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ADRP Secretariat
Legal Services Branch
Department of Industry and Science
Industry House
10 Binara Street
Canberra ACT 2601

Review of certain aluminium extrusions exported from China

This submission is made on behalf of Capral Limited, a member of the Australian aluminium extrusions industry and one of the applicants, in relation to the review of certain aluminium extrusions exported from China. We specifically refer to the application made by OPAL (Macao Offshore Commercial) Limited (OPAL), which was also submitted by PanAsia Aluminium (China) Limited (PanAsia). We do not agree with OPAL's assertions that the Minister did not have the power to alter the notices in the manner in which he did and make the following comments on each of the grounds raised in OPAL's application.

I. Anti-circumvention finding

OPAL claims that the Commission, in finding that the five identified importers had engaged in circumvention activity, failed to find that the importers had sold the circumvention goods in Australia without increasing the price commensurate with the total amount of duty payable as required by s.269ZDBB(5A)(d).

If an importer sells goods at a loss they have clearly not increased the price commensurate with the total amount of duty payable because they have failed to recover the additional cost of the duty on the goods. In this case none of the importers had sought an assessment of final duty payable and a refund of interim duty paid,[1] therefore it can reasonably be implied that the importers were satisfied with the amount of interim duty they paid. In such circumstances the question becomes: have the importers increased their prices in the Australian market by the amount of duty paid on their imports, or have they sold the goods at a loss? In some jurisdictions this is also referred to as duty absorption.

[1] As provided for under Division 4 of the *Customs Act 1901*

OPAL claims that sales at a loss are not a determinative factor in the application of s.269ZDBB(5A)(d) and refer to the Revised Explanatory Memorandum.[2] In fact that Explanatory Memorandum makes it quite clear that the purpose of this type of circumvention activity is to address sales at a loss:

> *The third reform introduces a new type of circumvention activity to address sales at a loss and other practices that undermine the effect of anti-dumping and countervailing duties already imposed.*[3]
>
> *In particular, the inquiry seeks to address situations where the circumstances are occurring because the exporter has lowered the export price, where a party in the transaction is making sales at a loss, or where the importer is absorbing the duties.*[4]

OPAL also claims that to determine whether the importers have increased their selling prices in Australia commensurate with the amount of duty payable, the importers' selling prices during the inquiry period must be compared to their selling prices prior to October 2010.[5] This represents a misunderstanding of the purpose of the legislation and is contradicted by OPAL itself later in its application for review where it states:

> *The purpose of the paragraph [s.269ZDBB(5A)(d)], in concert with s.269TAC of the Act, is to raise selling prices of the GUC in Australia to a level that reflects the recovery by the importer of the cost of duties imposed by the Dumping Duty Act.*[6]

We submit that OPAL's interpretation of the legislation quoted above is the correct interpretation, and the failure by the importers in this case to raise their selling prices of the goods in Australia to a level that reflects the recovery by them of the cost of duties imposed by the Dumping Duty Act (ie, by selling the goods at a loss), represents clear circumvention under the legislation.

II. Application to other importers

OPAL claims that any prospective alterations to the original notices should only apply to the five identified importers. This would be an absurd outcome, since these importers ceased importing 12 months ago. We repeat the reasonable assertion from our application to this review that if the Minister had altered the notices with respect to only these importers, then anti-circumvention action could never be effective because on the commencement of each anti-circumvention inquiry those companies will cease importing and new companies will take their place.

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[2] OPAL application for review Appendix A, p.4 at 11
[3] Replacement Explanatory Memorandum to the Customs Amendment (Anti-Dumping Measures) Bill 2013 and the Customs Tariff (Anti-Dumping) Amendment Bill 2013, p.2 at 4
[4] ibid., p.15 at 52
[5] OPAL application for review Appendix A, p.4 at 12
[6] ibid., pp.7-8 at 21

III. Identity of the exporter

OPAL claims that the Commission incorrectly identified PanAsia as the exporter and instead should have found OPAL to be the exporter. In response to this claim we note:

- in the same trading circumstances PanAsia was found to be the exporter during the original investigation[7]
- this finding is consistent with the Commission's published policy,[8] and
- this issue was not raised by OPAL (or any other party) during the inquiry.

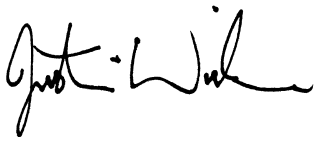
IV.-V. Application of s.269TAA(2) and arms length transactions

OPAL erroneously claims that the Commission relied on invoking s.269TAA(2) in assessing a new ascertained export price and that the assessment of any new ascertained export price would require a finding as to whether the sales were arms length transactions. In fact s.269TAA(2) is irrelevant, as the ascertained export price was established un s.269TAB(3) based on all relevant information.[9]

VI. Other variable factors

OPAL claims that the failure of the Minister to specify a new normal value is inconsistent with Australia's international obligations, as a signatory to the World Trade Organization *Anti-Dumping Agreement*. That agreement, and the concept of a 'fair comparison', covers the imposition of measures on an exporter as a result of finding that exporter to have dumped goods and caused injury to a domestic industry.

The matter at hand concerns the circumvention of those measures by an importer, which is not covered by the *Anti-Dumping Agreement*. In fact the Ministerial Decision on Anti-Circumvention noted that WTO negotiators had been unable to agree on a specific text dealing with the problem of anti-circumvention.[10] In the WTO the issue of circumvention of anti-dumping measures is instead dealt with by the Informal Group on Anti-Circumvention, established by the Committee on Anti-Dumping Practices.[11]



Justin Wickes
Director

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[7] Report to the Minister No.148, p.48 at 6.8.1
[8] Dumping and Subsidy Manual, pp.26-27
[9] Final Report No.241, p.41 at 5.4
[10] https://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm
[11] 1997 Report of the Committee on Anti-Dumping Practices, WTO Doc. No. G/L/204, p.4 at 15