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Joint Study on Anti-Dumping
c/o National Manager
Trade Measures Branch
Australian Customs Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Dear Sir/Madam

I refer to the announced Joint Study of the administration of Australia's anti-dumping system. The study was agreed to by the Minister for Justice and Customs and the Minister for Industry, Tourism and Resources. The purpose of the study is to "examine Customs' current administrative practices and consider options to improve the operation of Australia's anti-dumping system within the current legislative arrangements and policy settings".

The published announcement of the study indicated that the study "will not examine the Government's anti-dumping policy nor the legislative basis for the current Australian anti-dumping system". The focus of the study is to examine the administration of the system only.

Orica Australia Pty Ltd ("Orica") is the largest chemicals company in Australia. Orica has previously been involved as an applicant company in recent anti-dumping inquiries involving ammonium nitrate exported from the Russian Federation. Orica welcomes the opportunity to be able to comment on ways in which to improve the administration of the system, and looks forward to participating in the study.

1. Access to the Anti-Dumping System

Prima facie normal values

Orica is mindful that the onus of proof in establishing dumping rests with the applicant company. Obtaining market price information in an exporting country is often a difficult task for applicants. This is particularly the case in certain countries including most Eastern European countries (e.g. Russia, Estonia, Lithuania, Ukraine) and countries such as China where transparency in selling prices is not apparent. Publications which detail pricing trends and developments in western markets do not have sufficiently

established links within these not so well-developed markets. These difficulties result in applicant companies having to examine alternate methodologies for establishing *prima facie* normal values as the basis for an anti-dumping action.

In instances where domestic selling prices are not transparent, it is often equally difficult to obtain cost data relevant to the goods under consideration ("GUC"). The applicant has no option but to determine a *prima facie* normal on the best available information, which can often be a constructed selling price for the GUC.

Orica has not encountered difficulties with Customs in understanding the restrictions on applicants providing *prima facie* normal values. One of the key issues, however, is the contemporary nature of the information available to the applicant – it can often be data that is not aligned to the recent twelve month period upon which the investigation period is likely to be established.

The Reference Group is requested to consider the issue of the contemporary nature of information supplied for *prima facie* purposes. In most cases Customs exercises considerable judgment on whether to accept data supplied – guidance from the Reference Group on data that is considered to have "passed its use-by date" would assist applicants in this process.

China

In May 2006, Customs amended the Customs Manual (Volume 22) to reflect situations where domestic prices in an exporting country are considered "artificially low" by an applicant. The amendment followed the concerns raised by Australian manufacturers through the Trade Remedies Taskforce that Australia's recognition of China as a "market economy" for anti-dumping purposes translates to an acceptance of prices and costs in China as the basis for normal values.

Australian manufacturers had argued that prevailing prices in China for some industry sectors were influenced by the involvement of State Owned Enterprises ("SOEs") in those industry sectors and that selling prices and raw material costs did not reflect prices and costs evident in a market economy country.

As the amendments to the manual only occurred in May 2006, it is not clear to Orica whether there has been sufficient time to understand whether the amendments to the manual (and subsequent adoption of the proposals by Customs in the administration of overseas investigations) have been useful to Australian industry.

Orica is concerned that costs and prices in China do not reflect market economy values due to the influence of SOEs as raw material suppliers and/or participants in the industry of the GUC. It is Orica's experience that attempts to obtain costs and prices in China are often unsuccessful; hence applications involving China rely on the best alternate information. In some instances, surrogate information from another country may be all that an applicant can provide as the basis for *prima facie* normal values.

Orica encourages the Reference Group to recommend to Customs to expand upon the circumstances of "artificially low prices" as included in Volume 22 of the Customs manual (P. 59) and provide examples where Customs would further investigate claims put forward by the applicant.

Initiations

The 20-day screening period for Customs to examine an application and decide upon initiation is contentious. Customs has often indicated it would prefer a greater period than 20 days. Industry, however, considers that any longer period attracts additional time delays brought about by Customs' requesting further updated financial data. The current 20-day timeframe is sufficient time not to compromise the original data submitted.

For these reasons, industry is concerned by Customs' attitude to extending the 20-day pre-screening period whenever any "new" information is supplied during the pre-screening phase. Any new information submitted (particularly where it is relatively insignificant) should not automatically result in a "re-start the clock" attitude.

The applicant, along with Customs it must be assumed, seeks to have the application screened as quickly as possible within the 20-day timeframe and advance to initiation.

DLU

The principle of a team within the Trade Measures Branch with the remit of assisting small to medium enterprises in understanding the anti-dumping process is fully supported by Orica.

Further resources may be required to ensure the Dumping Liaison unit ("DLU") operates to its maximum ability in this regard.

2. Transparency

Confidentiality

Orica has recently encountered situations where organisations claim confidentiality in regards to information with large excerpts of submissions "blacked-out" or deleted in public file versions of the document. It is often difficult to understand the general thrust of the argument contained in the deleted sections of the submission.

It is Orica's understanding that whilst it is acceptable to remove commercially sensitive information from the Public File version of a report or submission, there must be sufficient information remaining to enable the reader to understand the nature of the argument or issue presented. In the event the deletion removes all detail of the central issue, Customs may elect not to take the particular issue into account in the context of the investigation.

The Reference Group is asked to critically examine the issue of confidentiality in the context of the Public File System and ensure that clear guidelines on this issue are available to all interested parties.

Public File

Access to the Public File, and obtaining information from it in a timely manner, are two critical issues in an investigation. The physical location of the Public file in Canberra makes it difficult for interested parties to review on a regular basis. Currently, interested parties are required to telephone the relevant Customs officer and request any new

submissions not previously viewed, be photocopies and forwarded (generally by mail) to them.

This places considerable strain on the interested party in gaining access to documents which may be time-critical in nature. Often this process (from telephone call requesting the documents to delivery) takes up to one week.

It is requested that consideration be afforded to placing all public file documents for an investigation in a secure location within Customs' website. This practice is presently available to interested parties in investigations conducted by the U.S. Department of Commerce in anti-dumping investigations.

3. Conduct of an investigation

Verification

The applicant verification visits conducted by Customs are extensive and thorough in nature. Orica anticipates that Customs ensures that there is a high degree of symmetry between a manufacturer's verification visit and that conducted at an exporter's premises.

The verification process at an exporter's premises would be expected by its very nature to be of greater timeframe than one conducted at the Australian applicant's premises. This would particularly be the case where translation of documents is required.

Of concern to Orica in the exporter verification process is the ease at which an exporter can demonstrate to Customs that the company maintains its financial records in accordance with generally accepted accounting standards in the exporting country. Orica considers that insufficient scrutiny is applied in investigations in testing the authenticity of such claims.

The present practice of seeking evidence that the exporter's accounts have been audited by an independent auditor and that the records have been verified by that auditor as being in accordance with the country's generally accepted accounting standards is little more than a mere 'desk audit' confirming the obvious.

The Reference Group is requested to investigate methodologies which would enable Customs to verify beyond reasonable doubt that the exporter's records have been maintained in accordance with country's generally accepted accounting standards. Orica would envisage that certain expenses e.g. depreciation, could be randomly investigated in accordance with detailed audit policies.

Provisional measures

Provisional measures are generally imposed at the time of the Statement of Essential Facts ("SoEF") when a Preliminary Affirmative Determination ("PAD") is made. The WTO Anti-Dumping Code enables provisional measures to be imposed from Day 60 of an investigation.

In recent times, there have been limited instances where a PAD was published prior to the SoEF (due at Day 110).

Orica considers that the current policy of publishing an SoEF and PAD at approximately similar times affords importers ample opportunity to continue to conduct the business of importing dumped product at injurious prices right up to the time of the SoEF. Present arrangements are all too predictable and lack any disincentive to continue to dump and cause material injury to an Australian industry.

Following receipt of a completed exporter's questionnaire that evidences dumping, and confirmation from a verification visit to the applicant industry that material injury has been, or is being caused or threatened, Customs should seek to impose provisional measures as early as is practicable from Day 60 of an investigation.

Orica is aware that there exists broad consensus among Australian manufacturers that early imposition of provisional measures is required to act as a disincentive to further dumping and material injury.

4. Post imposition of dumping measures

Circumvention - Country Hopping

Following the formal initiation of an investigation, it is not uncommon for importers to source dumped goods from an alternate country not covered by the initial anti-dumping action. The practice whereby importers "switch" sources after an investigation commences is known as "country hopping".

Some administrations (e.g. South Africa) specifically address country hopping in their anti-dumping provisions, and provide "accelerated" relief to aggrieved industries.

In Australia, the practice of country hopping has arisen regularly in applications involving the chemicals and plastics industries. Current practice (never tested) involves addressing instances of country hopping only in circumstances where the country hopping is evident before the completion of the final report and recommendations to the Minister in the initial inquiry. Country hopping, however, is not limited by the timing of an initial investigation – it is a practice that can follow from the imposition of interim duties, and may not take place until some many months following the Ministerial decision.

Ministerial guidance in the early 1990s indicated that, in theory, instances where importers switched sources could be readily addressed via truncated investigations, resulting in the early imposition of measures. Whilst such initiatives may have appeared workable, the reality was that investigations of normal duration followed.

Orica considers that instances of country hopping warrant accelerated initiation and the imposition of provisional measures following Day 60 into the country hopping investigation.

The reference Group is requested to examine opportunities to outline remedial action within current the current legislative provisions to address country hopping.

Monitoring

Monitoring of compliance with interim duties (or voluntary undertakings) should be a priority of the Trade Measures Branch following the Minister's decision to impose measures. The current approach to monitoring does not provide applicants with the

confidence that the system of anti-dumping measures is a deterrent to future dumping and material injury.

Applicants are often confronted with comments from customers that the measures which apply to exporter X from country Y "will not affect future pricing" for future exports by exporter X from country Y. The applicant will ponder how this is at all possible. Whilst Customs may evidence the payment of interim duties by the importer (on the GUC from exporter X from country Y), Customs does not know what the eventual selling price in the market is for the imported goods.

Exporter X may provide rebate relief to the importer at a time subsequent to importation. The applicant company will therefore need to have ongoing contact with Customs to convey impacts in the market of the imposition of interim duties. Orica views the monitoring of interim duties as a process which is not limited to solely the collection and assessment of interim duty payments – it also involves the regular examination of market selling prices and export prices through sales route (deductive export price) investigations.

Orica seeks the expansion of the monitoring program of interim duties to include Customs' regular and ongoing liaison with the applicant industry to ensure the interim duties have the desired impact on market selling prices for the GUC. On this basis, Customs would require an ongoing interface with the applicant industry to ensure rebates are not paid by the exporter at some subsequent time following importation.

The foregoing highlights some specific concerns Orica has identified with the present administration of Australia's anti-dumping provisions. Orica supports initiatives of the Joint Study which will contribute to improving the effectiveness of Australia's anti-dumping system and ensuring that the system operates to provide effective relief to Australian industries impacted from dumping.

Should you have any questions concerning this submission, please do not hesitate to contact the undersigned on (03) 9665 7870.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Fetter".

John Fetter
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