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Customs, Trade & Transport Ealert

Australian Customs initiate investigation into alleged dumping and subsidisation in relation to aluminium extrusions from China

Yesterday (24 June 2009), the Australian Customs and Border Protection Service ("Customs") published a notice confirming that it had resolved to initiate an investigation into alleged dumping and subsidisation in relation to Chinese exports of aluminium extrusion products.

The publication of the notice represents Customs' "prima facie" finding of dumping and subsidisation in relation to the Chinese exported products contrary to the provisions of the *Customs Act 1901*. The initiation followed extensive pre-initiation discussions between the applicant for the measures (Capral Limited) and Chinese interests, including the government of the People's Republic of China ("PRC").

The initiation of the investigation is a significant matter as there is a large market for the products in Australia and Australian producers have made significant investment in plant and equipment to produce the products here. Interestingly, the Customs "Initiation Report" refers to 2 potential Australian producers of aluminium extrusions that are expected to commence production in 2009 (being Ullrich Aluminium Pty Ltd and Extrusion Profiles Australia).

The initiation of the investigation follows a recent trend where measures imposed on products overseas are then followed with an application for measures in relation to those products as they are imported into Australia. For example, the application for measures in relation to alleged dumping of canned mushrooms imported from China in Australia followed similar measures having been applied in the United States. In this case, there has been a recent and major action in Canada against the same products. That action led to the imposition of measures on these products in Canada.

The fact of the previous action raises the issue as to the reliance on information and findings by the Canadian Border Services Agency ("CBSA"). While the WTO Agreements set the framework for the imposition of measures, different countries implement that framework differently. Clearly, the Australian industry will be maintaining that our system is very close to the Canadian system, on which basis measures should be imposed here. Customs' Initiation Report reflects that the applicant relied significantly on findings by the CBSA in the Canadian action especially in relation to a number of fundamental issues described below. Doubtlessly, those wishing to seek to oppose the imposition of measures on imports into Australia will take the position that there should not be undue reliance by Customs on the findings of the CBSA.

Further, material provided by Customs in support of its initiation of the investigation does raise some interesting issues.

- Customs has accepted the applicant's arguments that due to specific market conditions in the PRC (namely, levels of direct and indirect government influence), Customs should not accept local prices in the PRC as the basis for determining "normal value". While Customs has not accepted the arguments from the applicant that normal values should be based on prices paid on the London Metal Exchange (including a 10% profit margin), Customs has constructed its own "normal value" for Chinese aluminium extrusions using the applicant's "constructed selling price" and subtracting amounts for "profit and export administration expenses". However, the analysis is only provided in a confidential appendix which is not openly available. There will doubtlessly be representations that the refusal to use local PRC normal values is inappropriate. There will also be significant debate about the alternative means used by Customs to determine normal value.
- Customs has accepted that there is prima facie evidence of subsidies provided in PRC which support the imposition of countervailing duties to take into account those subsidies. In doing so, the applicant had indicated (consistent with claims by the applicants in the Canadian actions) that there were 56 programs which supported the imposition of countervailing duties. However, following further assessment and in a manner consistent with the findings by the CBSA, Customs came to the conclusion (on a prima facie basis) that only 15 of the programs supported the imposition of countervailing duties based on government subsidies and support. Customs then concluded that at least some of the exporters found by the CBSA to be receiving countervailing subsidies are also exporters of aluminium extrusions to Australia and that such alleged subsidies are above negligible levels.

The initiation of the investigation may well be the cause of some tension between the governments of Australia and the PRC. In particular, the government of the PRC argued strongly that the PRC should be considered as a "full market economy" so that local selling prices should be accepted in the first instance as the basis for calculation of normal values. The decision by Customs that there is a "market situation" involving government influence as a means to not use PRC normal values will be the cause of some tension. Further, the finding that some Chinese government programs constitute a subsidy supporting the imposition of countervailing measures will also be of concern to the PRC government. This also plays out against the background of concerns that trade remedies measures should not be used by governments or local industries as a means to unduly protect local industries.

As many of you will be aware, we have extensive experience in acting in anti-dumping measures whether for Australian industry in the initiation of measures or acting for overseas exporters and Australian importers of goods the subject of such anti-dumping or countervailing action. Of more recent time this has included assisting PRC exporters in arguments that their goods were not, in fact, dumped in Australia. As always, we will be pleased to assist parties in relation to this important investigation.

For further information, please contact Andrew Hudson.

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