MinterEllison LAWYERS

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Member
Anti-Dumping Review Panel
c/o ADRP Secretariat
Legal Services Branch
Department of Industry and Science
GPO Box 9839
ACT 2600.

10 May 2015

Dear Member

Submission by Opal (Macao Commercial Offshore) Limited (OPAL) relating to a decision of the Minister under s.269ZDBH(1) to declare that an alteration to the ascertained export price is taken to have been made to dumping and countervailing duty notices published on 28 October 2010 and applying to Certain Aluminium Extrusions exported from the People's Republic of China allegedly by PanAsia.

We act for OPAL in relation to the above matter and refer to our client's application of 23 March 2015 to the Review Panel together with the statements contained in Appendices 1 and 2 to that application. We also note the application of the same date by Capral Limited and the statement forming part of that application.

The purpose of this submission is to elaborate on certain points raised in the Appendices referred to above and to respond to the Capral application.

Exporter

The original finding by the Commission's predecessor in Report 148[1] was that PanAsia was the exporter of the GUC. Our rebuttal of that finding and our submission that the Commissioner in the current inquiry failed to consider the essential question of who is the exporter of the circumvention goods are set out in paragraphs 23-27 of Appendix A to our application. It now appears that the Commission may shift ground on this question. In the concurrent review of variable factors initiated by PanAsia[2] and referred to by the Commission in Report 241, the verification report relating to our clients now claims that … *PanAsia and OPAL, as a single entity, is the exporter of aluminium extrusions….*[3] The Commission further claims that the 'collapsing' of separate corporate entities is supported by the decision of a WTO Panel in *Korea –*

[1] Section 6.8.1 – p.44
[2] ADC 248
[3] EPR 248: item #053, section 4.6, p.22

Anti-Dumping Duties on Imports of Certain Paper from Indonesia.[4] Both claims are, in our view, incorrect.

The issue before the WTO Panel was very different to the question to be considered by the Review Panel and was expressed in the following terms:

> "The claim at issue concerns the first sentence of article 6.10. The issue here is whether, and if so under what circumstances, Article 6.10 permits an IA to treat separate legal entities, which export the subject product to the importing Member and which are in certain ways related to one another, as a single exporter and to determine a single margin of dumping for that exporter"[5]

The circumstances in that case were that each of three related companies exported the goods to Korea in their own right and all domestic sales by each of the companies were made through a single entity. The extent of the treatment of the three exporters as a single entity consisted of calculating the weighted average of the export prices of each company to calculate a common export price which was then applied to the exports to Korea by each company. The Panel's decision was that the determination of a dumping margin in that manner was not inconsistent with Korea's obligations under the first sentence of Article 6.10 of the Anti-Dumping Agreement (**Agreement**) which provides:

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

The decision, therefore, relates only to the permissibility in certain circumstances of calculating export prices for related exporting entities by reference to the weighted average of the export prices of each of those individual entities. As explained by the Appellate Body in *EC – Fasteners (China)*[6] the resulting single dumping margin applied to each exporter in a related group of 'several legally distinct exporters' meets the requirement of Article 6.10 to *…determine an individual margin of dumping for each known exporter.* Any concept of 'collapsing' to be drawn from these decisions relates only to the cumulation in certain circumstances of the export price data of each related exporter. It has no relevance or application to resolving the question under Australian law of who is the exporter of particular goods.

It is important to note that some WTO jurisprudence on the topic has been influenced by the use of the phrase 'exporter or producer' in a number of articles in the Agreement[7]. By contrast Australian legislation relevant to the assessment of export price only uses the descriptor, 'exporter', and does not provide any option for assessing export price by reference to a sale by a

[4] WT/DS312/R: 7.155 – 7.171
[5] ibid., 7.157
[6] WT/DS397/AB
[7] e.g. Articles 2.2.1.1 and 6.10

producer, not being an exporter, even if the goods are intended for sale to a foreign market by the purchasing entity.

Judicial observations relevant to that descriptor are explored at paragraphs 25-26 of Appendix A to our client's application for review and they give no support to the notion of collapsing separate legal entities. Furthermore, the notion gains no traction from an objective examination of the relevant provisions of the Customs Act. Determining the correct methodology for the ascertainment of an export price under s269TAB and determining whether the discretionary inference in s269TAA(2) applies, depends on the identification of an exporter and an importer in an import transaction. There is nothing in the use of those terms, or the context in which they appear, to suggest that their meaning extends beyond being descriptors of single entities. In particular there is nothing to support a claim that an exporter can be identified as a composite of two separate legal entities. On the contrary the use of the phrase …*purchased by the importer from the exporter*… in both of the provisions referred to above cannot be reconciled with the notion that the seller/exporter in the transaction is a composite entity.

We submit that any claim by the Commissioner that the exporter of the goods in the current matter is a composite of PanAsia/OPAL should be dismissed by the review Panel.

Importer Specific Dumping Margins and the Statutory Inference

We drew attention in our client's application to the fact that the Commission and the Minister had seen fit to limit the application of the retrospective alterations to the original notices to the nominated importers. We support that limitation and submit that the legality of that action would apply equally to a prospective notice that excluded importers in relation to whom no evidence of circumvention activity existed. Although we acknowledge that the Appellate Body has expressed the view that 'dumping' and 'margin of dumping' are exporter specific concepts, that view is conditioned by the Appellate Body's overall interpretation of the conduct that the Agreement seeks to regulate:

> "The concept of dumping relates to the pricing behaviour of exporters or foreign producers; it is the exporter, not the importer, that engages in practices that result in situations of dumping".
>
> "Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets".

Drawing support from these observations it is unsurprising that the Appellate Body reached the conclusion that the determination of dumping and dumping margins should be exporter specific.

However those observations have no application to the present matter because Australia, by introducing s269TAA(2) into the legislative scheme, has clearly signalled its intention to go beyond the terms of Article 2.3 of the Agreement and target importer conduct whether or not there is evidence of exporter involvement by way of the provision of some form of compensation to the importer. This authorises the Minister to determine the existence of dumping and the details of dumping margins by reference to only importer specific practices. While obviously not compatible with the contextual observations of the Appellate Body, this focus on importer practices in the Australian jurisdiction is best complemented in terms of outcomes by importer specific alterations declared pursuant to s.269ZDBH(1)(b) of the Act.

Fair Comparison

In the statement in support of our client's application we submitted that the central 'fair comparison' principle of the Anti-Dumping Agreement required any alteration of export price in the dumping and countervailing duty notices to be accompanied by other alterations reflecting an updated normal value and non-injurious price. The information necessary to ensure this fair comparison was available to the Commission but was not acted upon.

The concurrent review of variable factors referred to above shares a nine month period of investigation (1 April 2013 to 31 December 2013) with the anti-circumvention inquiry. As indicated in the statement in support of its application, PanAsia, as manufacturer, filed its response to the Commission's questionnaire in August 2014. That response contained a complete enumeration, with all relevant details, of all domestic sales and even the most cursory consideration of the material would have demonstrated that a substantial downward shift in normal value had occurred. This observation merely confirms what was already known to, and accepted by the Commission, from PanAsia's application of 1 May 2014 for a review of all variable factors. The application argued, with accompanying evidence, that PanAsia's domestic selling prices in the PRC had reduced, LME prices had declined and LME/SHFE and AUD/Rmb relativities had changed and that the combined effect of these factors was of a degree that justified a review of all variable factors. In the Consideration Report[8] the Commissioner accepted PanAsia's claims and sought and obtained the approval of the Parliamentary Secretary to extend the review of variable factors to cover all exporters from the PRC.

The vindication of PanAsia's application and supporting claims is evidenced by the Commission's preliminary finding that the revised dumping margin is minus 13.6% compared

[8] EPR 248: item #002

with plus10.1% in the original inquiry and the claimed plus 57.6% in Report 241. As all material necessary to assess a revised normal value was available to the Commission at relevant times, we repeat our submission that the preferable decision would be for the Minister to specify different factors for normal value and non-injurious price as well as export price.

Associated Parties

The issue of associated parties raised by Capral has no relevance to the recommendations of the Commissioner or the decisions of the Minister**.** Report 241 contains no reference to, or finding concerning, any actual associations between importing entities and the manufacturer or exporter. Despite the inadequacy of the terminology used by the Commission it is clear that its finding that export sales were not arms length transactions relied solely on adopting the discretionary statutory inference in s269TAA(2) when considering the application of s269TAA(1)(c).

Duty Assessment

The alterations to the original notices currently applying to all purchasers of the GUC from OPAL determine the amount of interim dumping and countervailing duty payable. In relation to those importers where there is no evidence of a failure to increase prices commensurate with the duty payable, the Commission may be tempted to assert that any adverse impact could be overcome if they applied for duty assessment under Division 4 of PartXVB of the Customs Act. It is true that they may be theoretically entitled to refunds under that process but the commercial reality is that avoidance of the adverse and unwarranted impact is unattainable.

In the first instance the duty assessment process involves delays of at least 12 months from the date of entry for home consumption before obtaining any refunds and while an importer is entitled to initiate an application it will not be accepted unless the exporter (and in some circumstances the Australian industry) is prepared to co-operate by devoting significant time and resources to the compilation of a detailed record of all domestic sales. Furthermore, during the process the importer will be unable to assess with any certainty whether refunds will eventuate or the amount of any such refunds. In the real world the importer has to settle the price to be paid by the Australian customer some weeks before importation. It would be commercial suicide in those circumstances to price the goods not on the basis of the interim duty payable but on a guesstimate of final duty payable in over a years time.

If the importer, at the time of settling the price of the goods, overestimated the amount of any refund of interim duties the ultimate irony is that the Commissioner may then claim that a circumvention activity has occurred because the importer has sold the goods at a loss. We submit that the duty assessment process clearly does not provide an option for importers who have not engaged in circumvention activity to maintain their import sourcing arrangements.

Yours sincerely

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