediately' but, rather, payment was to be within the period specified in the invoice (e.g., within 30 days, etc.)
However, as the verification team is or should be aware, what the invoiced payment terms state is not necessarily what actually happens in commercial practice. In other words, the commercial terms are varied by conduct between the parties and, in accordance with the Commission's usual practice, the actual terms adopted by the parties by conduct are given effect to. Hence, the credit adjustment was required to be made for PMBA's sales through its division, JB; and

(ii) **specifications**: a specification adjustment was not made as required for the more expensive alloy used to produce MCC PBS-6D-T1 compared to the surrogate MCC, PC-6A-T1. This fails to provide a fair comparison between the two MCCs. If a correct specification adjustment is made, it results in a lower normal value and, consequently, a lower dumping margin for this MCC.

Material injury

In a second submission made on behalf of my clients (**Submission 2**) on the same date as Submission 1, reference was made to the material injury and causation analysis in the SEF. Specifically, Submission 2 addressed the analysis of price undercutting at various levels of trade on the different finishes of aluminium extrusions and issues associated with that analysis.

In addition to the submissions made on those matters, the following observations are made and if these matters had been addressed, they would have provided further evidence to support the preliminary finding that you cannot be satisfied that the expiry of measures would lead or be likely to lead to a continuation of or recurrence of the material injury to the Australian Industry that the measures are intended to prevent.

1. Market segmentation in the Australian aluminium extrusion market

The Australian aluminium extrusion market is divided into various segments both horizontally and vertically. That is, it is divided horizontally into at least three levels of trade, namely, distribution, wholesale and retail. It also is divided vertically into:

(i) residential, which includes home restoration and home improvement;
(ii) industrial, which includes transport, marine and other manufacturing sectors; and
(iii) commercial construction.

Obviously, the aluminium extrusions supplied to each such market segment vary and are different not only according to the Commission's MCCs but also products within each MCC with limited, if any, overlap (i.e., cross elasticity of demand) between market segments.

Despite this market segmentation and product differentiation, the material injury and causation analysis in the SEF seemingly proceeds on the assumption that the Australian aluminium extrusions market is a single market for a largely homogenous commodity product. No doubt this has been in part due to the (excessively) broad description of the goods under consideration in the original investigation that has been persisted with.

This assumption is not correct and is misconceived. If further analysis and inquiry had been undertaken to obtain information and evidence from all interested parties of the aluminium extrusions supplied into each market segment at each level of trade not only by MCC but also products within each MCC relevant to the issues of material injury and causation there would have been further evidence supporting the expiry of the measures.

Specifically, that analysis should have included an assessment of the price elasticity of demand within each market segment, including:

- cross price elasticity of demand, that is, at what price point, if any, will end-users switch from one product (i.e., an MCC) within a market segment to another assuming all other factors affecting the purchasing decision are equal, which, of course, rarely occurs; and
- import-price elasticity of demand, that is, again, at what price point, if any, will end-users switch from a domestically produced product to an import product and vice versa, again assuming all other factors affecting purchase decisions are equal.

An examination of whether price undercutting is occurring within an MCC and, if so, the extent of such price undercutting does not of itself determine whether such price undercutting has any price or sales volumes effect. That is, of itself it does not establish the price at which end users will switch from one product to another based on price either within MCCs or between MCCs or form a domestically produced product to an imported product. Rather, it merely indicates one supplier's prices are less than another's. Additional analysis is required to draw any conclusions from price undercutting.

Further, if end users are switching from one supplier's products to another's, whether domestically produced or imported, as is contended by the Australian industry, then this would need to be established by an analysis of price elasticity of demand within segments of the Australian aluminium extrusion market. Mere anecdotal evidence is insufficient in this regard, especially if sourced solely from those entities claiming injury and not others in the supply chain and distribution networks, such as distributors, resellers and end-users, as well as other domestic producers.

It is submitted that such market analysis, supported by evidence, would address the insufficiency of relevant evidence identified in the SEF, which cannot be remedied by the provision of additional selective anecdotal information by one or more interested parties such as that presented by Capral Limited (**Capral**) in its most recent submission.

In this regard, it is noted that the 'additional evidence' provided by Capral in its recent submission consisted of information concerning three of its customers over a period of years. It is unclear why that information had not been previously provided given the period to which it relates and what other information has not been provided. In any event, anecdotal information is hardly compelling, nor sufficient to address the insufficiency of evidence you identified in the SEF.

That aside, it is noted but unclear why the market analysis referred to above was not undertaken in the original and subsequent investigations inquiries and reviews concerning exports of aluminium extrusions to Australia, including the applications resulting in such investigations inquiries and reviews. Such market segmentation and product differentiation within the Australian aluminium market is readily apparent from, for example, Capral's Annual Reports, Investor Presentations and its website. See, for example:

Supplier And Distributor Of Aluminium Products | Capral
For Investors | Capral

2. Market share of the Australian aluminium extrusion market

Also, for information, it is my clients' understanding that the total demand for aluminium extrusions in the Australian market is approximately [redacted] tpa of which the Australian industry has an estimated total production capacity [redacted] tpa. The share of the market held by members of the Australian industry is estimated as follows:

- Capral: [redacted] tpa
- G James: [redacted] tpa
- Others: [redacted] tpa

This leaves the balance to be met by imports. As noted in the SEF, imports from Malaysia hold approximately 2% of the total Australian aluminium extrusion market, which is approximately [redacted] tpa.

It hardly seems credible that 2% of the market could cause injury to [redacted]% of the Australian aluminium extrusion market or to [redacted]% of that market comprised by the Australian industry, especially given the structure of the Australian aluminium extrusion market and pricing within that market, which is common throughout the industry in all countries.

No evidence has been advanced by the Australian industry how 2% of the market that apparently is held by exports from Malaysia the subject of this inquiry could have caused injury to the Australian industry or affected the Australian aluminium extrusion market.

In this regard, my clients understand that Capral recently announced a price increase of [redacted]% for its aluminium extrusions, which, due to volatility in LME prices for aluminium, it has subsequently reduced to a [redacted]% increase. No doubt the Commission is aware of this. Clearly, Capral's prices are being neither suppressed nor depressed.

3. Placing additional information on the public file

In the SEF, it was indicated that certain additional information was required from interested parties for consideration absent which the proposed recommendation for the anti-dumping measures to be allowed to expire on the expiry date would remain.

Without commenting on what information and evidence would be sufficient for the finding that there is insufficient evidence to support a conclusion that the expiry of the anti-dumping measures would lead or be likely to lead to the continuation or recurrence of the material injury that the measures are intended to prevent, it will, of course, be necessary, if any such information and evidence is provided by interested parties, to be promptly placed on the public file or, at least, non-confidential summaries in accordance with section 269ZJ of the *Customs Act 1901*. To not do so would adversely affect the ability of interested parties to defend their respective interests and defeat the purpose of maintaining the public file.

It is noted that no new information from members of the Australian industry, as opposed to submissions, apparently has been provided by the due date for responses to the Statement of Essential Facts as none has been placed on the public file or non-confidential summaries of any such new information if confidential.

4. Investment

Finally, for information, it is widely known within the Australian aluminium extrusion industry that members of the Australian industry are currently investing in new plant and equipment to increase production capacity due to their inability to meet demand. That is not a symptom of an industry incurring injury or one that expects its economic performance to deteriorate in the foreseeable future.

No doubt you can confirm such investment activity from members of the Australian industry who, like Capral, are enjoying unprecedented profits constrained only by their respective limited production capacity.

Conclusion

As mentioned at the outset, while disagreeing with some of your preliminary findings concerning PMBA's exports, our clients support your proposed recommendation to the Minister that the continuation of the anti-dumping measures not be secured but be allowed to expire on the due expiry date. This for the reasons set out in the SEF amongst others and, in the case of PMBA's exports, the expiry of the measures will not lead or be likely to lead to a recurrence of dumping of such exports.

If you have any questions, please let me know.

Yours faithfully,

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Attachment A

WTO Jurisprudence – Fair Comparison

Article 2.4 of the WTO Antidumping Agreement

Extracts:

Panel Report, EU – Footwear (China), paras. 7.281-7.282 and 7.283

"We recall that Article 2.4 does not address how due allowance for differences affecting price comparability is to be made. Thus, in the absence of any guidance in this respect, we consider that Article 2.4 cannot be understood to establish specific obligations with regard to the methodologies that investigating authorities may use in order to ensure a fair comparison. We therefore see no legal basis for China's contention that the Commission was obliged to reflect in its PCN methodology all the characteristics of the product which may have affected price comparability.

Moreover, we recall our view that the fact that Article 2.4 requires investigating authorities to ensure a fair comparison does not mean that interested parties have no obligation in this process. Indeed, we consider that, consistently with Article 2.4, if an exporter believes that the methodology adopted by the investigating authority is inadequate to ensure a fair comparison, it is for the exporter to make substantiated requests for due allowance to be made in order to ensure such comparison. In this case, however, we see nothing in the evidence before us that would indicate to us that Chinese producers made substantiated requests for adjustments with respect to the factors which allegedly affected price comparability. Nor has China demonstrated otherwise. Simply arguing, as interested parties did before the Commission, and China does here, that the PCN categories established by the Commission were 'too broad' to allow a fair comparison is not sufficient, in our view, to discharge the exporters' obligations in this regard." (underlining added)

Panel Report, Egypt – Steel Rebar, paras. 7.333-7.334

"Article 2.4, on its face, refers to the comparison of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a comparison shall be 'fair'. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the fairness of the comparison. The next sentence, which starts with the words '[t]his comparison', clearly refers back to the 'fair comparison' that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the 'comparison', namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for 'differences

which affect price comparability', and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring 'price comparability' in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with 'ensur[ing] a fair comparison'. In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.

The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where 'the comparison under paragraph 4 requires a conversion of currencies' (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as 'the provisions governing fair comparison', and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis).” (*footnote omitted*)