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Review of measures applying to aluminium extrusions exported from China

This submission is made on behalf of PanAsia Aluminium (China) Co. Ltd (PanAsia) and provides comments on the submission made by Capral Limited (Capral) on 19 June 2014 to the review into certain aluminium extrusions exported from China. In its submission, Capral identified a number of new programs that it considers are countervailable subsidies that warrant further investigation by the Anti-Dumping Commission (Commission). One of those programs is titled 'Currency undervaluation'.

Capral highlights that US manufacturing industries have on a number of occasions applied to have currency undervaluation investigated as a countervailable subsidy by the US authorities. It acknowledges that the 'US has never initiated an investigation, on the basis that these industries failed to support their claim that the subsidy is specific.'

Capral appears to have circumvented the need to consider or demonstrate specificity by suggesting that currency undervaluation is a prohibited subsidy as defined in Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM). The entire basis for Capral's assertion that receipt of the subsidy is contingent, in fact, upon export performance, is because:

A Chinese manufacturer must export its products in order to receive foreign currency, and in order for that manufacturer to receive the benefit of the subsidy, it must convert that foreign currency into RMB.

PanAsia makes the following comments in response to Capral's claim.

Firstly, it is clear that Capral has provided no information or evidence to demonstrate that currency undervaluation is specific in accordance with Article 2.1 of the SCM.

Secondly, Capral has not provided any information or evidence to demonstrate that currency valuation falls within the illustrative list of export subsidies at Annex I of the SCM.

Lastly, in asserting that currency undervaluation meets the definition of an export subsidy pursuant to Article 3 of the SCM, Capral has conveniently overlooked footnote 4 of that article. That footnote

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provides further guidance on determining whether a subsidy is in fact contingent upon export performance. It states:

This standard is met when the facts demonstrate that the granting of subsidy, without having been legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

The Appellate Body explained in *Canada – Aircraft*¹, that ‘the ordinary connotation of “contingent” is “conditional” or “dependent for its existence on something else”’.

In examining the substantive elements required by footnote 4, the Appellate Body made the following findings²:

170. *The first element of the standard for determining de facto export contingency is the “granting of a subsidy”. In our view, the initial inquiry must be on whether the granting authority imposed a condition based on export performance in providing the subsidy. In the words of Article 3.2 and footnote 4, the prohibition is on the “granting of a subsidy”, and not on receiving it. The treaty obligation is imposed on the granting Member, and not on the recipient. Consequently, we do not agree with Canada that an analysis of “contingent ... in fact ... upon export performance” should focus on the reasonable knowledge of the recipient.*

171. *The second substantive element in footnote 4 is “tied to”. The ordinary meaning of “tied to” confirms the linkage of “contingency” with “conditionality” in Article 3.1(a). Among the many meanings of the verb “tie”, we believe that, in this instance, because the word “tie” is immediately followed by the word “to” in footnote 4, the relevant ordinary meaning of “tie” must be to “limit or restrict as to ... conditions”. This element of the standard set forth in footnote 4, therefore, emphasizes that a relationship of conditionality or dependence must be demonstrated. The second substantive element is at the very heart of the legal standard in footnote 4 and cannot be overlooked. In any given case, the facts must “demonstrate” that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are contingent upon export performance.*

The interpretation of Article 3.1(a) and footnote 4 was further considered by the WTO Dispute Panel in *Automotive Leather II*³. As the respondent, Australia made submissions to the dispute outlining its view on the test set out in Article 3.1(a). The Panel report states⁴:

Australia favours a narrow approach to the “contingent ... in fact” test in Article 3.1(a). In Australia’s view, the contingent in fact standard is defined and limited by footnote 4 of the SCM Agreement. The distinction between “contingent in law” and “contingent in fact” is intended to distinguish between the situation where something is set out explicitly in legislation or regulation

¹ Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, para 166, page 43.

² Ibid, para 170-171, page 44.

³ Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R.

⁴ Ibid, para 9.51, page 106.

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("in law") and where there is some non-legislative, administrative arrangement whereby the granting of the subsidy is actually tied to export performance ("in fact"). The purpose of the "in fact" provision is to provide a way of dealing with the situation where the administration of a subsidy programme allows the disbursement of funds to favour exports, i.e. to provide subsidies to firms tied to export performance. Australia urges us to reject a test based on some "undefined level of exports" for determining whether a subsidy is a prohibited export subsidy. The facts must demonstrate that the granting of the subsidy is in fact tied to actual or anticipated exportation or export earnings. In other words, "the complainant must show that the granting of the subsidy is in fact tied in its application to export performance and so favours export over domestic sales". In this regard, Australia argues that WTO rules need to provide clear guidance to Members, and the United States position would leave Member unable to plan domestic support policies in a way that would avoid running afoul of the prohibitions of Article 3.1(a).

Australia further argued⁵:

That in order to demonstrate that the granting of the subsidy is in fact tied in its application to export performance, it must be determined that the grant (or maintenance) of the subsidy favours export over domestic sales.

PanAsia agrees with the findings of the Appellate Body and Australia's interpretation of Article 3.1(a) of the SCM and as a result considers that Capral has failed to demonstrate that reasonable grounds exist to investigate whether currency undervaluation is a countervailable subsidy. In our view, Capral has applied the incorrect interpretation and test of Article 3.1(a). Moreover, Capral's assertion falls foul of the second sentence of footnote 4 which makes clear that the mere fact that a subsidy is granted to enterprises which export cannot be the sole basis for concluding that a subsidy is "in fact" contingent upon export performance.

In conclusion, given WTO jurisprudence and Australia's stated interpretation of Article 3.1(a) and footnote 4 of the SCM, PanAsia respectfully requests the Commission to reject Capral's application for currency undervaluation to be investigated as a countervailable subsidy in the review of measures applying to aluminium extrusions exported from China.

Yours sincerely,

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⁵ Ibid, para 9.52, page 107.