



Customs Act 1901 - Part XVB

TRADE MEASURES BRANCH

PRELIMINARY AFFIRMATIVE DETERMINATION NO. 145

Geosynthetic Clay Liners from the Federal Republic of Germany

8 May 2009

Introduction

On 12 November 2008, Geofabrics Australasia Pty Ltd (Geofabrics) lodged an application under s. 269TB of the *Customs Act 1901*¹, requesting that the Minister for Home Affairs (the Minister) publish a dumping duty notice in respect of Geosynthetic Clay Liners (GCLs) exported to Australia from the Federal Republic of Germany (Germany).

Further information in support of the application was received on 2 and 11 December 2008.

The Chief Executive Officer (CEO) of the Customs and Border Protection Service (Customs and Border Protection) considered the application and the further information received in support of the application and decided not to reject it. On 5 January 2009 Customs and Border Protection published in the Australian newspaper notification of initiation of an investigation. Australian Customs Dumping Notice (ACDN) No. 2009/01 relating to the initiation was issued on the same day.

The application was made by Geofabrics on behalf of itself and its wholly-owned subsidiary Elco Solutions Pty Ltd (Elco) which together constitute the Australian industry. Geofabrics and Elco are referred to together in this report as 'the applicants'.

Customs and Border Protection notified that the investigation period was from 1 January 2008 to 31 December 2008 and that it would examine exports to Australia of the goods the subject of the application during that period to determine whether dumping had occurred. Customs and Border Protection also notified that it would examine details of the Australian market from 1 July 2005 for injury analysis purposes.

Customs and Border Protection received submissions within 40 days after the date of initiation of the investigation (or a longer period if a formal application for an extension of time was received and accepted) from:

- Global Synthetics Pty Ltd (the importer of the goods under consideration); and
- Clayton Utz Lawyers (representatives of Naue GmbH & Co. KG, the exporter of the goods under consideration).

During the course of the investigation, Customs and Border Protection visited Geofabrics and Elco (the applicants), Global Synthetics Pty Ltd, and Naue GmbH & Co. KG for the purpose of verifying the information provided by these companies in their application or submissions.

In accordance with s. 269TDAA(1), the CEO must issue a statement of essential facts within 110 days of the initiation of an investigation (unless the date has been extended). The statement sets out the essential facts on which the CEO proposes to base recommendations to the Minister. Trade Measures

¹ All references to legislation in this report, unless otherwise expressly indicated, will refer to provisions of the *Customs Act 1901*.

statement of essential facts No. 145 in relation to the investigation was placed on the public record on 28 April 2009. Interested parties have 20 days to respond to issues raised in the statement of essential facts. Responses are due by 18 May 2009.

When considering an application for the publication of a dumping duty notice under s. 269TD, the CEO may, at any time not earlier than 60 days from the date of initiation of an investigation, make a preliminary affirmative determination (PAD) that there appears to be, or it appears there will be, sufficient grounds for the publication of a notice.

In making a PAD, Customs and Border Protection must have regard to the application, any submissions that are received within 40 days after the date of initiation of the investigation and, may have regard to any other matters considered relevant. Customs is not obliged to have regard to any submissions received after day 40 if to do so would, in the opinion of the CEO, prevent the timely consideration of the question whether or not to make a PAD.

Customs and Border Protection must make a PAD before provisional measures can be imposed or a price undertaking considered by the Minister. If a PAD is made, public notification of this decision must be given.

The CEO may apply provisional measures in order to prevent further injury, or threat of injury, to the Australian industry while the investigation is preceding to finalisation. Customs and Border Protection may require and take provisional measures in the form of securities under s. 42 in respect of interim duty that may become payable on the goods.

This PAD report sets out the reasons for making a determination whether Customs and Border Protection will collect securities on future shipments and sets out the date from which they will apply.

The goods

The applicants described the goods as geosynthetic clay liners, commonly referred to as GCLs, comprising one or more geotextile layers and one or more layers of bentonite clay.

The applicants provided the following additional details in respect of the goods:

Geosynthetic Clay Liners (“GCLs”) usually includes two geotextile layers to encapsulate a layer of bentonite clay. The geotextile outer layers are generally made of polypropylene or polyester with a uniform core of premium quality bentonite clay to form a hydraulic barrier, or “sandwich” of textile and clay.

The components and performance criteria of a GCL typically fall within the following specification ranges:

Component	Per square metre
<i>Bentonite clay</i>	<i>2500g/m² to 5500 g/m²</i>
<i>Cover textile</i>	<i>100 g/m² to 450 g/m²</i>
<i>Carrier textile</i>	<i>80 g/m² to 550 g/m²</i>
Performance Criteria	
<i>Permeability</i>	<i>No greater than 7 x 10⁻¹⁰ m/s</i>
<i>Peel strength</i>	<i>Between 150N/m and 3500N/m</i>

The “sandwich” may consist of more than one layer of the textile components, depending upon the application for which it is intended. The clay, cover textile and carrier textile are usually needle-punched together to form a geocomposite. The fibres from the cover textile are punched through the clay and carrier textile to confine and retain the clay in place whilst providing internal shear strength to the product. The goods may be heat treated to lock the fibres in place and the cover textile may be impregnated with bentonite clay.

GCLs are used as hydraulic barriers in civil and hydraulic engineering applications including waste and contaminated soil caps, land fill base liners; gas and vapour seals; surface impoundment liners; secondary containment; dams, canals and water courses; tailings containment; groundwater protection; and waterproofing.

GCLs exported to Australia from Germany are sold under the product name Bentofix®. The following three grades of Bentofix® were exported from Germany to Australia in 2008:

- NSP 4300;
- NSP 4900; and
- BFG 5000.

The goods were manufactured in, and exported from Germany, by Naue GmbH & Co. KG (Naue). Naue has an exclusive distributor agreement with the Australian importer, Global Synthetics Pty Ltd (Global).

The goods are classified to subheading 6815.99.00 (statistical code 09) in Schedule 3 to the *Customs Tariff Act 1995*. The rate of duty on goods imported from Germany under this subheading is 5 percent.

Like goods

Geofabrics markets GCLs manufactured by Elco under the product name ElcoSeal®. ElcoSeal® is manufactured in four standard grades: X800; X1000; X2000; and X3000. Each grade has different specifications and properties such as permeability, peel strength and shear strength.

The applicants provided a comprehensive comparison of the grades of ElcoSeal® and Bentofix® in their application. The application also included a table that matched the major grades of ElcoSeal® with the equivalent grades of Bentofix® exported to Australia in 2008. The table is reproduced below.

Australian manufactured GCLs (ElcoSeal®)	The goods the subject of the application (Bentofix®)
X800	NSP 4000; NSP 4300
X1000	NSP 4300; NSP 4900
X2000	NSP 4900; BFG 5000
X3000	BFG 5000

Customs and Border Protection found from its examination of certain projects in 2008 that the following grades of GCLs were in direct competition: NSP 4300 with X1000; NSP 4900 with X800, X1000 and X2000; and BFG 5000 with X1000 and X2000.

Customs and Border Protection was satisfied that the GCLs produced and sold by the applicants are like goods to the goods the subject of the application. Although the different grades of German and Australian GCLs vary in specifications, grades of the imported and Australian product are effectively substitutable for each other, and have significant physical, commercial, functional and production likeness.

Australian market

The Australian market is supplied by GCLs manufactured by Elco and imported from a number of countries, mainly the People's Republic of China (China) and Germany. China accounts for the largest proportion of imports.

As the data contained in Customs and Border Protection's commercial database indicated there were few (if any) GCL imports from countries other than China and Germany in 2008, Customs and Border Protection estimated the market size based on verified sales of Australian, and German GCLs and the applicants' estimates of sales of Chinese GCLs.

Customs and Border Protection estimated the annual average size of the Australian market for GCLs, over the injury analysis period, was greater than one million square metres (sqm). Analysis of the data indicates that there was a contraction in the market in 2007/08 compared with the previous two years. It appears, however, that the market size recovered in 2008.

Customs and Border Protection understands that:

- the demand for GCLs has historically been driven by the lining requirements for landfills. There is now an emerging demand for GCLs in other applications, in particular, mining and building water proofing as well as water conservation and secondary containment;
- the Australian market can be divided into the following market segments:
 - o landfill – characterised by large contracts typically between 10,000 to 80,000 sqm;
 - o mining – also characterised by large contracts of around 30,000 sqm;
 - o industrial/building & construction – typically consisting of small contracts ranging from 1,000 to 30,000 sqm; and
 - o consumer – characterised by very small contracts of between 200 to 1,500 sqm;
- the landfill and mining segments are project driven, often with long lead times between winning the contract and supply of the products;
- the industrial segment consists largely of basement waterproofing;
- the Australian product is manufactured by Elco and distributed by Geofabrics to contractors/subcontractors (typically specialist GCL lining companies) or direct to asset owners (i.e. the entity that owns the facilities where GCLs are to be installed). The German product is manufactured by Naue and distributed by Global to similar customers as Geofabrics;
- Sales of the larger volume contracts are usually determined by tender arrangements with Geofabrics, Global and other importers/distributors of imported product competing against each other in open tenders; and
- The major parties in a tendering process are the asset owners; the consultant responsible for design and specifications for the project; and the contractor/ specialist lining sub-contractor contracted to install the liners.

As the Australian market is largely driven by sales to large volume contracts, Customs and Border Protection placed considerable weight on project specific analysis, in particular the tendering processes that took place with specific projects involving GCL supplies in 2008. Customs and Border Protection noted in responses to questionnaires sent to purchasers of GCLs in relation to these projects that price was considered one of the most important considerations along with the specifications of the grade quoted. Customs and Border Protection found it was not uncommon for one GCL supplier to be aware of the price of its competitor, either specifically in relation to a particular project, or in terms of a general awareness of its competitors historical prices. At times a competitor's understanding of another's average prices or prices at particular projects was very accurate, but at other times it was not accurate.

Preliminary findings on dumping

Customs and Border Protection notified that the investigation period to examine whether there was any dumping was from 1 January 2008 to 31 December 2008.

In order to calculate preliminary findings on dumping, Customs and Border Protection established the export price under s. 269TAB(1)(a) using the price paid or payable for GCLs by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation, or in respect of any other matter arising after exportation. Specifically, Customs and Border Protection has based its export price calculations on the prices contained in Naue invoices for GCLs sold to Global and exported in the investigation period.

Customs and Border Protection considers that sufficient information has been furnished to enable normal values to be established under s. 269TAC(1), using the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter. Specifically, Customs and Border Protection has based its normal value calculations on the prices contained in Naue invoices for GCLs sold domestically in Germany.

In calculating normal values, Customs and Border Protection has made adjustments to the domestic selling prices as required by s. 269TAC(8), to ensure that the normal values are properly comparable with the export prices. Adjustments were made in relation to differences in domestic and export prices arising from different domestic and export credit terms; different domestic and export inland freight; and export clearance and FOB charges (which do not apply to domestic sales).

In addition, where Customs and Border Protection found no sales by Naue in the domestic market that were in the ordinary course of trade for the grade directly comparable to the grades exported to Australia, adjustments were made for the physical differences between the relevant export grade and the next most comparable grade sold domestically.

Customs and Border Protection compared the weighted average of export prices over the whole of the investigation period with the weighted average of corresponding normal values over the same period, in accordance with s. 269TACB(2)(a).

The weighted average dumping margin, for GCLs exported to Australia by Naue in the investigation period, was 26.7 per cent.

Preliminary findings on injury

The application was made by Geofabrics on behalf of itself and its wholly owned subsidiary Elco, the sole manufacturer of GCLs in Australia. All GCLs manufactured by Elco are marketed and sold by Geofabrics. Customs and Border Protection considers that Elco and Geofabrics constitute the Australian industry producing like goods.

Customs and Border Protection notified that it would examine details of the Australian market from 1 July 2005 for injury analysis purposes. Verified financial data covering the financial years 2005/06 – 2007/08 and the first half of 2008/09 was used for this purpose. The Australian industry also provided detailed sales data for the 18 months ending December 2008 which enabled Customs and Border Protection to conduct certain analyses separately for the investigation period (calendar year 2008).

In addition to analysis of volume, price and profit data at the aggregate level, Customs and Border Protection also examined the circumstances surrounding the following projects involving GCL supplies in 2008:

- Boddington Gold Mine (Boddington);
- South Cardup Cell 7 Landfill (Cardup);
- Wingfield Eco-Resource Management Centre Landfill (WERM);
- Woodford Island/Clarenza STP (Woodford Is);
- BP Terminal Tank Farm Carrington;
- Beaudesert Central Landfill (Beaudesert);
- Highbury Landfill (Highbury); and
- Browns Plains SMART Tip (Browns Plains).

In respect of preliminary findings on injury, Customs and Border Protection considers that:

- although aggregated sales volume data does not show a loss in total domestic sales volume for the investigation period, the Australian industry has lost sales volume in relation to the Boddington and Cardup projects and this lost volume represents a loss in market share in the investigation period;
- Geofabrics' selling prices were undercut by Global in relation to the Boddington project. In addition Customs and Border Protection found that Global's weighted average prices for 2008 were, in three out of six comparisons of comparable grades, lower than the Geofabrics' weighted average prices of GCLs;
- Customs and Border Protection considers that aggregated sales data and project specific sales data for the Woodford Is, WERM, Beaudesert, Browns Plains and Highbury projects indicate that Geofabrics experienced significant price depression in the investigation period;
- The relationship between cost to make and sell (CTMS) and price indicates price suppression in 2007/08. In the first half of 2008/09 prices continued to decrease albeit at a lower rate than the decrease in CTMS. In addition having regard to sales data for the Woodford Is, WERM, Beaudesert, Browns Plains and Highbury projects, prices at those projects were lower than the weighted average selling prices of all GCL sales for corresponding and preceding years. Geofabrics therefore experienced significant price suppression in the investigation period; and

- Aggregate data indicates that the applicants experienced reduced profits and profitability in 2007/08 but this appeared to be improving in 2008/09. However Customs and Border Protection considers that the lost sales and depressed/suppressed prices caused lost profits and reduced profitability in the investigation period.

Customs and Border Protection considers that its analysis of aggregate financial data, and its analysis of project specific sales data, indicates the Australian industry has experienced material injury demonstrated in terms of:

- Lost sales volume;
- Lost market share;
- Price undercutting;
- Price depression;
- Price suppression;
- Lost profits; and
- Reduced profitability.

Preliminary findings on causality

In respect of preliminary findings on causality, Customs and Border Protection considers that:

- GCLs were exported from Germany to Australia in 2008 at dumped export prices, in volumes that were not negligible, and the margin of dumping was 26.7 per cent;
- the magnitude of the dumping margin was a significant factor in enabling Global to undercut the prices of the Australian industry, and in enabling Global to be competitive with the Australian industry;
- the competitive prices for GCLs sold by Global caused the loss of sales volume (in relation to Cardup and Boddington Projects) for the Australian industry and the associated loss in market share;
- the presence of competitive pricing from German GCLs, and the knowledge of lost contracts at Boddington and Cardup, caused Geofabrics to reduce quoted prices in bidding for contracts in 2008 resulting in significant price depression and price suppression; and
- notwithstanding increased sales volumes overall in 2008, the loss of the Boddington and Cardup projects, together with significant price depression and price suppression, caused the Australian industry's profits and profitability to be lower than they would have been without dumping.

Conclusions

Sufficient grounds

Customs and Border Protection considers that dumping has caused material injury to the Australian industry.

Customs and Border Protection is therefore satisfied that there appears to be sufficient grounds for the publication of a dumping duty notice in respect of geosynthetic clay liners exported to Australia from Germany.

Taking Securities

Customs and Border Protection considers that:

- imports of GCLs from Germany are likely to continue;
- these imports are likely to be at dumped prices; and
- material injury to the Australian industry will continue to be caused by the dumped imports of GCLs from Germany.

In order to prevent material injury occurring while the investigation continues Customs and Border Protection requires that securities be taken under s. 42 of the Act in respect of interim duty that may become payable in relation to GCLs exported to Australia from Germany that are entered for home consumption on or after 8 May 2009.

Non-injurious price

Dumping duties may be applied where it is established that dumped imports have caused or threatened to cause injury to the Australian industry producing like goods. The level of dumping duty imposed by the Minister cannot exceed the margin of dumping, but a lesser duty may be applied if it is determined that it is sufficient to remove the injury.

The non-injurious price (NIP) provides the mechanism whereby this lesser duty provision is given effect. It is the price that would be sufficient to remove the injury caused to the Australian industry by the dumping. Anti-dumping duties are based on free-on-board (FOB) prices in the country of export. Therefore a NIP is calculated in FOB terms for the country of export.

Customs and Border Protection generally derives the NIP by first establishing a price at which the Australian industry might reasonably sell its product in a market unaffected by dumping. This price is referred to as the unsuppressed selling price (USP). Customs and Border Protection's preferred approach to establishing a USP observes the following hierarchy:

1. industry selling prices at a time unaffected by dumping;
2. constructed industry selling prices – industry CTMS plus profit; or
3. selling prices of undumped imports.

Having calculated the USP, Customs and Border Protection then calculates a NIP by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia. The deductions normally include overseas freight, insurance, into store costs and amounts for importer expenses and profit.

After taking account of comments from relevant parties, Customs and Border Protection considers the most appropriate basis for the USP is Geofabrics'

selling prices of GCLs in the second half of 2007 and the NIP, at the FOB price level, be calculated by deducting from the USP amounts for:

- importer profit;
- importer administrative, selling and general expenses;
- importer into-store costs; and
- overseas freight and marine insurance.

Customs and Border Protection compared the NIPs calculated for each grade of GCL exported to Australia by Naue in the investigation period to Naue's respective weighted average export prices for the same period.

Based on the respective export volumes of the three grades, Customs and Border Protection then calculated a weighted average difference between the NIPs and export prices. Customs and Border Protection found the NIPs exceeded the export prices by a weighted average margin of 5.6 percent which is less than the weighted average dumping margin of 26.7 percent. This means that the lesser duty rule will be applied for the purpose of provisional measures.

Provisional measures

For the purposes of this PAD Customs and Border Protection calculated export prices, normal values and NIPs as described above. The amount of dumping security payable is the difference between the PAD export price and the PAD NIP. Provisional measures have been set at 5.6 percent of the PAD export price.

Three grades of Bentofix® GCLs were imported into Australia from Germany in 2008. Customs and Border Protection therefore calculated provisional measures based on two product categories: GCLs with a total mass of less than and equal to 5,000 grams/ sqm and GCLs with a total mass of greater than 5,000 grams/ sqm. A total mass of 5,000 grams/ sqm was selected to distinguish the BFG 5000 grade (and higher grades) from lower grades of product.

Provisional measures will be in place from 8 May 2009 for six months and continue to be collected until the Minister's decision is published, which is expected after 8 July 2009 (the date the final report is due to be sent to the Minister), or they expire.