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18 August 2015

Mr Scott Ellis
Member
The Anti-Dumping Review Panel
c/o ADRP Secretariat
Legal Services Branch
Department of Industry and Science
GPO Box 9839
CANBERRA ACT 2600

Dear Mr Ellis

Re: Silicon Metal exported from the People's Republic of China – Simcoa Australia Pty Ltd comments on Review ApplicationExecutive Summary

I refer to the application for review by Pacific Aluminium of the Parliamentary Secretary's decision of 3 June 2015 to impose anti-dumping and countervailing measures on silicon metal exported from the People's Republic of China ("China").

Simcoa Australia Pty Ltd ("Simcoa") is the Australian manufacturer of silicon metal the subject of the dumping and countervailing notices. Simcoa submits that the Parliamentary Secretary has made the correct and proper decision in imposing notices under:

- s. 269TG(1) and (2) for dumping duties on silicon metal exported to Australia from China; and
- s.269TJ(1) and (2) for countervailing duties on silicon metal exported to Australia from China.

Simcoa requests the Anti-Dumping Review Panel (the "Review Panel") to affirm the decisions of the Parliamentary Secretary to impose the anti-dumping and countervailing measures.

Pacific Aluminium's claims for review

It is asserted by Pacific Aluminium that the Parliamentary Secretary ought not have relied upon the findings and recommendations in Report No. 237 (Silicon Metal exported from China) to impose countervailing measures on the uncooperative exporters at a margin of 37.6 per cent. It is further argued by Pacific Aluminium that the uncooperative exporters did not meet the eligibility criteria for the 38 identified countervailable subsidy programs, did not access all of those programs and did not receive a benefit under each of the programs.

Pacific Aluminium also suggests that the findings of the Parliamentary Secretary (in relation to the countervailing matters) are "*inconsistent with the (Customs) Act and the Agreement on Subsidies and Countervailing Measures*" and did not constitute the preferred decision of the Parliamentary Secretary. Pacific Aluminium argues that if the Parliamentary Secretary had not determined that the uncooperative exporters met the eligibility criteria for the 38 countervailable programs, the Parliamentary Secretary would not have determined a 37.6 per cent subsidy margin for all uncooperative exporters from China.

Pacific Aluminium contends that the decision of the Parliamentary Secretary has resulted in the imposition of countervailing measures "that are significantly higher than those that ought to have been imposed".

Simcoa notes that Pacific Aluminium is only contesting the Parliamentary Secretary's decision as it relates to the imposition of countervailing measures on uncooperative exporters of silicon metal from China to Australia.

Pacific Aluminium's claims

Pacific Aluminium has correctly referred to the legislative provisions contained in s.269TAACA(1)(c) and (d) of the Act which essentially declares that where there is a lack of cooperation from the exporter(s) and the government in the exporting country, the Commissioner or the Minister (i.e. Parliamentary Secretary) may rely upon the facts available and make assumptions that are reasonable.

The Explanatory Memorandum and Reading Speech referred to by Pacific Aluminium reinforce the content of s.269TAACA and aligns the provision with the Subsidies and Countervailing Measures ("SCM") agreement.

Simcoa notes Pacific Aluminium's comment that the legislative provisions have not been tested in the Federal Court of Australia.

The inference from Pacific Aluminium is that the Commissioner has applied the 'the facts available' in a punitive manner in determining the countervailing margin applicable to uncooperative Chinese exporters of silicon metal.

Simcoa strongly disagrees with Pacific Aluminium's proposition. The methodology followed by the Commissioner is to afford the cooperative exporter(s) with full opportunity to substantiate the receipt of a countervailable benefit where applicable. For uncooperative exporters, the Commissioner (and Minister) must consider all of the available and relevant facts.

In the context of Pacific Aluminium's claims it should be noted:

- (i) silicon metal exported from China is the subject of anti-dumping and countervailing measures in Canada and the USA, and anti-dumping measures in Europe;
- (ii) Chinese exporters and interested parties were provided with the opportunity to supply relevant information in response to exporter questionnaires and in respect of the Government of China ("GOC"), requests for information (RFIs);
- (iii) The relevant exporters (i.e. those supplying Pacific Aluminium) and the GOC elected not to cooperate with the Commission's investigation;
- (iv) Pacific Aluminium did not seek to provide the Commission during the significantly extended inquiry timeframe with relevant information that may have aided the Commission's understanding and findings in respect of each subsidy program, including influencing the relevant 'facts available' findings; and
- (v) Pacific Aluminium (representing Rio Tinto Aluminium) is aware that the recent Canadian dumping and countervailing investigation imposed measures on exports from China by Rio Tinto Singapore and that cooperation with the investigating authorities (i.e. in Investigation No. 237) assists findings that rely on the best available information.

Pacific Aluminium and other Chinese exporters deemed uncooperative did not assist the Commission with information to influence the findings accepted by the Parliamentary Secretary. As the Commissioner was satisfied that at least one of the uncooperative exporters was located in the Yunnan province where the electricity is subsidized by

approximately 32 per cent¹, the Commission should have included the maximum applicable subsidy margin for the electricity in the category for uncooperative and other exporters, as there is no alternate category for exporters other than cooperative and uncooperative in accordance with s.269TACAB. The Commissioner did not do this and elected to use the 6.3 per cent subsidy level for the Linan Group's two cooperative exporters and apply this to the category for the uncooperative exporters. For the remaining subsidy programs, the Commissioner has correctly concluded – in the absence of any information from an exporter or the GOC to contest or contradict the information available to the Commission – that the maximum benefit was available to the Chinese exporter during the period of investigation.

It is therefore reasonable for the Commissioner to apply the maximum rates available to exporters under each of the identified subsidy programs. Simcoa submits that the Commissioner should have applied the maximum electricity benefit to the uncooperative exporters – that is, at a rate of 32 per cent rather than the concessional 6.3 per cent for the cooperative exporters in the Linan Group.

Pacific Aluminium's review application is seeking a less onerous finding in respect of the subsidy margins applicable to uncooperative Chinese exporters.

Simcoa will address each subsidy program referred to in Pacific Aluminium's application for review.

Electricity (Program 1)

Simcoa has referred to the Commissioner's finding that an exporter (considered uncooperative) located in the Yunnan province of China supplied silicon metal to Australia during the investigation period. Electricity prices in Yunnan province are up to 32 per cent below prices to other users on the China electricity grid.

Pacific aluminium refers to "in the absence of any evidence as to the quantum of those subsidies" when referring to the subsidised rates for electricity. As highlighted, Simcoa contends that the Commissioner should have used the 32 per cent rate applicable for producers in the Yunnan province on the basis that one of the identified uncooperative exporters is located in the Yunnan province.

Income tax (Programs 6 and 8)

Simcoa notes that the Commissioner considered the taxable income of the cooperative exporter, the Linan Group for establishing a tax benefit (for concessional tax) to be applied to the uncooperative exporters.

Pacific Aluminium infers that this is unreasonable. Pacific Aluminium did not contest the determination of the subsidy amount under Programs 6 and 8 following the publication of Statement of Essential Facts ("SEF") No. 237, nor did it submit alternative information for the Commissioner to consider.

Grants, tariff exemptions & VAT (Programs 7, 9-13; 15-31; 33-44)

As per the Commission's view on income tax benefit, the Commissioner considered that each uncooperative exporter would likely meet the eligibility criteria of each of the identified programs and applied the subsidy to information sourced from the Linan Group verification.

Simcoa again highlights that Pacific Aluminium did not contest or supply alternate information upon which the Commissioner could consider in respect of each of the grant, tariff exemption or VAT programs following publication of SEF No. 237.

¹ Refer Simcoa Application (Section B-4.1) referencing CBSA Statement of Reasons, 5 November 2013 and independent information sourced from CRU (Refer Section C-1 of Simcoa Application).

Most reliable/available information

Pacific Aluminium's request for review contends that the Commissioner has adopted a punitive approach in determining subsidy amounts under each program for the Chinese uncooperative exporters of silicon metal.

Pacific Aluminium has acknowledged that the Commissioner has used information obtained from the Linan Group's verification data to base its findings on each of the subsidy categories referred to in Pacific Aluminium's appeal. That is, the basis for the findings in relation to Program 1 (i.e. electricity at less than adequate remuneration) rely upon the subsidy benefit determined for the cooperative exporter. Similarly, the subsidy findings in relation to the income tax benefit under Programs 6 and 8 reflect the Linan Group's turnover. This information was the only information available to the Commissioner for an exporter in the Chinese silicon metal industry and was therefore considered the most reliable.

It is asserted by Pacific Aluminium that the purpose of concluding findings based upon available facts is to "fill in any missing gaps". The Commissioner has only had access to Chinese exporter information supplied by the Linan Group – there has been no other alternative information provided to the Commissioner from an interested party associated with the production and export of the goods the subject of the investigation in China (including Pacific Aluminium as an importer). The Linan Group information was therefore considered by the Commissioner to be the most reliable information available to it upon which the findings and recommendations have been made.

In the absence of adequate information as it would relate to a Chinese exporter of silicon metal, the Commissioner has applied the maximum benefit that would be received by a recipient company. Pacific Aluminium has suggested that the Commission has also not explained why it has applied:

- the total volume of sales for Program 1; and
- turnover for the remaining 37 programs

for the purposes of apportioning the subsidy per unit of silicon metal. The Commissioner has indicated that it has used the only information that is available – that sourced from the Linan Group. It is unclear from Pacific Aluminium's representations how it would anticipate the Commissioner to subjectively determine alternate assessments to those sourced from the cooperative exporters.

Pacific Aluminium has also suggested that the Commissioner has made "non-factual" assumptions that it was not permitted to take and that the decisions were not based upon the available facts. As demonstrated above, the Commissioner has had due consideration to the available information from the cooperative exporters of the Linan group, and this information (along with publicly available information sourced from the recent CBSA final determination of 5 November 2013) has been considered as the most reliable factual information upon which to base findings and recommendations to the Parliamentary Secretary.

Conclusions

Simcoa submits that the Commissioner's findings and recommendations accepted by the Parliamentary Secretary and contained in Report No. 237 as they relate to the subsidy findings for uncooperative exporters of silicon metal from China to Australia is the correct and preferred decision. Pacific Aluminium has not demonstrated that the Commissioner had information available to him that was more reliable that could be relied upon and which the Commissioner has disregarded.

Simcoa requests the Review Panel to affirm the decision of the Parliamentary Secretary of 3 June 2015 to impose anti-dumping and countervailing measures on injurious exports of silicon metal from China.

If you have any questions concerning this submission, please do not hesitate to contact me on (08) 9780 6762 or Simcoa's representative Mr John O'Connor on (07) 3342 1921.

Yours sincerely

A handwritten signature in blue ink, appearing to read "David Miles". The signature is fluid and cursive, with a large initial "D" and a long horizontal stroke at the end.

David Miles
Vice President
Site Services and Marketing