



14 September 2017

Public record version

By email:

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Dear Director

**ADC 392: Review of Measures – Aluminium Extrusions
exported from the People's Republic of China**

1 Introduction

- 1.1 We refer to our previous submissions made on behalf of Kam Kiu in our letter dated 14 August 2017. Capitalised terms and references to legislative material used in this letter have the same meaning as in our earlier letter. We refer also to the Anti-Dumping Commission's Statement of Essential Facts (SEF 392) published on 25 August 2017 and to the Confidential Attachments to that statement comprising various calculations relating to Kam Kiu (**Calculations**), which were provided to us by email on 28 August 2017.
- 1.2 As you are aware, Zhong Lun and Corrs Chambers Westgarth act for Kam Kiu in relation to this matter. Kam Kiu thanks the Commission for its consideration of our previous submissions.
- 1.3 We make the following further submissions on behalf of Kam Kiu, in response to the Statement of Essential Facts and the Calculations.

2 Dumping duties

Profit margin

- 2.1 Kam Kiu respectfully submits that there appears to be a minor error in the Commission's calculation of the dumping margin applicable to Kam Kiu.
- 2.2 The Commission's calculations contained within the *Kam Kiu Confidential Appendix 4: Normal Value (uplifted constructed revised profit) workbook (Normal Value Workbook)* suggest that the profit margin applied by the Commission in calculating constructed normal values was [REDACTED]. This is apparent from the value [REDACTED] which appears in cells

- C6:F6, C19:F19, et cetera, in respect of each model, on the worksheet “Normal Values” in the Normal Value Workbook.
- 2.3 This value appears to have been calculated using the pivot table at cells A18:C32 of the worksheet “Profit” in the Normal Value Workbook. However, we note that this calculation appears to include the “Medical”, “Sunroof Rail” and “Phone Case” models.
- 2.4 We had understood, from the Commission’s conclusion stated at section 4.9.4 of the Statement of Essential Facts—namely, “that the profits derived from the domestic sales of High-end Models should be excluded from the calculation of profit for the purpose of constructing a normal value”—that those models should have been excluded from the calculation of profit margin. This appears to have been the process undertaken in the pivot table at cells F18:H33 in the “Profit” worksheet in the Normal Value Workbook, which calculates a value of [REDACTED].
- 2.5 The [REDACTED] profit margin is used to calculate the constructed normal values set out in the table at cells I4:N15 on the worksheet “Normal Values”. That table is then imported into cells B2:F13 on the worksheet “Normal Value” in the *Kam Kiu Confidential Appendix 5 Dumping Margin (uplifted constructed revised profit)* workbook (**Dumping Margin Workbook**).
- 2.6 The normal values from the table are then used in column BT in the worksheet “Deductive Export Price -KMY (2) (**DEP Worksheet**) within the Dumping Margin Workbook. That column is then used to calculate the dumping margins appearing in column BW.
- 2.7 The “Variable factors” worksheet in the Dumping Margin Workbook is a pivot table which draws on the values from the DEP Worksheet. This worksheet which is used to calculate the 21% dumping margin in respect of Kam Kiu which appears at section 4.10 of the Statement of Essential Facts. Specifically, column B in this worksheet aggregates values from column BU of the DEP Worksheet and the values for that column are derived using the normal values in column BT mentioned above.
- 2.8 Therefore, the [REDACTED] profit margin is ultimately used by the Commission’s calculation of the 21% dumping margin for Kam Kiu.
- 2.9 By our own calculations—specifically, by recalculating the normal values table in the Dumping Margin Workbook and then refreshing the “Variable factors” pivot table—if a profit margin of [REDACTED] is used, rather than a margin of [REDACTED], the calculated dumping margin is reduced from 21% to 20.488%.
- 2.10 Kam Kiu invites the Commission to revisit its dumping margin calculations for Kam Kiu in light of the foregoing and subject to the submission made in the following section.

***Export price***

- 2.11 The Commission has calculated the FOB export value in cash terms in column BG of the DEP Worksheet. In calculating this value, it appears that a rate of 1.5%—being the value in cell BG1—has been applied to the non-cash value. This is said to reflect a “credit adjustment based on 45 days credit terms”.
- 2.12 Kam Kiu submits that this amount is too high and represents an unrealistic amount of 12% per annum.
- 2.13 Kam Kiu submits that an interest rate of 4.35% per annum should be used, which is the benchmark lending interest rate for short-term loans published by the People’s Bank of China in 2016. We note that this is the interest rate that was provided in Kam Kiu’s questionnaire response.
- 2.14 Therefore, Kam Kiu submits that, for a 45 day term, an interest rate of 0.54% should be used: $4.35\% / 365.25 \times 45$.

3 Countervailing duties

- 3.1 Kam Kiu acknowledges the Commission’s findings at section 5.5.1 of the Statement of Essential Facts that Kam Kiu received benefits under programs 21, 47, 48 and 61–71.
- 3.2 The Commission’s subsidy calculations in respect of Kam Kiu are contained within the workbook *Kam Kiu Subsidy Calculations (Subsidy Workbook)*.

Approach to calculating subsidy margin

- 3.3 Kam Kiu respectfully submits that the approach used by the Commission to calculate subsidisation is inappropriate in the manner in which it is allocated to the goods under consideration. As the subsidies received by Kam Kiu are not specifically limited to the goods under consideration, the amount of the subsidy must be proportionately allocated to the goods under consideration.
- 3.4 It appears from the calculations in the Subsidy Workbook that the Commission has allocated the value of each subsidy to the goods under consideration according to the physical weight of all goods produced sold by Kam Kiu. However, in Kam Kiu’s respectful submission, that approach does not fairly take into account the differences in the revenue and profit generated by the varied range of products produced by Kam Kiu and in respect of which any benefits are received under the programs identified by the Commission.
- 3.5 In particular, we note that Programs 47 and 48 relate to the amount of tax paid by Kam Kiu. That, of course, in turn is affected by the amount of profit generated by Kam Kiu. As we noted in our submission of 14 August 2017, and the Commission has accepted, the profit margin earned by Kam Kiu on its High-end Models is higher than the profit earned on the Normal Models. The High-end Models are not exported to Australia.
- 3.6 By allocating any benefits received by Kam Kiu under Programs 47 and 48 according to weight, the Commission is treating all of Kam Kiu’s products as if



they generated equal profits per kilogram, when the Commission knows that is not the case.

- 3.7 In Kam Kiu's respectful submission, a fairer and more appropriate means of allocation of any benefits received under those programs would be based on the proportion of profits earned by Kam Kiu from the goods exported to Australia, or at the very least, the proportion of revenue earned from those goods.
- 3.8 The Commission could adopt that approach by undertaking the following steps, instead of the approach taken in the Subsidy Workbook:
- (i) calculate the total benefit from the relevant program received by Kam Kiu during the review period;
 - (ii) calculate the total revenue generated by Kam Kiu;
 - (iii) calculate the revenue generated by Kam Kiu in respect of the goods under consideration, thereby excluding revenue generated by the High-end Models;
 - (iv) calculate the amount of (i) allocated to the goods under consideration, being: $(iii) / (ii) \times (i)$;
 - (v) calculate the total mass of the goods under consideration sold;
 - (vi) calculate the benefit received per kilogram of the goods under consideration, being: $(iv) / (v)$.
- 3.9 The amount calculated in (vi) in paragraph 3.8 above would allow a fair comparison to be made against the FOB export price.

Errors in the calculation of benefit ratio under Program 48

- 3.10 We have identified what we believe to be an error in the Commission's calculations in relation to Program 48.
- 3.11 As recognised by the Commission in its Final Report in Review of Measures ADC 248 (REP248) in relation to Program 48:

The reduction in corporate income tax provided under this program is a financial contribution by the GOC, which involves the foregoing of corporate income tax revenue otherwise due to the GOC.

- 3.12 Therefore, the maximum benefit received by Kam Kiu under Program 48 is the tax saving that it made on its research and development (**R&D**) expenses deduction, rather than the amount of that deduction itself. To calculate this tax saving, Kam Kiu's R&D expenses deduction—which is 50% of its expenditure on R&D—must be multiplied by the applicable income tax rate. That is to say, the amount appearing in cell B6 of the "Program 48" worksheet in the Subsidy Workbook, which is currently the amount of the R&D expenses deduction, should be multiplied by 15%.

- 3.13 Putting to one side the submission made in the preceding section, this means that the subsidisation, based on the Commission's current methodology, from Program 48 would be 0.39%, rather than the currently stated 2.63%.

Specificity of Programs 47 and 48

- 3.14 Kam Kiu submits that Programs 47 and 48 lack specificity, insofar as they apply to Kam Kiu, and, therefore, should not be subject to any countervailing measures.

- 3.15 Article 1.2 of the *SCM Agreement* provides:¹

A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II ["Prohibited Subsidies"] or shall be subject to the provisions of Part III ["Actionable Subsidies"] or V ["Countervailing Measures"] only if such a subsidy is specific in accordance with the provisions of Article 2.

- 3.16 Article 2.1 of the *SCM Agreement* provides:

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

- 3.17 Further, article 2.2 of the *SCM Agreement* provides:

A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

- 3.18 As the Commission is aware, section 269TAAC, which implements article 2 of the *SCM Agreement* into Australian law, provides:

¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Subsidies and Countervailing Measures*') (**SCM Agreement**).



[...]

(2) *Without limiting the generality of the circumstances in which a subsidy is specific, a subsidy is specific:*

(a) *if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or*

(b) *if, subject to subsection (3), access is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority; or*

(c) *if the subsidy is contingent, in fact or in law, and whether solely or as one of several conditions, on export performance; or*

(d) *if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.*

(3) *Subject to subsection (4), a subsidy is not specific if:*

(a) *eligibility for, and the amount of, the subsidy are established by objective criteria or conditions set out in primary or subordinate legislation or other official documents that are capable of verification; and*

(b) *eligibility for the subsidy is automatic; and*

(c) *those criteria or conditions are neutral, do not favour particular enterprises over others, are economic in nature and are horizontal in application; and*

(d) *those criteria or conditions are strictly adhered to in the administration of the subsidy.*

3.19 Justice Nicholas helpfully summarised s 296TAAC as follows in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs*:²

Section 269TAAC has the following basic structure:

- *Subsection (1) says that a subsidy is a countervailable subsidy if it is specific. Without limiting the generality of subs (1), subs (2) specifies circumstances in which a subsidy will be considered specific.*
- *Subsection (3) specifies particular circumstances in which a subsidy will not be considered specific.*

[...]

² *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* (2015) 243 FCR 190, [82].



- 3.20 Article 28 of the *Enterprise Income Tax Law* of the People's Republic of China (EITL), which gives rise to the preferential tax treatment the subject of Program 47, provides:

As regards important high-tech enterprises necessary to be supported by the state, the enterprise income tax shall be levied at the reduced tax rate of 15%.

- 3.21 Similarly, article 30(1) of the EITL, which gives rise to the preferential tax treatment the subject of Program 48, provides:

An enterprise may additionally calculate and deduct the following expenditures in the calculation of the taxable income amount [t]he expenditures for researching and developing new technologies, new products and new techniques [.]

- 3.22 Kam Kiu submits that Programs 47 and 48 do not meet the threshold of s 269TAAC(2)(a), as they are not explicitly limited to particular enterprises. Rather, as is evidence from the articles set out in the preceding paragraphs, Program 47 is available to any enterprise which is a certified "high-tech enterprise" and Program 48 is available to any enterprise carrying out R&D for new technologies, new products or new techniques.

- 3.23 In relation to Article 28 of the EITL, "High-tech enterprise" is defined in article 2 of the *Notice of the Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on Revising and Issuing the Measures for the Administration of the Certification of High-tech Enterprises (2016)* as follows:

For the purpose of these Measures, "high-tech enterprises" means the resident enterprises registered within China (excluding Hong Kong, Macao and Taiwan regions) that are engaging in continuous research and development as well as transformation of their technological achievements in the fields as prescribed in the High-tech Fields under the Key Support of the State, have formed their core independent intellectual property rights and are carrying out business activities based on the said intellectual property rights.

- 3.24 Article 93 of the *Regulation on the Implementation of the Enterprise Income Tax Law of the People's Republic of China (2008)* further provides:

The "hi-tech enterprises that are specifically supported by the State" as prescribed in Paragraph (2) of Article 28 of the Enterprise Income Tax Law refer to an enterprise that owns the core proprietary intellectual property rights and fulfils all of the following conditions:

- (1) *Its products (services) fall under the prescribed scope of the Hi-Tech Sectors Specifically Supported by the State;*
- (2) *Research and development expenses shall not be less than the prescribed percentage;*



- (3) *Incomes from hi-tech products (services) accounts for not less than the prescribed percentage of its total incomes;*
- (4) *The number of technicians accounts for not less than the prescribed percentage of the total number of employees of the enterprise;*
- (5) *Other conditions as prescribed in the administrative measures for the assessment of the Hi-tech enterprises.*

The Hi-Tech Sectors Specifically Supported by the State and the administrative measures for the assessment of the Hi-Tech enterprises shall be jointly formulated by the competent scientific & technological, financial and tax departments of the State Council and other relevant departments of the State Council and released for enforcement after being reported to and approved by the State Council.

3.25 Article 11 of the *Notice of the Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on Revising and Issuing the Measures for the Administration of the Certification of High-tech Enterprises (2016)* sets out the following conditions for an enterprise to receive “high-tech enterprise” certification:

To be certified as a high-tech enterprise, an enterprise shall concurrently meet the following conditions:

- (1) *The enterprise has been registered for not less than one year when applying for certification.*
- (2) *The enterprise shall own intellectual property rights of technologies which show core support to their key products (services) by such means as independent research and development, transfer, donation or merger in the past three years.*
- (3) *The technologies which show core support to their key products (services) shall fall within the scope as prescribed in the High-tech Fields under the Key Support of the State.*
- (4) *The number of scientific and technical personnel engaged in research and development as well as relevant technology innovation activities shall account for not less than 10% of the total number of employees of the enterprise for the current year.*
- (5) *The proportion of its total research and development expenditure in the past three fiscal years (or during the actual period of business operations if three years*



have not lapsed since the formation of the enterprise, hereinafter the same) to its total sales revenue during the same period shall meet the following requirements:

- (i) If the sales revenue of the enterprise in the latest year is not more than 50 million yuan, the proportion shall not be less than 5%.*
- (ii) If the sales revenue of the enterprise in the latest year is more than 50 million yuan but not more than 200 million yuan, the proportion shall not be less than 4%.*
- (iii) If the sales revenue of the enterprise in the latest year is more than 200 million yuan, the proportion shall not be less than 3%.*

In particular, the proportion of the total research and development expenses incurred within China to the total research and development expenses shall not be less than 60%.

- (6) The enterprise's revenue from high-tech products (services) shall account for not less than 60% of its total revenue in the latest year.*
- (7) The evaluation of innovative capacity of the enterprise shall satisfy the corresponding requirements.*
- (8) No major safety accident, major quality accident or serious environmental violation of law occurs within one year before the enterprise applies for certification.*

3.26 The fields currently considered "High-tech Fields under the Key Support of the State" are set out in the Attachment to that Notice as follows:

- (i) electronic information technology;
- (ii) biotechnology and new pharmaceutical technology;
- (iii) aviation technology;
- (iv) new materials technology;
- (v) hi-tech services industry;
- (vi) new energy and energy conservation technology;
- (vii) resources and environmental technology; and
- (viii) advanced manufacturing and automation.

3.27 Kam Kiu submits that these fields are not stated by reference to particular industries, with the exception of (v), or groups of industries. Rather, these fields could be applied to a very large proportion of the People's Republic of China's



economy, allowing enterprises within many, unspecified, industries to access measures tied to “high-tech enterprise” certification.

3.28 As the Panel stated in *United States—Upland Cotton*:³

The breadth of this concept of "industry" may depend on several factors in a given case. At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products.

3.29 Similarly, in *EC and certain member States—Large Civil Aircraft*, the Panel stated:⁴

While it could be argued that the EIB lending objectives, although very broad, do establish an explicit limitation on its lending activities, we do not consider these to result in a limitation on the availability of its loans to "certain enterprises". In our view, the wide array of economic sectors covered by the EIB's explicit lending objectives means that its operations are expressly intended to benefit recipients well beyond a particular enterprise or industry or group of enterprises or industries.

3.30 To adopt the wording of the Panel in *United States—Upland Cotton*,⁵ Kam Kiu submits that the reference to “high-tech enterprises” does *not* represent a “sufficiently discrete segment” of the People’s Republic of China’s economy in order to qualify as “specific” within the meaning of Article 2 of the *SCM Agreement*.

3.31 It follows that the constraint of a measure to “high-tech enterprises” does not mean that the measure “is explicitly limited to particular enterprises”, as required in order for a measure to be considered “specific” under sub-section 269TAAC(2)(a).

3.32 In the alternative to the submission made at paragraphs 3.22–3.31 above, Kam Kiu submits that, pursuant to sub-section 269TAAC(3) and contrary to the Commission’s findings in Reports 237, 238 and 248, the measures the subject of Programs 47 and 48 should be considered “not specific”, as they each meet the following criteria of sub-section (3)—they:

- (i) are established by objective criteria, which are set out in the EITL;
- (ii) involve automatic eligibility—in the case of Program 47, once an enterprise received “high-tech” certification; and
- (iii) have neutral criteria that do not favour particular enterprises and which are strictly adhered to in the administration of the measure.

³ Panel Report, *United States—Upland Cotton*, WTO Doc WT/DS/267/R (8 September 2004) [7.1142].

⁴ Patel Report, *EC and certain member States—Large Civil Aircraft*, WTO Doc WT/DS316/R (30 June 2010) [7.931].

⁵ Above n 3, [7.1152].



- 3.33 In relation to sub-paragraph 3.32(ii) above, Kam Kiu notes that the measures do not require enterprises to specifically apply for the measure, rather these measures are simply applied during the taxation process, once an enterprise has been certified as a “high-tech enterprise”—as to the conditions that need to be met in order to obtain “high-tech enterprise” certification, see paragraph 3.25 above.
- 3.34 In relation to sub-paragraph 3.32(iii) above, and as discussed more generally at paragraph 3.27 above, Kam Kiu notes that these measures are not aimed at assisting the aluminium industry, producers of aluminium extrusions, or any other particular industry or particular enterprises. Rather, these measures exist to encourage all companies in the People’s Republic of China to engage in R&D and to aim to improve production technologies.
- 3.35 Kam Kiu submits that the Panel’s following reasoning in *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, applies equally here. In its Report, the Panel held:⁶

In the Panel's view, the European Communities has failed to make a prima facie case that the "High Growth Job Training Initiative" is specific under Article 2 of the SCM Agreement. While it is true that the Program "targets only certain industries, including the aerospace industry", the industries "targeted" are too broad (e.g. "advanced manufacturing" as 1 of 14 "industries") to support a finding of specificity.

- 3.36 As such, Kam Kiu submits Programs 47 and 48 lack specificity, as they fail to meet the threshold of sub-section 269TAAC(2)(a), and are, in fact, “not specific” pursuant to sub-section (3). Therefore, any benefits derived from these programs should be excluded from the calculation of any countervailing measures applicable to Kam Kiu.

Should you have any queries in relation to these submissions, please do not hesitate to contact Andrew Korbel on (02) 9210 6537 or James Wood on (02) 9210 6221.

Yours faithfully

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⁶ United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint), WTO Doc WT/DS353/R (31 March 2011) [7.1368].