



Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 23

Silicon Metal

September 2015



ADRP Report No.23

Silicon Metal

Review of a Decision of the Parliamentary Secretary to Publish a a Countervailing Duty Notice in relation to Silicon Metal exported from the People’s Republic of China.

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Summary

- 1 Pacific Aluminium (“applicant”) applied pursuant to s 269ZZC of the *Customs Act 1901* (Act) for review of a decision of the Parliamentary Secretary to the Minister for Industry and Science made on 3 June 2015, notice of which was published in the Australian newspaper on that date.
- 2 The decision under review was made under s 269TJ(1) and (2) and was to declare that s 10 of the *Customs Tariff (Anti-Dumping) Act, 1975* (“Dumping Duty Act”) applies in respect of silicon metal exported from the Peoples’ Republic of China and like goods (“the goods”) that were exported to Australia after 23 February 2015. In accordance with s 269TJ(11), the notice included a statement setting out the amount of the countervailable subsidy, being:
 - (a) 6.3 percent in respect of goods exported by Hua’an Linan Silicon Industry Co., Ltd (“Hua’an”) and Guishou Liping Linan Silicon Industry Co., Ltd (“Guishou Linan”) under program 1; and
 - (b) a subsidy margin of 37.6 percent in respect of goods exported by uncooperative and other exporters under programs 1, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44.¹
- 3 The decision of the Parliamentary Secretary involved accepting the findings and recommendations made by the Anti-Dumping Commission (Commission) in the *Commission Report No 237* (“Report”).
- 4 The applicant argued that:
 - (a) the Commission, and hence the Parliamentary Secretary:
 - (i) failed to properly apply s 269TAACA(1) of the Act and failed to apply a logical process of reasoning and evaluation of the facts;
 - (ii) made recommendations and findings about:
 - (1) whether uncooperative exporters obtained the benefit of various subsidy programs; and

¹ The Parliamentary Secretary also made a decision on 3 June 2015 that s 8 of the Dumping Duty Act applied to the goods, with the consequence that anti-dumping duties applied to the goods. The applicant does not challenge the anti-dumping decision.



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- (2) the amount of the subsidy obtained by those persons
without regard to material facts; and
- (b) the correct and preferable decision was that the uncooperative and all other exporters had a subsidy margin of 6.3 percent and that countervailing measures should be imposed by the Parliamentary Secretary at that rate.
- 5 Pacific Aluminium also raised issues about the Commission's calculation of the amount of benefits received by the uncooperative and other exporters.
- 6 The Senior Member of the Panel directed that I should constitute the Panel for this application. A Notice of Intention to Conduct a Review was published on 23 July 2015.
- 7 I consider that the decision the subject of the notice was not the correct and preferable decision in that the subsidies accessed by the uncooperative and other exporters in respect of the goods were incorrectly identified. I consider that, like the cooperative exporters, the uncooperative and other exporters only accessed subsidy program 1.
- 8 Accordingly, I recommend that the Minister:
- (a) revoke the reviewable decision; and
- (b) substitute a decision that s 10 of the Dumping Duties Act applies to the goods which identifies a subsidy margin of 6.3 percent under subsidy program 1 for all exporters.

The issues

- 9 The following questions arise:
- (a) how should s 269TAACA(1) of the Act be applied; and
- (b) in light of the answer to the first question, which of the subsidy programs identified in the Report did the uncooperative and other exporters access?



- 10 After outlining some of the background to the application and articulating general principles applicable to the conduct of this review, these questions will be considered in turn.

Background

- 11 The decision under review arose out of an application by Simcoa Operations Ltd (“Simcoa”) dated 6 January 2014 under s 269TB of the Act. The application sought the imposition of dumping duties and countervailing duties. The Commission gave notice on 6 February 2014 of the initiation of an inquiry under the Act.
- 12 Simcoa is an Australian producer of silicon metal and was found to be the Australian Industry by the Commission.
- 13 Pacific Aluminium manages the operations of three entities within the Rio Tinto Group of companies:
- (a) Rio Tinto (Bell Bay) Company Ltd;
 - (b) Boyne Smelters Ltd; and
 - (c) Tomago Aluminium Co Ltd.

Pacific Aluminium participated in the inquiry on behalf of each of these companies. Each is an aluminium producer.

- 14 The goods the subject of the decision are silicon metal containing:
- (a) at least 96.00 percent but less than 99.99 percent silicon by weight; and
 - (b) at least 89.00 percent but less than 96.00 percent silicon by weight and which also contains more than 0.20 percent aluminium by weight.

The application related to such silicon in all forms and sizes and included “off specification” silicon which, although meeting these requirements, also contains high percentages of other metals.



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- 15 Silicon is used in the chemical industry to produce silicones and photovoltaics. It is also used by aluminium producers as an alloying agent. Silicon is sold in lumps, granules and fines² but it appears that the primary differentiator of silicon metal is the grade and the amounts and types of impurity.³
- 16 The goods are classified to tariff subheading 2804.69.00 in Schedule 3 to the *Customs Tariff Act, 1995*, statistical code 14.
- 17 It appears that silicon is manufactured by putting raw materials in a furnace, and passing a high electric current through electrodes in the furnace. This produces so much heat that liquid metallic silicon is formed at the bottom of the furnace, which is then tapped. This method of manufacture requires lots of electricity, which is a significant component of the cost of making silicon. Charcoal, coal and woodchips are other significant inputs.⁴
- 18 The application related to silicon exported from China. The Commission identified 16 potential exporters of silicon metal from China. The Commission sent exporter questionnaires to the 16 exporters. Only Hua'an Linan and Guishou Linan, and an associated selling agent, Xiamen K Metal Co Ltd ("K Metal"), provided responses. The Commission conducted a verification visit with Guishou Linan and K Metal. The Commission also requested certain information from the Government of China ("GOC"). Although the GOC provided some information to the Commission, it did not provide all the information sought.
- 19 The Commission published a Statement of Essential Facts dated 23 February 2015.
- 20 The Report was published on 7 May 2015.
- 21 The Parliamentary Secretary accepted the recommendations of the Commission and on 3 June 2015 made the decision under review. The effect of the decision is set out in paragraph 2.

² Report 237 at 22.

³ Report 237 at 18.

⁴ Report 237 at pp 21 to 22.



General principles

- 22 In accordance with s 269ZZK(1) of the Act, the Panel must recommend that the Minister (acting in this case, through his delegate the Parliamentary Secretary) either affirm the decision under review or revoke it and substitute a new specified decision.
- 23 In undertaking the review, s 269ZZ requires the Panel to determine a matter required to be determined by the Minister in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard, if the Minister was determining the matter.
- 24 The role of the Panel is to determine for itself the “correct and preferable decision”. However, given the limited time available and the variety and scope of the issues which must be considered by the Commission in undertaking its investigation, the Panel is, in general, entitled to focus its attention to those questions which are raised by the parties during the course of the review and to proceed on the basis that findings and reasoning of the Commission which are not challenged are correct.
- 25 In carrying out its function the Panel is not to have regard to any information other than to “relevant information” as that expression is defined in s 269ZZK(6)(a), i.e. information to which the Commission had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Panel is to have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s 269ZZJ. The materials falling within s 269ZZK(4)(b) are:
- (a) the application for review made by Pacific Aluminium of 3 July 2015;
 - (b) the Commission’s Response to the Invitation to Comment of 7 August 2015; and
 - (c) the submissions of Simcoa dated 18 August 2015.



The operation of s 269TAACA

- 26 The Commission found that the uncooperative and other exporters had received financial contributions under 39 programs found to be countervailable in relation to silicon metal.⁵ The Commission also concluded that the subsidy margin in respect of the uncooperative and other exporters was 37.6 percent.⁶ No issue was raised in relation to the conclusion that the uncooperative and other exporters received a subsidy under the first of the programs identified in the Report (“program 1”). That program related to electricity provided by the GOC at less than adequate remuneration.
- 27 Pacific Aluminium argued that the Commission had incorrectly applied s 269TAACA(1) of the Act in concluding that the uncooperative exporters received subsidies under the programs, other than program 1, and in calculating the amount of the subsidies received.
- 28 Section s 269TAACA(1) applies during countervailing duty investigations under Part XVB of the Act where the Commission is satisfied that an entity has not given the Commission information which the Commission considers relevant.⁷
- 29 Section 269TAACA(1) provides that, in such circumstances:
- ... the Commissioner or the Minister
 - (c) may act on the basis of all facts available to the Commissioner or the Minister (as the case may be); and
 - (d) may make such assumptions as the Commissioner or the Minister (as the case may be) considers reasonable.
- 30 In conducting a review under s 269ZZA, the Panel is required to determine the matter in like manner as if it were the Minister. Section 269TAACA therefore

⁵ Report 237 at 7.4.2, 46.

⁶ Report 237 at 7.4.4, 47.

⁷ “Entity” includes the government of the country of origin of the goods to which the investigation relates (see s 269TAACA(2)).



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applies to the conduct of this review by the Panel, although the Panel is not named in s 269TAACA.

31 The uncooperative exporters had not given the Commission relevant information. The uncooperative exporters did not respond to exporter questionnaires directed to them by the Commission. The GOC did not provide all the information requested of it by the Commission, although it did provide some information.

32 Pacific Aluminium argued that:

(a) s 267TAACA should be interpreted so that it operates consistently with Art 12.7 of the Agreement on Subsidies and Countervailing Measures (“SCM”) and with the World Trade Organisation (“WTO”) jurisprudence dealing with that provision;

(b) the effect of Art 12.7 and the WTO jurisprudence is that:

(i) where an exporter failed to provide necessary information, the authority was confined to acting on the basis of other information on the record; and

(ii) the investigating authority was not permitted to draw an inference adverse to the exporter on the basis of the exporter’s failure to cooperate.

33 Art 12.7 of the SCM provides:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

34 As part of the review process, the Panel invited the Commission to comment on the application.

35 In its comments, the Commission contended that the arguments advanced by Pacific Aluminium were not directed to the language of s 269TAACA(1), but to the



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WTO jurisprudence. The Commission pointed out, correctly, that s 269TAACA(1) differs from Art 12.7 of the SCM and that the task of the Panel is to apply s 269TAACA(1) of the Act, not Art 12.7 of the SCM. However:

- (a) the provisions of the SCM and decisions under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provide context for ascertaining the intention of Parliament in enacting s 269TAACA(1);⁸
- (b) decisions of the WTO Appellate Body and Panels should be given substantial weight in selecting the appropriate construction to be given to the provisions of Pt XVB where the language chosen by the Parliament permits;⁹ and
- (c) the Second Reading Speech for the *Customs Amendment (Anti-Dumping Improvements) Amendment Act (No 2) 2012* indicates that the amendment was “based on” Art 12.7 of the SCM and implements proposals to “better reflect definitions and operative provisions” of the SCM.¹⁰

36 The operative part of paragraph 269TAACA(1)(c) differs only slightly from Art 12.7 of the SCM. Paragraph 269TAACA(1)(c) specifies that the decision maker “may” act on the basis of “all the facts available”. Art 12.7 of the SCM simply refers to “the facts available”. The use of “all” in s 269TAACA(1)(c) reflects the effect of the decision of the Appellate Body in *Mexico – Anti-dumping Measures on Rice*.¹¹ There the Appellate Body said that recourse to Art 12.7 “is not a licence to rely on only part of the evidence provided”.¹² The inclusion of the expression “may” in s 269TAACA(1)(c) is intended to emphasize this point. The whole of the

⁸ Rares J in *Siam Polyethylene Company Ltd v Minister of State for Home Affairs* (2009) 258 ALR 481 at [65] to [67] (Reversed on other grounds, *Minister of State for Home Affairs v Siam Polyethylene Company Ltd* (2010) 258 ALR 481).

⁹ Rares J in *Siam Polyethylene Company Ltd v Minister of State for Home Affairs* (2009) 258 ALR 481 at [65] to [67].

¹⁰ *Second Reading speech (Hansard, Wednesday, 21 March 2012, page 3688)*.

¹¹ WT/DS295/AB/R, 9 November 2005.

¹² At [294].



evidence, or “facts available” must be weighed up when applying s 269TAACA(1). This does not, of course, mean that a decision maker is not entitled, in appropriate circumstances, to reject particular evidence put forward by a party.

- 37 Paragraph 269TAACA(1)(d) has no equivalent in Art 12.7 of the SCM. Art 12.7 does not explicitly enable a decision maker to make “assumptions”. However, the process under Art 12.7 must involve reasoning and inference from material that is available to the decision maker to the findings necessary for a determination to be made. In many cases, this process of reasoning and inference will involve the making of (reasonable) assumptions. Paragraph 269TAACA(1)(d) explicitly permits this process. The making of reasonable assumptions, does not, in my opinion, justify unfounded speculation. An assumption which is counterfactual, or contradicted by reliable information on the record, is unlikely to a “reasonable assumption”. The requirement for an adequate basis for making assumptions is implicit in paragraph 269TAACA(1)(d). Paragraph 269TAACA(1)(d) does not allow a decision maker to ignore facts or evidence.
- 38 An issue which arises in this case is whether a failure to provide information enables an inference to be drawn which is adverse to the interests of the party which has failed to provide the information. Section 269TAACA(1) does not expressly require adverse inferences to be drawn where necessary information is not available. It differs significantly in this regard from provisions such as Article 54 of the *Foreign Trade Act* of Mexico, which mandated determination of a countervailing duty on the basis of the highest margin of price discrimination or subsidization obtained from the facts available. That provision was considered in *Mexico – Definitive Anti-Dumping Measures on Rice and Beef* and was found to be inconsistent with Art 6.8 of the Anti-Dumping Agreement and Art 12.7 of the SCM Agreement.¹³

¹³ At [298].



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39 Pacific Aluminium referred to the decision of a WTO Panel in *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (“China – GOES”)*.¹⁴ The Panel said:

While paragraph 7 of Annex II of the Anti-Dumping Agreement states that non-cooperation by an interested party “could lead to a result which is less favourable to the party than if the party did cooperate”, we see no basis in Annex II for the drawing of adverse inferences.¹⁵ In our view, the purpose of the facts available mechanism is not to punish non-cooperation by interested parties. ... While non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation. Accordingly, [the Ministry of Commerce People’s Republic of China] was still required to establish a factual foundation for its determination that the utilization rate of certain subsidy programmes by the respondents was 100%.

In *China - GOES*, the Panel was dealing with the Annex to the Anti-Dumping Agreement (“ADA”), rather than the SCM. However, the Appeal Body has said¹⁶ that the approach to Art 6.8 of the ADA is not markedly different to the approach to Art 1.27 of the SCM.¹⁷

40 The approach of the Panel in *China – GOES* is consistent with the approach taken to a failure to provide evidence in adversarial civil proceedings in this country. Where a party fails to call at trial a witness that it might be expected to have called, the court may infer that the evidence of that witness would not assist the

¹⁴ WT/DS414/R (15 June 2012) at 7.302. The appeal did not consider this issue. See the Report of the Appellate Body dated 18 October 2012.

¹⁵ Paragraph 7 of Annex II reads in full: It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

¹⁶ In *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* WT/DS436/AB/R 8 December 2014 (“US Hot-Rolled Steel”).

¹⁷ At [4.424]



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party's case. The failure to call the witness may assist in the drawing of inferences from such facts as otherwise appear from the evidence. However, the court may not go further and infer that the witness would have given evidence adverse to the party's case.¹⁸

- 41 The operation of Art 12.7 of the SCM was also considered at some length in *US Hot Rolled Steel*,¹⁹ where the Appellate Body said:

4.425. We find further support for this understanding in the references in paragraph 7 of Annex II to exercising "special circumspection" when relying on information from secondary sources, and to, where practicable, "check[ing] the information from other independent sources", both of which are indicative of a process of reasoning and evaluation. The final sentence of paragraph 7 of Annex II to the Anti-Dumping Agreement is also relevant to the interpretation of Article 12.7 of the SCM Agreement, particularly in respect of the measure at issue. It states that:

It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

4.426. This clause acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party. It describes what could occur as a result of a non-cooperating party's failure to supply or otherwise withhold relevant information and the investigating authority's use of the "facts available" on the record. The juxtaposition between the "result" and the "situation" of non-cooperation in this clause confirms our understanding that the non-

¹⁸ *Jones v Dunkel* (1958 – 1959) 101 CLR 298.

¹⁹ At [4.399] to [4.426].



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cooperation of a party is not itself the "basis" for replacing the "necessary information". Rather, non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement for an unknown fact. Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority's use of "facts available" under Article 12.7 of the SCM Agreement. In this regard, we note that paragraph 1 of Annex II makes a connection between the "awareness" of an interested party, and the ability for an investigating authority to have recourse to the "facts available". This suggests that the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those "facts available" on which to base a determination and in explaining the selection of facts. Having said that, where there are several "facts available" from which to choose, an investigating authority must nevertheless evaluate and reason which of the "facts available" reasonably replace the missing "necessary information", with a view to arriving at an accurate determination.

While emphasizing that an investigating authority would rely on other evidence forming part of the record, the Appellate Body in *US – Hot Rolled Steel* appeared to contemplate that the awareness of a party being investigated of the possibility that an adverse inference might be drawn is a relevant matter to the conclusions that might be reached by the investigating authority.

- 42 At a practical level, it is important that investigations under the Act not be frustrated by the failure of exporters or governments to cooperate. Frequently, the best evidence of whether any particular exporter has received subsidies can be



provided by the exporters themselves. Exporters may decline to respond to inquiries by investigative authorities such as the Commission to prevent the investigative authority discovering the full extent of subsidisation. However, exporters may have other reasons for failing to provide a response. The Commission’s questionnaire sought confidential information. Some exporters might have reservations about providing information of that nature.

43 I consider that the most satisfactory approach is to consider each case on the merits. There may be circumstances where a failure to provide information assists in drawing inferences adverse to an uncooperative exporter. There will be other cases where the effect of a failure to cooperate is negated by circumstances surrounding the failure to provide information or where other facts negate the adverse inference that might otherwise be drawn.

The uncooperative exporters’ subsidies

44 The Commission considered the application of the following programmes to exports by the uncooperative and other exporters and reached the following conclusions:

Program Number	Program Name	Commission’s conclusion in relation to uncooperative and other exporters
1	Electricity provided by government at less than adequate remuneration	Applicable
2	Preferential Tax Policies for Enterprises with Foreign Investment Established in the Coastal Economic Open Areas and Economic and Technological Development Zones	Program ceased. ²⁰
3	Preferential Tax Policies for Foreign Invested Enterprises – Reduced Tax Rate for Productive Foreign Invested Enterprises scheduled to operate for a	Program ceased. ²¹

²⁰ Report 237 at 104.

²¹ Report 237 at 104.



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Program Number	Program Name	Commission's conclusion in relation to uncooperative and other exporters
	period of not less than 10 years	
4	Preferential Tax Policies for Enterprises with Foreign Investment Established in Special Economic Zones (excluding Shanghai Pudong area)	Program ceased. ²²
5	Preferential Tax Policies for Enterprises with Foreign Investment Established in Pudong area of Shanghai	Program ceased. ²³
6	Preferential Tax Policies in the Western Regions	Accessed
7	Land Use Tax Deduction	Accessed
8	Preferential Tax Policies for High and New Technology Enterprises	Accessed
9	Tariff and Value-Added Tax (VAT) Exemptions on Imported Materials and Equipment.	Accessed
10	One-time Awards to Enterprises Whose Products Qualify for 'Well-Known Trademarks of China' and 'Famous Brands of China'	Accessed
11	Matching Funds for International Market Development for Small and Medium Enterprises	Accessed
12	Superstar Enterprise Grant	Accessed
13	Research & Development Assistance Grant	Accessed
14	Patent Award of Guandong Province	Not accessed because it was unlikely that silicon production would meet criteria for award. ²⁴
15	Innovative Experimental Enterprise Grant	Accessed
16	Special Support Fund for Non State-Owned Enterprises	Accessed

²² Report 237 at 104.

²³ Report 237 at 104.

²⁴ Report 237 at 104



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Program Number	Program Name	Commission's conclusion in relation to uncooperative and other exporters
17	Venture Investment Fund of Hi-Tech Industry	Accessed
18	Grants for Encouraging the Establishment of Headquarters and Regional Headquarters with Foreign Investment.	Accessed
19	Grant for key enterprises in equipment manufacturing industry of Zhongshan	Accessed
20	Water Conservancy Fund Deduction	Accessed
21	Wuxing District Freight Assistance	Accessed
22	Huzhou City Public Listing Grant	Accessed
23	Huzhou City Quality Award	Accessed
24	Huzhou Industry Enterprise Transformation & Upgrade Development Fund	Accessed
25	Wuxing District Public List Grant	Accessed
26	Anti-dumping Respondent Assistance	Accessed
27	Technology Project Assistance	Accessed
29	Environmental Protection Grant	Accessed
30	High and New Technology Enterprise Grant	Accessed
31	Independent Innovation and High-Tech Industrialization Program	Accessed
32	VAT Refund on Domestic Sales by Local Tax Authority	Directed to automotive steel sheets and would not, therefore, have benefited silicon production.
33	Environmental Prize	Accessed
34	Jinzhou District Research and Development Assistance Program	Accessed



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Program Number	Program Name	Commission's conclusion in relation to uncooperative and other exporters
35	Grant for Industrial enterprise energy management centre construction demonstration project Year 2009	Accessed
36	Key industry revitalization infrastructure spending in budget Year 2010	Accessed
37	Provincial emerging industry and key industry development special fund	Accessed
38	Environmental protection fund	Accessed
39	Intellectual property licensing	Accessed
40	Financial resources construction special fund	Accessed
41	Reducing pollution discharging and environment improvement assessment award	Accessed
42	Comprehensive utilization of resources - VAT refund upon collection	Accessed
43	Grant of elimination of out dated capacity	Accessed
44	Grant from Technology Bureau	Accessed

45 The Commission concluded that the uncooperative exporters had received financial contributions that have conferred a benefit under the 38 subsisting programs, each of which was found to be countervailable in relation to silicon metal.²⁵ As indicated above, Pacific Aluminium did not challenge the conclusion in relation to program 1. The challenge is in respect of the remaining 37 programs.

46 At 7.4.3, the Report stated:

As set out in Non-Confidential Appendix 3, the Commission considers that in the absence of cooperation by exporters or the GOC it is likely that

²⁵ Report 237 at 7.4.2, 46.



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uncooperative exporters meet the eligibility criteria for all these programs, and therefore received financial contributions under these programs.

47 The report stated in Non-Confidential Appendix 3:

For uncooperative and all other exporters, no other information was provided by either GOC or the individual exporters themselves regarding whether benefits were conferred on these exporters under all other programs ie paragraphs 6 – 13, 15 – 31 and 33 – 44.

It is noted that some of these programs are limited to enterprises in specific regions in China. The Commission requested the GOC provide information as to the location of all silicon metal exporters in China but this was not provided.

The [Australian Customs and Border Protection Services] import database does list “supplier” addresses, but it is not certain for each “supplier” whether they are in fact the exporter of the goods, and whether the supplier operates in more locations than the one listed (e.g. the listed location could represent a central or head office of an enterprise that operates silicon metal manufacturing facilities in multiple locations in China).

In the absence of the above relevant information, the Commission considers it is likely that uncooperative exporters meet the eligibility criteria for all these programs, have accessed these programs, and therefore received financial contributions under these programs.²⁶

48 In its response to the invitation to comment,²⁷ the Commission reiterated that the Commission considered it reasonable to assume that uncooperative and all other exporters were eligible for all the programs.

49 In its submissions, Simcoa pointed out that:

²⁶ At pp 104 - 105

²⁷ At section 5.



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- (a) silicon metal exported from China is the subject of antidumping and countervailing measures in Canada and the USA and antidumping measures in Europe;
- (b) the uncooperative exporters and the GOC did not cooperate with the investigation by providing information;
- (c) Pacific Aluminium did not seek to provide the Commission with a longer timeframe, which might have aided the Commission's understanding of facts; and
- (d) Pacific Aluminum, as part of the Rio Tinto Group of companies, was aware from the Canadian dumping and countervailing duties investigation and the imposition of duties on Rio Tinto Singapore that cooperation with investigating authorities assists findings that rely on the best available information.

50 Simcoa's submission to this review reflected the reliance in its original application on the imposition of countervailing duties by other countries. As set out in the Statement of Reasons²⁸ of Canada Border Services Agency (CBSA) provided by Simcoa countervailing duties were imposed under the *Special Import Measures Act* on uncooperative exporters at rates which were higher than those imposed on the cooperating exporters. However, the CBSA report indicates that the amount of subsidy received by uncooperative exporters was calculated pursuant to a ministerial stipulation which mandated an assumption that uncooperative producers received a benefit under all actionable subsidy programs for which information about the actual receipt of benefits was not available or had not been received.²⁹ The decision of the CBSA is not, therefore, evidence that the uncooperative exporters to China had in fact received subsidies in the amounts determined under the Canadian legislation. The imposition of duties by the

²⁸ Dated 5 November 2013.

²⁹ At [218].



European and US authorities depends, of course, on the information presented to them and the legislative frameworks under which they operate.

51 In relation to the last two points raised by Simcoa, it is not apparent that Pacific Aluminium took steps to affect the length of the investigation. Nor is it apparent that Pacific Aluminium failed to provide the Commission with such relevant information as it was able. Pacific Aluminium's knowledge of the likely consequences of non-compliance is not in issue.

52 The following matters are relevant to whether the uncooperative exporters accessed the subsidies:

(a) the Linan Group did not receive benefits under the subsidy programs, other than program 1;

(b) the Verification Report of 20 August 2014 indicates:

(i) K Metal, Hua'an Linan and Guishou Linan were part of a group of companies, the "Linan Group". Each was a separate corporation, with different shareholders for registration purposes, although "K Metal" has a controlling interest in all plants within the group;³⁰

(ii) during questioning as part of the site visit by Commission staff, a representative of K Metal stated that:

K Metal advised that the Chinese Government does not provide grants to silicon metal industries. K Metal stated that the government does not support the silicon metal industry and applies strict limits to high energy consumption industries such as silicon metal manufacturers. In the event the government is not happy with the power consumption of a particular manufacturer, the government will force the operation to shut down. K Metal stated that the silicon metal industry is highly regulated because of the high energy

³⁰ Page 8, section 2.1.



consumption it requires, and no subsidies are provided to support the silicon metal industry.

The Verification Report indicates that representatives of the Linan Group also asserted that they were not related entities, when in fact they were. Consequently, remarks about the level of subsidization in the silicon industry should not be accepted uncritically;

- (c) there was material which suggested that the GOC was “influencing domestic selling prices in China due to a range of factors including the elimination of backward production capacity”.³¹

53 Features of the various subsidy programs are also relevant:

- (a) some of the subsidy programs are geographically specific. It appears unlikely that each of the geographically limited subsidy programs would apply to the whole of the production of each of the uncooperative exporters. The Commission hypothesized that exporters would access all geographically limited subsidies on the basis that the exporters “might” have multiple, geographically separated, facilities. It is true that exporters might have such facilities, but is a significant step to conclude that all of them did. Further, there is no reason to think that the government of one area of China would subsidize silicon production in another area. Using the Linan Group as an example, the Guizhou government might subsidize production in Guizhou by Guizhou Linan and the government of Fujian might subsidise production in Fujian by Hua’an Linan. However, it seems unlikely that the Guizhou government would subsidize production in Fujian, and vice versa. It may be assumed, in my opinion, that geographically

³¹ Report 237 at 27.



specific subsidies would apply only to production from the relevant area.

The programs include two city specific programs;³² and

- (b) a number of the programs were subject matter specific. The Commission did exclude some programs which did not appear related to silicon production, but it appears unlikely that *each* of the exporters would qualify for an award on the basis that it was a “well known trademark of China” or a “famous brand of China”³³ or on the basis that it was a “key enterprise in equipment manufacturing industry”³⁴.

- 54 The questionnaire provided to exporters dealt with the consequences of a failure to respond. The questionnaire included the following on the instructions page:

What happens if you do not respond to this questionnaire?

You do not have to complete the questionnaire. However, if you do not respond, do not provide all of the information sought, do not provide information within a reasonable time period, or do not allow the Commission to verify the information, we may deem you uncooperative. In that case the Commission may be required to rely on information supplied by other parties (possibly information supplied by the Australian industry). In that case we may assess a dumping and/or subsidy margin for your company based on other exporters’ information, which may be less favourable to your company.

It is in your interest, therefore, to provide a complete submission.

Although this part of the instructions warns the exporter of a less favourable outcome, it does not suggest that a failure to respond would itself be a basis for an inference adverse to the exporter. Consistently with *China GOES*, the

³² The Huzhou City Quality Award and Public Listing Grants.

³³ Program 10.

³⁴ Program 19. This program is also geographically limited to Zhongshan.



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consequence of non-compliance identified in the questionnaire is merely that the Commission will look to other parts of the record.

55 In light of all the circumstances, it does not appear reasonable to conclude or assume that each of the uncooperative exporters accessed each of the subsidy programs for the following reasons:

- (a) it appears inherently unlikely that *each* of the uncooperative exporters would access *each* of the 38 subsidy programs in issue. The geographical and subject matter limitations on the subsidies decreases the prospects that this would occur;
- (b) the Linan Group can be used as a comparator to the uncooperative exporters in relation to benefits received under subsidy programs. The Report states that “where there are cooperating and uncooperative exporters, the most directly relevant and therefore the best information would that obtained from those cooperating”.³⁵ The Linan Group did not access any of the subsidies, other than the subsidized electricity under program 1. There is no reason to think that the uncooperative producers were significantly better at obtaining subsidies than the Linan Group. The Linan Group employed 3,400 persons. It seems unlikely that any failure to obtain subsidies and grants would not be due to a lack of resources on the part of the Linan Group or knowledge of available grants. The Linan Group was used as a comparator to the uncooperative exporters at other points in the Report; and
- (c) efforts by the GOC to rationalize the industry are, on their face, inconsistent with the provision of widespread subsidies for participants in the industry.

56 It appears that, in this case, the primary factor in drawing the conclusion that each of the uncooperative and other exporters accessed all the programs was their

³⁵ At 41.



failure to provide requested information. Although there may be cases where an adverse inference could perhaps be drawn, the matters identified above persuade me that this inference should not be drawn in the present case.

- 57 In light of the above matters, I consider that a reasonable assumption is that the uncooperative exporters were only as successful in accessing subsidy programs as the Linan Group and that they would, therefore, only have accessed subsidy program 1. This is a preferable finding to the finding that each of the uncooperative exporters accessed each of the disputed subsidies.

Other matters

- 58 Pacific Aluminium also took issue with the assumptions made by the Commission in calculating the amount of the benefit received by the uncooperative and other exporters. In light of the conclusion reached above, it is not necessary to deal with this.
- 59 The issues which were raised in relation to the decision did not relate the material injury caused or threatened to be caused by the importation of the goods.

Recommendation

- 60 I consider that the decision the subject of the notice was not the correct and preferable decision in that the subsidies accessed by the uncooperative and other exporters were incorrectly identified.
- 61 Accordingly, I recommend that the Minister:
- (a) revoke the decision; and



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- (b) substitute a decision that s 10 of the *Dumping Duties Act* applies to the goods and which identifies a subsidy margin of 6.3 percent under subsidy 1 for all exporters.

A handwritten signature in black ink, appearing to read 'S. Ellis'.

Scott Ellis

Date: 21 September 2015