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PUBLIC RECORD VERSION

16 April 2015

Mr Geoff Gleeson
 Director, Operations 1
 Anti-Dumping Commission
 55 Collins Street
 MELBOURNE VIC 3000

Dear Mr Gleeson

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**Review of Measures – Hollow Structural Sections exported from Korea by Kukje Steel Co Ltd –
 Statement of Essential Facts No 266**

Introduction

I refer to *Statement of Essential Facts No. 266* (“SEF”) published on 4 March 2015 concerning the review of anti-dumping measures applicable to hollow structural sections (“HSS”) exported from the Republic of Korea (“Korea”) by Kukje Steel Co. Ltd (“Kukje”).

Further to my submission (dated 24 March 2015) in response to the SEF, I now seek leave to make the following additional comments concerning the Commission’s decision not to undertake a verification of Kukje’s Response to the Exporter Questionnaire (“REQ”) when making assessments concerning the export price, normal value and dumping margin.

Standard of proof in anti-dumping inquiries

I note that Article 6.6 of the WTO *Anti-Dumping Agreement* (“WTO Agreement”) provides, in relevant part, the importance of accurate information:

*“6.6 ...[T]he authorities shall during the course of an investigation **satisfy themselves as to the accuracy of the information** supplied by interested parties upon which their findings are based.” [emphasis added]*

Although the anti-dumping provisions of the *Customs Act 1901* (“the Act”) do not prescribe how the Commissioner (on behalf of the Parliamentary Secretary) should satisfy himself of the accuracy of the information supplied, the *Dumping and Subsidy Manual* (Anti-Dumping Commission, December 2013 edn.) (“Manual”) establishes the principle of “verified information”, and the practice of “verification visits”. For example, in the case of determination of the normal value under paragraph 269TAC(2)(b) of the Act, the Manual explicitly acknowledges that where:

*“it may not be possible to **conduct additional inquiries or verification visits** solely for the purpose of acquiring other seller information”¹, [emphasis added]*

¹ Anti-Dumping Commission, *Dumping and Subsidy Manual* (December 2013 edn.) 37.

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then the use of “other sellers” information for the determination of normal values, is not possible. In other words, there is an acknowledgement in the Commission’s policy that the use of a verification visit is the best means of satisfying the Commissioner of the accuracy of the information supplied.

Further, the Manual directs the Commission to treat unverified information supplied with a high degree of circumspection. For example, in the context of an exporter’s adjustment claim, the Manual states:

*“If an adjustment claim is **made after the verification visit to the exporter**, the Commission will assess its appropriateness having regard to the reliability of the information provided and the remaining time available to complete the report.”² [emphasis added]*

I understand that the requirement under the WTO Agreement, does place the burden on the administering authority to satisfy itself of the accuracy of the information supplied³. In light of the foregoing, it is ATM’s position that, by the Commission’s own policy and practise, the evidentiary burden is satisfied by the verification visit process.

No evidence of accuracy of information supplied

However, even if ATM is incorrect in its view, then, at the very minimum the WTO Agreement requires that the Commission (as administering authority) be, actually, satisfied as to the accuracy of the information supplied.

When ATM reviews the available evidence concerning whether or not the Commission has achieved the level of satisfaction required by the WTO Agreement, ATM notes that not only was no verification whatsoever performed, but neither was any test of the accuracy of the information supplied. The contemporaneous evidence currently available to interested parties is contained in a document titled: “*Review of Anti-Dumping Measures Case 266, Hollow Structural Sections exported from the Republic of Korea by Kukje Steel Co., Ltd, Applicant: Stemcor Australia Pty Ltd (February 2015)*”⁴ (“the Report”), and SEF 266.

Indeed, the Report explicitly states:

“1.3 Purpose of this report

“The Commission elected not to undertake verification of Kukje’s REQ [Response to Exporter Questionnaire] and has relied on data submitted in Kukje’s REQ in making the assessments contained in this report.

“The purpose of this report is to assess Kukje’s REQ and to make preliminary assessments of:

- Export price;
- Normal value; and
- Dumping margins.”⁵

As a matter of evidence, the Report⁶ provides no indication of any steps taken by the Commission to satisfy itself of the accuracy of the information supplied by Kukje. The latter published SEF 266, also provides no evidence of the Commission taking any steps to satisfy itself of the information supplied by the exporter. The absence of such evidence is of critical importance to the sufficiency of the inquiry, as the SEF necessarily constitutes a statement “on

² *Ibid.* 59

³ Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO Doc WT/DS156/R (24 October 2000) [8.172]

⁴ EPR 266, Folio 009 (25 February 2015)

⁵ EPR 266, Folio 009 (25 February 2015) 3

⁶ *Ibid*

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which the Commissioner proposes to base a recommendation to the Minister in relation to the review of those measures”⁷.

Risk to the reliability of the information before the Parliamentary Secretary

ATM does not believe that its concerns regarding the accuracy of the information supplied are not without justification. Certainly, it appears on the strength of the exporter’s own information (i.e. as contained within its REQ) that a large number of its Korean domestic sales were sold at a loss (i.e. in “substantial quantities”). It is ATM’s opinion that as soon as the Commission identified a large number of unprofitable domestic sales, then the risk of the information supplied being inaccurate is too great to justify the approach of non-verification on any view of a cost-to-benefit analysis.

Not unsurprisingly, the Commission’s refusal to verify the information supplied by Kukje has resulted in no discernible scrutiny of the validity or fairness of Kukje’s claims. For example, in the original investigation (Case No. 177), the then “Exporter Visit Report” relating to verification of Kukje’s information in or about February 2012⁸, recorded a “positive adjustment” to the company’s normal value in terms of “painting costs”⁹. There is no evidence in the current case, of an adjustment, that would otherwise be against the exporter’s interests being made.

Risk of regard to irrelevant considerations

ATM submits that as the Commission cannot reasonably claim to be satisfied as to the accuracy of the information supplied, then it is not open to the Commissioner to base any recommendation to the Parliamentary Secretary on the strength of the information so supplied. In turn, ATM asserts that it is not possible for the Parliamentary Secretary to be reasonably satisfied as to the reliability of the information supplied by Kukje, and relied upon by the Commissioner in making the recommendations foreshadowed in SEF 266.

As matters currently stand, ATM submits that some information, within the Commission’s access and control, such as the Customs Commercial Import Database, may be considered accurate and reliable in terms of determining the export price. Beyond, any observed changes to the export price, as a variable factor, any alleged changes to the normal value, based on the exporter’s unverified information, and in the express absence of any evidence that the Commission has satisfied itself of the accuracy of that information is simply not open to the Commissioner or the Parliamentary Secretary as a permissible relevant consideration. Indeed, ATM considers reliance on such information as regard to irrelevant considerations, and potentially subject to further challenge.

Impact of [REDACTED] on outcome of review

[REDACTED]

⁷ Subsection 269ZD(1), *Customs Act 1901*

⁸ EPR 177, Folio 335 (4 April 2012)

⁹ *Ibid* 26

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[REDACTED]

[REDACTED]

[REDACTED] - [A confidential administrative process]

Conclusion

The WTO Agreement requires the Commission, as administering authority, to be satisfied as to the accuracy of the information supplied. In the case of this review, the Commission has evidenced no steps taken to reach the level of satisfaction required under the WTO Agreement, or indeed under principles of sound administrative decision making. As such, the proposed recommendation to the Parliamentary Secretary contained in SEF 266, are based on information the accuracy of which has not, on the available information, been tested. Therefore, neither the Commissioner, nor the Parliamentary Secretary can be reasonable satisfied of the reliability of the information, and such be disregarded.

Further, ATM considers that the risk of concluding the review [REDACTED]
[REDACTED] [A confidential administrative process]

If you have any further questions concerning this letter please do not hesitate to contact me on (07) 3909 6130.

Yours sincerely,



Brett Willcox
Manager –Strategy and Business Planning