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Dear Director

Review 482—Aluminium Extrusions exported from the People's Republic of China

1 Introduction and Executive Summary

1.1 Zhong Lun and Corrs Chambers Westgarth act for the following entities—Tai Shan City Kam Kiu Aluminium Extrusion Co., Ltd (**KAE**), Kam Kiu Aluminium Products Sdn. Bhd (**KMY**), Kam Kiu (Hong Kong) Limited (**KHK**), and Kam Kiu (Australia) Pty Ltd (**KAU**) (together, "**Kam Kiu**").

1.2 We are writing to you in relation to the Anti-Dumping Commission's Review of Anti-Dumping Measures in relation to certain aluminium extrusions exported from the People's Republic of China (Review 482).

1.3 We make the following submissions on behalf of Kam Kiu in response to the Verification Team's Exporter Verification Report in relation to KAE, published on 21 January 2019 (**Verification Report**). Some, but not all, of the matters dealt with in this document were also the subject of a submission from Kam Kiu to the Commission in Review 392, dated 14 August 2017.[1]

1.4 In these submissions, references to "the Act" are made in respect of the *Customs Act 1901* (Cth), references to "the Regulations" are made in respect of the *Customs (International Obligations) Regulation 2015* (Cth), and references to "the AD Agreement" are made in respect of the *Agreement on Implementation of Article IV of the General Agreement on Tariffs and Trade 1994*. Similarly, references to "sections", "regulations", and "articles" are references to the provisions of these instruments, respectively.

[1] Document 051 on EPR 392.

1.5 In summary, as outlined in detail in this document, Kam Kiu respectfully submits that:

(a) the Commission should form the view that the High-end Models (defined below) sold domestically by Kam Kiu are not like goods to the goods under consideration;

(b) if the Commission considers that the High-end Models are like goods, then to allow for a fair comparison to be made between the constructed normal value and the export price determined for Kam Kiu, the higher profit from the domestic sale of those High-end Models needed to be excluded from the constructed normal value; and

(c) the Act and the Regulations (which should be read as consistent with article 2.4 of the AD Agreement) permit that to occur by:

(i) the exclusion of the High-end Models from the goods used to calculate the profit component of the constructed normal value;

(ii) an adjustment to the profit component of the constructed normal value; and/or

(iii) an adjustment to the costs component of the constructed normal value.

1.6 These submissions are structured as follows:

2 Background

2.1 The goods the subject of the anti-dumping measures which are being reviewed (**Goods**) are defined in the following terms:

> *Aluminium extrusions produced via an extrusion process, of alloys having metallic elements falling within the alloy designations published by The Aluminium Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness or diameter greater than 0.5 mm., with a maximum weight per metre of 27 kilograms and a profile or cross-section which fits within a circle having a diameter of 421 mm.*

2.2 This definition has been further elaborated—for example, in Anti-Dumping Notice No. 2018/111—as follows:

> *The goods include aluminium extrusion products that have been further processed or fabricated to a limited extent, after aluminium has been extruded through a die. For example, aluminium extrusion products that have been painted, anodised, or otherwise coated, or worked (e.g. precision cut, machined, punched or drilled) fall within the scope of the goods.*
>
> *The goods subject to the anti-dumping measures do not include intermediate or finished products that are processed or fabricated to such an extent that they no longer possess the nature and physical characteristics of an aluminium extrusion, but have become a different product.*

2.3 KAE manufactures a range of models that are used in medical equipment, in the motor vehicle industry and in mobile phones (**High-end Models**). We are instructed that the High-end Models account for about 65% of Kam Kiu's domestic sales. These products are focussed on KAE's domestic market, and, as the Commission knows, KAE does not export these High-end Models to Australia. The High-end Models differ from other models manufactured by KAE (**Normal Models**), including those that KAE *does* export to Australia, in that they involve different combinations of:

(a) tighter manufacturing tolerances;

(b) higher grades of alloy;

(c) additional processing—such as, precision bending, cutting, punching or drilling;

(d) additional preparations prior to being coated; and/or

(e) detailed finishes.

2.4 Section 269TACB prescribes that the assessment of whether dumping has occurred is to be undertaken using a methodology by which the "export price" of a good and the "normal value" of that good are compared. The export price is

established in accordance with section 269TAB, whilst the corresponding normal value is established in accordance with section 269TAC.

2.5 At section 5.3 of the Verification Report, the Verification Team recognises that, in this case:

> *…due to market situation claims, normal values are likely be constructed [sic] pursuant to sub-section 269TAC(2)(c) of the Act, using costs to make the goods exported to Australia, plus SG&A applicable to the goods sold domestically, and an additional amount for profit.*

3 Like Goods

3.1 At sections 2.3–5 of the Verification Report, the Verification Team considers what are the "like goods" manufactured by KAE with respect to the Goods. In this regard, the Verification Team notes that it has considered the submissions made by Kam Kiu in Review 392 in relation to Kam Kiu's High-end Models. The Verification Team concludes that it:

> *…considers that these "high-end" models are properly categorised under the goods description as "aluminium extrusions that are parts intended for use in intermediate or finished products".*

3.2 We assume that the submissions of Kam Kiu referred to by the Verification Team are the submissions about "like goods" included in our letter dated 14 August 2017 to the Commission in the context of Review 392. We confirm that Kam Kiu presses those submissions again in the context of the current review. Those submissions are repeated in **Schedule 1** to this letter, and are supported by the Confidential Annexures to that schedule.

4 Fair comparison requires an allowance for profits from High-end Models

4.1 As Schedule 1 and its confidential annexures make clear, and as the Commission has accepted,[2] the High-end Models that Kam Kiu sells domestically differ to the models exported to Australia in a range of ways which affect their price comparability, and the comparability of the profit derived from the High-end models and the exported models.

4.2 If the Commission does not accept Kam Kiu's submissions (in **Schedule 1**) regarding "like goods" then Kam Kiu submits, for the reasons outlined in the remainder of this letter, that the Commission should make an allowance, in the calculation of the constructed normal value for Kam Kiu, for the significantly higher profit associated with the High-end Models than with the profits earned domestically on goods of the type exported to Australia.

4.3 Such an allowance is necessary to ensure a fair comparison between the export price and normal value determined for Kam Kiu. If no allowance is made, the normal value will be inflated by the inclusion of a larger profit margin than Kam Kiu could actually achieve in respect of the Goods that it exports to Australia, owing to

[2] Sections 2.3 to 2.5 of the Verification Report for KAE in Review 392, published on 31 July 2017 – EPR document 050 in Review 392; Statement of Essential Facts 392, section 4.9.3; Verification Report in Review 482, sections 2.3 and 2.4 at pages 5–6.

the higher profit margin that it generates from the High-end Models which it sells in its domestic market.

4.4 By including those higher profit margins, there is the potential for a flawed and unfair outcome in which any of Kam Kiu's competitors that do not manufacture models equivalent to the High-end Models—models which those competitors would be able to sell at a higher rate of profit in their domestic market—would have a lower rate of profit applied to their products by the Commission during its construction of a normal value in respect of their products. In this case, Kam Kiu's Normal Products would have a higher dumping margin applied to them—despite potentially having the same cost to manufacture and sell as their competitors, as well as the same profit margin on the equivalent products sold domestically—and may ultimately become more expensive in Australia, pricing Kam Kiu out of the Australian market.

4.5 Such an adjustment would be consistent with the purpose of both the AD Agreement and the relevant provisions of the Act.

4.6 The concept of a "normal value" is to allow a fair comparison to be made between the price charged by a foreign manufacturer in its domestic market—such as the People's Republic of China—and the price charged by that manufacturer in an export market—such as the Australian market. Where the "normal value" of a good in the foreign market would not allow a fair comparison—typically due to some factor decreasing the price of the good in that market—section 269TAC(2) allows the Minister to construct a normal value. Therefore, it would be contrary to the purpose of a "normal value" if the constructed normal value was affected by some other factor which artificially raised the value, so that a fair comparison could not be achieved.

4.7 This objective of enabling a fair comparison to be made is reflected in the text of article 2.4, which is extracted in paragraph 7.2 below.

4.8 To illustrate further the unfairness that would result from not making an allowance, it is perhaps worth considering a hypothetical scenario in which the alleged dumping (and therefore the goods under consideration) is of High-end Models, rather than Normal Models.

4.9 In this hypothetical, the foreign manufacturer produces both Normal Models and High-end Models, each of which it sells domestically, but only exports the High-end Models to Australia. As is the case for Kam Kiu, the foreign manufacturer in this hypothetical earns a higher profit margin in respect of its High-end Models than its Normal Models. Further, for the purpose of this hypothetical, assume that these High-end Models are, in fact, being dumped into Australia by the foreign exporter.

4.10 If the Commission, in constructing a normal value in respect of the goods under consideration, were to treat the High-end and Normal Models as "like goods" for the purposes of section 269TAC(2), the profit margin applied in constructing the normal value—as calculated otherwise in accordance with regulation 45(2)—may result in an unrealistically low constructed normal value for the High-end Models.

As a consequence, this could lead to an outcome where goods that are, in fact, being dumped are, nevertheless, not found to have been dumped by the Commission.

4.11 Presumably, in this scenario, the Australian industry would be dissatisfied with this outcome and would submit that the profits derived by the foreign manufacturer from the domestic sales of their Normal Models should be excluded from the profit margins applied by the Commission when constructing a normal value.

4.12 Kam Kiu submits that that would, in this counterfactual scenario, be the appropriate course for the Commission to take, as it would allow a proper comparison between prices.

4.13 Similarly, Kam Kiu respectfully submits that, in respect of their High-end Models, it is not appropriate for these models to be included in the profit margins applied by the Commission in constructing a normal value for the goods under consideration, as this does not allow a proper comparison between prices.

5 Exclusion of High-end Models from profit calculation is permitted

5.1 As noted at paragraph 2.5 above, the Verification Team anticipates that the Commission will determine the normal value for Kam Kiu's Goods through the process prescribed in section 269TAC(2)(c)—being a "constructed normal value".

5.2 The Verification Team considers profit in the context of constructing a normal value at section 5.4 of the Verification Report. The Verification Team recognises that, in SEF 392, the Commission accepted that:[3]

> *…profits derived from the domestic sale of high-end models should be excluded from the calculation of profit for the purpose of constructing a normal value, ensuring a fair comparison is made between the export price of the goods under consideration and the normal value of those goods.*

5.3 In REP 392, the Commission confirmed this position, stating:[4]

> *As part of SEF 392 the Commission revised the amount of profit applied in constructing normal values for Kam Kiu from that previously applied for the purposes of a verification report to ensure a fair comparison was made between the export price of the goods under consideration and the normal value of like goods. The Commission noted at section 4.9.4 of SEF 392 that the revised amount of profit was determined by reference to product code. This approach excluded from the calculation of profit approximately 99.5 per cent of High-end models, identified by Kam Kiu, sold in the OCOT by virtue of the fact that these product codes related to models not exported to Australia.*

5.4 Despite this, in the current review the Verification Team has said that it considers that "excluding the profit of any like goods sold in the ordinary course of trade on

[3] Statement of Essential Facts – SEF 392, document 056 on EPR 392, 29.
[4] Final Report – REP 392, document 069 on EPR 392, 34.

the domestic market in the profit calculation used for the construction of normal value is inconsistent with section 45 of the [Regulations]".

5.5 Kam Kiu respectfully disagrees with the Verification Team's conclusion and requests that the Commission give this matter further consideration. In Kam Kiu's submission, the position taken by the Commission, in SEF 392 and REP 392, and accepted by the Minister, was correct and is to be preferred.[5]

5.6 As a result of the inclusion of Kam Kiu's High-end Models among the goods used to calculate the profit component in the constructed normal value, the Commission has not been able to perform a fair comparison between the export price and the normal value for Kam Kiu.

5.7 As noted at paragraph 5.4 above, the Verification Team has attributed its proposed change of approach to this issue to regulation 45.

5.8 Regulation 45 provides (emphasis added):

> *(1) For subsection 269TAC(5B) of the Act, this section sets out:*
>
> *(a) the manner in which the Minister must, for subparagraph 269TAC(2)(c)(ii) or (4)(e)(ii) of the Act, work out an amount (the amount) to be the profit on the sale of goods; and*
>
> *(b) factors that the Minister must take account of for that purpose.*
>
> *(2) The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.*
>
> *(3) If the Minister is unable to work out the amount by using the data mentioned in subsection (2), the Minister must work out the amount by:*
>
> *(a) identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or*
>
> *(b) identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or*
>
> *(c) using any other reasonable method and having regard to all relevant information.*

5.9 The calculation of profit for the purpose of the constructed normal value in the Verification Report was undertaken under regulation 45(2).

5.10 The Commission has not explained the reason why the Verification Team now considers that the approach taken in Review 392 is not permitted by regulation 45. It may be that the Verification Team has reached a different view to that of the Commission and the Minister in Review 392 after considering the decision of the

[5] Anti-Dumping Notice No. 2017/138, document 070 on EPR 392.

Federal Court of Australia in *Steelforce*,[6] and of the Full Court of the Federal Court of Australia in the *Steelforce Appeal*.[7]

5.11 If that is the reason for the changed view then, as we explain below, the change is not required or justified by those decisions.

5.12 In *Steelforce*, at paragraph 86 of the Court's judgment, Justice Robertson said:

> *I accept that on the proper construction of the Regulation it is not open to the Commissioner to identify goods in the same general category and then use only part of those goods to work out the amount to be the profit on the sale of goods under s 45 of the Regulation. […]*

5.13 Justice Robertson's statement at paragraph 86 must be read in context. It is clear from the passage itself that his Honour is referring specifically to regulation 45(3)(a) and not to regulation 45(2), given that 45(2) does not concern "goods in the same general category". His Honour also acknowledges at paragraphs 62 and 64 of his judgment that "[as] the Commission found that there were no sales of like goods in the ordinary course of trade…" that "s 45(2) of the Regulation could not apply."

5.14 Kam Kiu also observes that his Honour's statement at paragraph 86 is preceded by the following in paragraph 83:

> *[…] The applicants submitted that s 45(3)(a) of the Regulation required the Minister to work out the profit amount by identifying the actual amount realised by the exporter from "the sale of the same general category of goods" in the domestic market of the country of export. The applicants submitted the Commissioner was not authorised to select part of the goods in the same general category for the purposes of the Regulation.*

5.15 In Kam Kiu's submission, paragraph 83 makes clear that, in paragraph 86, his Honour was opining in the context of regulation 45(3)(a) only. What his Honour said at paragraph 86 should not be read as having broader application to regulation 45(2).

5.16 In the *Steelforce Appeal*, the Court also dealt with regulation 45, but again with a focus on regulation 45(3), not 45(2). Justice Perram relevantly stated at paragraphs 64 to 67:

> *[64] Regulation 45(2)–(4) and (6) provide:*
>
> […]
>
> *[65] This requires an assessment of the amounts realised 'from the sale of the same general category of goods' in the domestic market. The primary judge accepted (at [86]) that once the general category had been*

[6] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2016] FCA 1309 (9 November 2016) (***Steelforce***).

[7] *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* (2018) 161 ALD 36 (***Steelforce Appeal***).

> *identified the Commissioner could not lawfully disregard some subset of the general category in carrying out the profit calculation.*
>
> *[66] This mattered because the Appellants argued that it was clear from several parts of the Final Report that the Commissioner had determined that non-prime and downgrade product were both of the same general category of goods. If this were correct, it had significant implications for his treatment of the topic of profit (at paragraph 4.4.3.2 of the Final Report) for, as set out above, it was clear that the Commissioner had decided to treat non-prime goods differently to downgrade. If the Commissioner had indeed concluded that non-prime and downgrade HSS were in the same general category of goods, then given the way in which the primary judge had construed reg 45(3)(a), this would have involved error on the part of the Commissioner.*
>
> *[67] It was not suggested in this Court that the primary judge's approach to the construction of reg 45(3)(a) was incorrect. […]*

5.17 Similarly, Justice Pagone stated at paragraph 131:

> *The third ground of appeal complained that his Honour should have found that the Commissioner had incorrectly regarded non-prime and downgrade HSS as being in the same general category of goods. The task undertaken by his Honour was identified at [86] in which his Honour accepted that upon the proper construction of the relevant provisions the Commissioner could not identify goods in the same general category but use only part of those goods to work out the amount of the profit on the sale of the goods under s 45 of the Customs (International Obligations) Regulation 2015 (the Regulation). His Honour went on correctly to observe at [86] that the question was "whether that is what the Commissioner did in the Report" and correctly concluded in the paragraphs which followed that the Commissioner had not done so. His Honour's conclusion was correct for the reasons he gave, namely, that the Commissioner had not found that non-prime and downgrade HSS were both in the same general category of goods for the purposes of s 45(3)(a) of the Regulation.*

5.18 While the Full Court was not required to decide on the application of regulation 45(3)(a), as these passages make clear, Justices Perram and Pagone also take Justice Robertson's reasoning at paragraph 86 as relating to the correct construction of regulation 45(3)(a), rather than to regulation 45 more broadly.

5.19 In Kam Kiu's submission, Justice Robertson's reasoning at paragraph 86 does not have broader application than regulation 45(3)(a) and to apply that reasoning to regulation (2) would be an error.

5.20 The language used in regulation 45(2) is relevantly different to regulation 45(3), and does not impose a requirement that all like goods be used when calculating a profit under regulation 45(2). Regulation 45(3) requires the Minister to identify "the actual amounts realised", whereas regulation 45(2) is less prescriptive.

Regulation 45(2) instead requires the Minister to "work out the amount of profit by using data relating to the production and sale of like goods" (emphasis added).

5.21 The language in regulation 45(2) provides scope for the Minister to use only some of the "data relating to the production and sale of like goods". For example, regulation 45(2) permits the exclusion of some of the like goods from the profit calculation where that is considered appropriate to allow for a fair comparison between the normal value and the export price.

5.22 Even if that view is incorrect and such an exclusion is not permitted, regulation 45(2) does not prohibit adjustments from being made to the data in order to achieve a fair comparison.

5.23 That conclusion is supported by consideration of the language of article 2.2 of the AD Agreement, which is the genesis of regulation 45. Article 2.2 relevantly provides:

> *2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.*
>
> *2.2.1 […]*
>
> *2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> *(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;*
>
> *(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;*
>
> *(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.*

5.24 As recognised by Justice Perram at paragraph 101 of the *Steelforce Appeal*, in *EC — Bed Linen* the WTO Appellate Body rejected the argument that sales which are not in the ordinary course of trade should be excluded from those sales considered under article 2.2.2(ii).[8,9] The Appellate Body stated at paragraph 80 of its report:

> *Here, we note especially that Article 2.2.2(ii) refers to "the weighted average of the actual amounts incurred and realized by other exporters or producers" (emphasis added). In referring to "the actual amounts incurred and realized", this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase "actual amounts incurred and realized" includes the SG&A actually incurred, and the profits or losses actually realized by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding some amounts that were actually incurred or realized from the "actual amounts incurred and realized". It follows that, in the calculation of the "weighted average", all of the "actual amounts incurred and realized" by other exporters or producers must be included, regardless of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the "weighted average" under Article 2.2.2(ii).*

5.25 It is the reference to "actual amounts realised" in regulation 45(3)(a) and (b), and the reference to "actual amounts incurred and realized" in article 2.2.2(i) and (ii), which have been seen to proscribe the exclusion of certain data for the purposes of those provisions. Given that regulation 45(2) uses the broader language of "data relating to … like goods", Kam Kiu submits that certain data *can* be excluded—for example, where the inclusion of those data would prevent a fair comparison from being made—when determining an amount for profit in accordance with regulation 45(2).

5.26 Therefore, Kam Kiu contends that the reasoning in *Steelforce* does not restrict the Commission from excluding Kam Kiu's High-end Models when calculating the profit component of a constructed normal value—as it felt it appropriate to do in Review 392. Kam Kiu respectfully submits that the Commission should not accept the Verification Team's proposition that to do so is inconsistent with regulation 45.

6 Adjustments to allow for profits from High-end Models are permitted

6.1 Alternatively, if the Commission remains minded to include Kam Kiu's High-end Models among the "like goods" used to calculate the profit component for the constructed normal value, then it is required to make an adjustment to be made when determining the normal value for Kam Kiu's Goods in respect of the profit

[8] Appellate Body Report, European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, WTO Doc WT/DS141/AB/R (1 March 2001) (***EC — Bed Linen***).
[9] Article 2.2.2(ii) is the equivalent to regulation 45(3)(b).

component, to facilitate a fair comparison between the normal value and the export price.

6.2 There is nothing in the Act or Regulations proscribing the Commission from making an adjustment to the profit determined under regulation 45(2) to reflect the higher profit margins in relation to the High-end Models, and ultimately to allow a fair comparison between the export price and the normal value. Kam Kiu submits that it is appropriate for such an adjustment to be made and that the Commission *should* make that adjustment, if the High-end Models are included in the profit calculation.

6.3 Alternatively, if the Commission is of the view that it is unable to make an adjustment to the profit component of a constructed normal value, the Commission could, nevertheless, make a commensurate adjustment to the cost component.

6.4 Relevantly, section 269TAC(9) provides (our emphasis added):

> *Where the normal value of goods exported to Australia is to be ascertained in accordance with paragraph (2)(c) or (4)(e), the Minister must make such adjustments, in determining the costs to be determined under that paragraph, as are necessary to ensure that the normal value so ascertained is properly comparable with the export price of those goods.*

6.5 Again, Kam Kiu submits that there is nothing in section 269TAC(9) or elsewhere which would prevent such an adjustment from being made and, indeed, that in the absence of an adjustment to the profit component, such an adjustment would be appropriate.

7 Article 2.4 of the AD Agreement requires these adjustments

7.1 Each of the approaches outlined above would allow the Commission to meet its obligations under article 2.4 of the AD Agreement. Conversely, if the Commission formed the view that no allowance or adjustment was permitted to deal with the issue raised, then that would be to accept that the Act and the Regulations do not allow the Commission and the Minister to comply with the requirements of article 2.4.

7.2 Article 2.4 provides:

> *A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.*

7.3 The use of a constructed normal value does not preclude the need for due allowances or adjustments between the export price and the normal value. In *EC*

— *Fasteners (Article 21.5 – China)*, the Appellate Body said "[t]he fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value".[10] In *Egypt — Steel Rebar*,[11] the Panel said:

> *[We] do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, "built up" by adding costs of production, administrative, selling and other costs, and a profit.*

7.4 No distinction is drawn in article 2.4 between costs and profit. Rather, the AD Agreement simply dictates that an adjustment (or "allowance") should be made for differences which affect price comparability between the export price and normal value. Kam Kiu submits that the differences catalogued between the High-end Models that it sells domestically and the Normal Models which it exports to Australia, and the consequential differences in profit, are clearly matters in respect of which an adjustment is required to ensure price comparability.

7.5 Part XVB of the Act, and Part 8 of the Regulation, are to be interpreted in such a way that, subject to any express provisions to the contrary,[12] they are consistent with international law,[13] and give effect to Australia's obligations under international law.[14] Given the purpose of article 2.4, and in the absence of any provision within the Act or Regulations to the contrary, regulation 45(2) and section 269TAC(9) would be given a sufficiently broad interpretation to allow either:

(a) an adjustment to be made to the profit component of the normal value; or

(b) an adjustment to be made to the costs component of the normal value, commensurate to, and in lieu of, the adjustment that *would* be made to the profit component, but for any perceived limitation owing to the language of the section.

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10 Paragraph 5.205 , Appellate Body report, *European Communities —Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China — Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016.

11 *Egypt – Definitive Anti-Dumping Measures on Steel Rebar form Turkey*, WT/DS211/R at 7.388.

12 See, eg, *Brown v Classification Review Board* (1998) 82 FCR 225, 236 (French J); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ).

13 See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 77 (Dixon J) and 80–1 (Williams J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 526 [8] (French CJ). See, eg, also *Kruger v Commonwealth* (1997) 190 CLR 1, 70–1 (Dawson J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 [97] (Gummow and Hayne JJ); *AMS v AIF* (1999) 199 CLR 160, 180 [50] (Gleeson CJ, McHugh and Gummow JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 33 [100] (McHugh and Gummow JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 49 [145] (Kirby J).

14 See, eg, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 77 (Dixon J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249, 269 [114] (Black CJ, Sundberg and Weinberg JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92 [155] (Black CJ, Sundberg and Weinberg JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664, 674 [27] (Kirby J).

8 Conclusion

8.1 In summary, Kam Kiu respectfully submits that:

(a) Kam Kiu's High-end Models are not "like goods" and, as such, it is not appropriate for the Commission to include Kam Kiu's High-end Models when determining a constructed normal value;

(b) to the extent Kam Kiu's High-end Models *are* considered "like goods", the Commission should exclude the High-end Models when determining the profit margin to be applied in the constructed normal value;

(c) if the Commission considers that it cannot exclude the High-end Models in this manner, then the Commission should make an adjustment to either the profit component or cost component when determining the constructed normal value; and

(d) only by accepting one of the submissions in (a)–(c) above will the Commission be able to conduct a fair comparison between the export price and normal value of Kam Kiu's Goods for the purpose of assessing a dumping duty under section 269TACB.

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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Schedule 1 – Submissions on Like Goods

1 Schedule 1 - Submissions on Like Goods

1.1 The term “like goods” is defined in section 269T as follows:

> *…in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.*

1.2 This definition invites two alternative assessments. In respect of the second assessment, Justice Lockhart stated in *GM Holden Ltd v Commissioner of the Anti-Dumping Commission*,[15] that the use of the word “characteristics”:

> *…implies a comparison of the physical characteristics of the goods themselves, including but not limited to their appearance. Characteristics would include, for example, the composition of the goods, the materials used to manufacture them, their outward appearance and the uses for which they were suitable in a commercial and practical sense.*

1.3 The definition in section 269T mirrors that in article 2.6, which stipulates:

> *Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.*

1.4 In its report in *Korea – Certain paper from Indonesia*,[16] the Panel said of this article:

> *We note that Article 2.6 takes "the product under consideration" as the starting point of the definition of "like product". It then stipulates that the like product is the product that is identical to the product under consideration, or one that has physical characteristics that closely resemble those of the product under consideration.*

1.5 Therefore, it is clear that, for a product to be appropriately deemed a “like product” with respect to the goods under consideration, it must be either: (a) “identical” or “alike” in all respects; or (b) have characteristics closely resembling those of the goods under consideration.

1.6 Kam Kiu considers that information provided by KAE during Review 392 should be, at least, sufficient to establish that its High-end Models *are not* identical or

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[15] *GM Holden Ltd v Commissioner of Anti-Dumping Commission* (2014) 225 FCR 222.

[16] Panel Report, *Korea—Anti-dumping duties on imports of certain paper from Indonesia*, WTO Doc WT/DS312/R (28 October 2005) [7.219].

alike in all respects to the goods under consideration. In Review 392 the Commission found that the High-end Models are not exported to Australia. It also found[17] that the High-end Models differ from the Goods exported to Australia including by way of:

(a) alloy composition,

(b) appearance as described by size or shape,

(c) additional production and quality control processes applied during their manufacture, and

(d) specificity of commercial application.

1.7 It found that it would not be appropriate for these High-end Models to be included in determining a normal value pursuant to section 269TAC(1). Those conclusions seem to be accepted by the Verification Team in the current review.[18]

1.8 Kam Kiu considers that its main point of difference with the Commission on the issue of "like goods" will be whether the High-end Models have characteristics closely resembling those of the goods under consideration. In this regard, and recalling the types of characteristics referred to by Justice Lockhart in *GM Holden* (supra), Kam Kiu notes that the High-end Models are:

(a) materially different in that they are often made with different grade alloys compared to the alloys used to manufacture Normal Models;

(b) different in outward appearance by way of the smaller lengths to which they are cut, when compared to the multiple metre long lengths that Normal Model aluminium extrusions are cut to;

(c) also different in outward appearance by way of the different, and sometimes detailed, finishes applied to them;

(d) also different in outward appearance by way of other additional production processes that are applied to them, such as drilling, CNC milling, and bending;

(e) characteristically different to the Normal Models due to the tighter tolerances to which they are built and the additional quality control inspections that they are subjected to—that is, the High-end Models that make it to sale are more consistent and accurate to specification than Normal Models; and

(f) made especially for and used in specific commercial applications—namely, in the production of mobile phones, in the production of sunroofs for motor vehicles, and in the production of medical equipment—whereas Normal Models are used in a broad range of applications, including window frames, door frames, et cetera.

[17] Sections 2.3 to 2.5 of the verification report for KAE in Review 392, published on 31 July 2017 – EPR document 050 in Review 392; Statement of Essential Facts 392, section 4.9.3.
[18] Verification Report, sections 2.3 and 2.4, 5–6.

1.9 In Kam Kiu's submission, the product code system used by Kam Kiu is, by itself, an inappropriate means to determine whether two models within the scope of that product code should also be considered "like goods". This is due to the significant differences that exist in the characteristics between certain of these products. Kam Kiu submits that these differences are such that, while the High-end Models are potentially within the scope of the "same general category of goods", they are outside the scope of "like goods".

1.10 In terms of differences in the physical characteristics of the High-end Models used in the manufacture of mobile phones, Kam Kiu notes the following points—by way of example, during the production of these High-end Models:

(a) the yield from the ingot when it is processed into billets is only 83%, compared with 85.6% for Normal Models;

(b) the aluminium, whilst it is in its liquid form, goes through two filters and a degasser, compared to only one filter and no degassing for Normal Models;

(c) the extrusions are cut to lengths of 6.25 mm and 134.27 mm, compared to the Normal Models, which are cut to extrusion lengths of, for example, 5800 mm; and

(d) various processes are applied to the cut lengths during production which are not applied to Normal Models, including CNC milling, scalping and bending.

1.11 Further, as mentioned above, High-end Models are produced with tighter manufacturing tolerances and often use higher grades of alloy. High-end Models also have additional production processes applied to them, such as, precision bending, cutting, punching or drilling. Some High-end Models require additional preparations prior to being coated with their finish and certain High-end Models have special, detailed finishes applied to them.

1.12 Examples of the differences in the yields at each stage of production between High-end Models for electronic products and Normal Models are set out in further detail in **Confidential Annexure A** to this letter. The higher yield rates for Normal Models lead to lower manufacturing costs for these models; whereas the lower yield rates for High-end Models lead to higher manufacturing costs. However, High-end Models can be sold with a higher profit margin, because of the higher quality control requirements, and further value is added to the models with each additional production process that is applied.

1.13 **Confidential Annexure B** to this letter contains a series of photographs from within KAE's manufacturing facilities which help to demonstrate the differences in the production processes between typical Normal Models and then High-end Models for certain electronics products, including in 6 mm length, and sun roof products for the automotive industry.

1.14 These photographs emphasise the differences in the physical characteristics of the High-end Models as against the Normal Models, in terms of their dimensions, the processes used to manufacture the extrusions, and the differences in their

outward appearances owing to the additional production processes that are applied to the High-end Models, such as drilling, CNC milling, bending, and laser marking.

1.15 These photographs also show the higher levels of scrutiny with which the High-end Models are inspected, which lead to a greater proportion of goods being rejected and, therefore, lower yields. Finally, the photographs show the different methods of packing a typical Normal Model and certain High-end Models, which ensure that the goods are delivered to the customer in a suitable form.

1.16 Kam Kiu submits that these photographs support a conclusion that the High-end Models are different in nature to the Normal Models and have more in common with intermediate, semi-finished goods than with the Normal Models. The additional processes that have been applied to the High-end Models mean that they no longer possess the physical characteristics of an "aluminium extrusion". In the case of KAE's sun roof products, these are ready to be incorporated directly into the production of a final good, without requiring the customer to undertake further processing of the product.

Confidential Annexure A

Example differences in yields between High-end Models for electronic products and Normal Models

[omitted]

Confidential Annexure B

Comparison of production processes

[omitted]