



POSITION PAPER 2014/04

REVIEW OF MEASURES

CERTAIN ALUMINIUM EXTRUSIONS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

CASE 248

1. PURPOSE

The purpose of this position paper is to outline the Anti-Dumping Commission's (the Commission's) proposed approach to the consideration of countervailable subsidies in the Division 5 of Part XVB of the *Customs Act 1901* review of anti-dumping measures applicable to certain Aluminium Extrusions (review of measures) exported from the People's Republic of China (China) (case 248).

This paper on countervailable subsidies considers:

- a background to this review of measures and relevant findings in the original investigation;
- additional countervailable subsidy programs that have been raised for consideration; and
- the Commission's proposed approach to those additional programs in this review of measures.

The Commission considers that it is consistent with WTO rules¹ to consider additional subsidy programs as part of this review of measures. In relation to the programs raised, the Commission's preliminary view is that program 62 (currency valuation) is not a countervailable subsidy. The Statement of Essential Facts will set out the material findings of fact upon which the Commission intends to base its recommendations to the Parliamentary Secretary, including with regard to countervailable subsidies.

¹ Specifically, articles 12, 21 and 22 of the Agreement on Subsidies and Countervailing Measures

2. BACKGROUND

This review of measures

On 12 June 2014, the Commission commenced a review of the anti-dumping measures applying to certain aluminium extrusions exported to Australia from China.

The review of measures is the result of an application by PanAsia Aluminium (China) Co Ltd seeking a review of the anti-dumping measures as they apply to its exports to Australia. The Parliamentary Secretary to the Minister for Industry (Parliamentary Secretary), who is responsible for anti-dumping matters, accepted a recommendation from the Commissioner of the Anti-Dumping Commission (Commissioner) to extend the review of measures to all exporters covered by the measures.

Past investigation

The anti-dumping measures were initially imposed by public notice on 28 October 2010 by the Attorney-General following consideration of *Trade Remedies Branch Report No. 148* (REP 148). Following a review by the Trade Measures Review Officer, Australian Customs and Border Protection² (ACBPS) conducted a reinvestigation into certain findings made in REP 148. *International Trade Remedies Report No. 175* sets out the findings affirmed and new findings made by ACBPS as a result of the reinvestigation.

To give effect to this decision the Attorney-General published new notices under section 269ZZM of the *Customs Act 1901* (the Act). These notices, which came into effect on 27 August 2011, replaced the dumping and countervailing duty notices published on 28 October 2010. Following judicial review by the Federal Court of Australia, on application by Pan Asia and Kam Kiu³, rates of dumping and countervailing duty for Kam Kiu and Pan Asia reverted to “consolidated” levels (rather than by finish) to apply retrospectively from 27 August 2011.⁴

Findings in relation to countervailable subsidies

In the original investigation, ACBPS investigated 43 subsidy programs. Of those 43 programs, ACBPS found that aluminium extrusions exported from China to Australia received financial contributions that conferred a benefit and were specific and therefore countervailable in relation to nineteen of those programs. The programs which were countervailed can be categorised as:

- Reduced income tax based on location programs
- Grants
- Reduced income tax
- Provision of goods for less than adequate remuneration (primary aluminium)

² Australian Customs and Border Protection previously exercised powers now exercised by the Anti-Dumping Commission.

³ Tai Shan City Kam Kiu Aluminium Extrusion Co Ltd (Kam Kiu) and its related companies Kam Kiu Aluminium Products SDN BHD and Kam Kiu (Australia) Pty Limited

⁴ Further details regarding the findings of the course case and amendments to anti-dumping measures applicable to aluminium extrusions can be found in ADN 2013/80.

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- Tariff and Value-added Tax (VAT) exemptions on imported materials and equipment.

3. ADDITIONAL COUNTERAVAILABLE SUBSIDY PROGRAMS

Additional programs

In a submission (dated 19 June 2014) Capral Limited, an Australian manufacturer of aluminium extrusions, raised a number of additional alleged countervailable subsidy programs for consideration as part of the broader review (EPR248/006). These are:

- **Program 44:** Preferential lending programs - loans from Chinese policy banks and state-owned commercial banks
- **Program 45:** Provision of land use rights
- **Program 46:** Provision of electricity
- **Program 47:** Preferential tax policies for high and new technology enterprises
- **Program 48:** Provincial government of Guangdong tax offset for research and development
- **Program 49:** Exemption from city construction tax and education tax for FIEs
- **Program 50:** Refund of land use for firms located in the Zhaoqing new and High-tech Industrial Development Zone
- **Program 51:** Fund for SME bank-enterprise cooperation projects
- **Program 52:** Special fund for science and technology in Guangdong
- **Program 53:** Provincial fund for fiscal and technological innovation
- **Program 54:** Provincial loan discount special fund for SMEs
- **Program 55:** Export rebate for mechanic, electronic, high-tech products
- **Program 56:** PGOG special fund for energy saving technology reform
- **Program 57:** PGOG science and technology bureau project fund
- **Program 58:** Development assistance grants from the ZHTDZ
- **Program 59:** Provision of water
- **Program 60:** Provision of natural gas
- **Program 61:** Provision of heavy oil
- **Program 62:** Currency valuation

Consideration of additional programs in review of measures

The Commission considers that new countervailable subsidies can be included in a general review of measures applying to all exporters. This is because a review of measures applying to all exporters provides an opportunity to consider the need for the continued imposition of the duty, including whether the duty is still necessary to offset subsidisation and whether the injury would be likely to continue or recur if the duty were removed or varied.

A legitimate function of a review of measures by the Commission is to not only determine if exports to Australia are no longer benefiting from certain previously identified specific subsidy, but also to determine if exports are benefiting from varied or additional subsidy schemes. This approach recognises that avenues of assistance offered to exporters can change over time while still having a detrimental impact on domestic industry of the importing country.

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In recommending to the Parliamentary Secretary that the current review be extended to all exporters, the Commission noted that the change in circumstances upon which PanAsia Aluminium's application for review would be commenced was common to all Chinese aluminium manufacturers. On this basis, the Commissioner considered that it would be appropriate to recommend that the review be extended to ensure that any changes to the measures are applied across all exporters.

By extending the review to all exporters, any decision by the Commission on subsidy programs is able to apply to all exporters. Further, in terms of process, the Commission is able to issue questionnaires to all exporters and conduct necessary verification visits. It is therefore the Commission's position that, given the extension of the review by the Parliamentary Secretary, assessment of new countervailable subsidy programs can appropriately be considered in this review of measures.

Consistency with WTO rules

The Government of China has submitted that it considers that the Commission's consideration of new subsidy programs is inconsistent with WTO rules (see EPR248/022 and EPR 248/027).

The view expressed by the Government of China is that:

- the Commission has, without warning, commenced an investigation of the above subsidy programmes without a proper written application on behalf of the Australian industry;
- the Commission has not invited the Government of China for consultations as required by Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM) after accepting an application under Article 11 and before initiating an investigation;
- the Commission has acted inconsistently with its obligations under Article 22 of the SCM to provide adequate information on the subsidy practice or practices to be investigated.

The Commission considers that the examination of additional subsidy programs in the context of this review of measures is consistent with WTO rules. The Commission notes that the review application lodged by the Chinese exporter, PanAsia Aluminium (China) Co Ltd, is not an application for the purposes of in Article 11.1 of the SCM. This is because applications under Article 11.1 may only be made by or on behalf of the domestic industry and relate to the initial investigation to determine the existence, degree and effect of any alleged subsidy, not the review of measures already in place.

This review of countervailing measures applying to aluminium extrusions exported from China is being conducted in accordance with the obligations established by Article 21.2 of the SCM, noting the requirement in Article 21.1 that countervailing duties remain in force only as long as ***and to the extent necessary*** to counteract subsidisation which is causing injury (emphasis added). The Commission considers that, in conducting a review of countervailing measures under Article 21 of the SCM, it is required under Article 21.2 to examine to what extent exported goods are benefitting from countervailable subsidies including, where relevant, newly alleged subsidies. This would be relevant to a determination under Article 21.2 of whether

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the continued imposition of the duty is necessary, for instance, to offset subsidisation or because injury would be likely to recur if the duty were removed or varied.

The Commission considers that, pursuant to Article 21.4 of the SCM, the provisions of Article 12 of the SCM regarding evidence and procedure apply to any review of countervailing measures. The Commission does not agree that any obligations arise under Article 11 ('initiation and subsequent investigation') or Article 13 ('consultations') of the SCM, as asserted by the Government of China.

The Commission notes that its conduct of the review to date has included the following procedures:

- the public notice published in *The Australian* newspaper on 12 June 2014 and ADN 2014/46 published on the Commission's website advising of the initiation of the review;
- the establishment of the electronic public record EPR248⁵ containing all non-confidential submissions; and
- the issuing of questionnaires to the Government of China and exporters of the goods, including seeking information relevant to an objective assessment of the newly alleged subsidies

The Commission considers that its conduct of review fully complies with the obligations established under Articles 12, 21 and 22 of the SCM.

4. APPROACH TO COUNTERAVAILABLE SUBSIDIES

Programs 44 to 61

In relation to programs 44 to 61, the Government of China has declined to provide a response to the questionnaire sent to them to examine the claims made by Capral in relation to these programs. The Commission therefore proposes to assess whether aluminium extrusions exported from China to Australia received financial contributions that conferred a benefit in relation to those schemes, including the specificity of those schemes, on the basis of all the facts available in accordance with s269TAACA(1) of the Act. In this context, such facts may be established from a range of sources including: publicly available information in relation to these schemes, information collected through past investigations, information submitted by other interested parties, including Australian industry, and reliable and verifiable information provided by exporters. The Commission's position on these schemes will be detailed in the Statement of Essential Facts following the completion of any exporter verification visits.

Program 62

In relation to program 62, the Government of China has provided a submission in relation to this scheme (EPR248/041). The Commission has considered this submission, Capral Limited's submission, Pan Asia's submission⁶, and publicly available information in reaching a preliminary view as to whether this program

⁵ Available at <http://www.adcommission.gov.au/cases/EPR248.asp>

⁶ PanAsia Submission July 2014, EPR 248/009

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constitutes a countervailable subsidy for the purpose of this review of measures. Based on the Commission's assessment of the available information, the Commission considers that this program does not represent a countervailable subsidy.

This is primarily because, regardless of any evidence regarding the valuation of Chinese currency, there is insufficient evidence that the Government of China's approach to currency exchange is a subsidy within the countervailable subsidies framework given:

1. 'Subsidy' is defined in Article 1 of the SCM. While various arguments may be advanced as to how currency valuation could be considered a 'subsidy'⁷, the Commission is not satisfied that the currency valuation is a 'financial contribution' or a form of 'income or price support', nor that a benefit is conferred, within the meaning of article 1 of the SCM in respect of aluminium extrusions exported to Australia from China.
2. Further, and notwithstanding the abovementioned view that there is not a 'subsidy', the requirements of specificity under Articles 1.2 and Article 2 of the SCM do not appear to be met. That is, the benefit received does not appear to be specific to a particular industry (or to a group of enterprises or industries) but is a broad macroeconomic policy. Therefore, even if currency valuation could be considered a 'subsidy' under Article 1 this requirement would not be met.
 - o The Commission notes Capral's argument⁸ that specificity is not required as the alleged currency valuation activities are a prohibited subsidy under Article 3 of the SCM. The Commission notes firstly that, to be considered under Article 3 any program must meet the requirements of a 'subsidy' as set out in Article 1. Secondly, the Commission considers that even if the currency valuation program was a 'subsidy' it cannot be established in the current case that there is a receipt of a subsidy *contingent upon export performance or contingent upon the use of domestic over imported goods*. Specifically, the Commission does not consider that the fact that a manufacturer must sell goods in foreign currency to receive any benefits of currency conversion is sufficient to establish export contingency.

Given the above, the Commission's preliminary view is that program 62 (currency valuation) is not a countervailable subsidy.

5. CONCLUSION

The Commission intends to continue to consider alleged new countervailable subsidies in the review of anti-dumping measures applicable to certain Aluminium Extrusions exported from China. In relation to program 62 (currency valuation), the

⁷ For example, Capral has referred the Commission to Caryl, B. 'Is China's Currency Regime a Countervailable Subsidy? A legal analysis under the World Trade Organisation's SCM Agreement, *Journal of World Trade*, 45, no.1 (2011); 187-219

⁸ Capral submission dated 19 June 2014, p.18 (EPR 248/006)

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Commission's preliminary view is that this program is not a countervailable subsidy and is therefore not relevant to the review of measures. In relation to other programs, the Commission intends to conduct verification visits to certain exporters in relation to information provided to the investigation to date.

The Statement of Essential Facts will set out the material findings of fact upon which the Commission intends to base its recommendations to the Parliamentary Secretary, including with regard to countervailable subsidies.