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4 July 2014

The Hon Michael Moore
Senior Panel Member
Anti-Dumping Review Panel
c/- Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra
Australian Capital Territory 2601

By email

Dear Mr Moore

Win&P., Ltd
Review of Ministerial decisions concerning wind towers

This submission is made on behalf of Win&P., Ltd ("Win&P") under Section 269ZZJ of the *Customs Act 1901* ("the Act").

Win&P thanks the Anti-Dumping Review Panel ("the Review Panel") for its efforts in seeking information and clarification from the Anti-Dumping Commission ("the ADC") in relation to the review.

In the Review Panel's letter to the ADC dated 4 June 2014, the Review Panel invited the ADC's comments in relation to the following:

> *1. Identify any information provided with, or referred in, the application, that, in the view of the Commission, is not relevant information as defined in s.269ZZK(6) Customs Act 1901;*
>
> *2. Identify any factual claims in the application that the Commission disputes, and refer to relevant information in that regard;*
>
> *3. Provide some commentary on the grounds of the application, referring to relevant information; and*
>
> *4. If it seems appropriate, any additional background information in relation to the matter, including referring to any relevant policy position or guidelines which impacted on the decision under review.*

The ADC was invited by the Review Panel to provide its comments by 18 June 2014.

The non-confidential version of the ADC's response to the invitation to comment ("the ADC's comments") was emailed to us earlier today, as well as being placed on the Review Panel's public record. Today is the last day for interested parties to provide submissions in this review.

Win&P has been afforded limited time to review the ADC's comments and to provide its views in relation to those comments within the legislative timeline under *Customs Act 1901* ("the Act").

Nonetheless, Win&P highly appreciates the opportunity to provide such comments, and again thanks the Review Panel for its consideration.

Win&P would now like to offer its response to the ADC's comments.

A "Claim 1: Embeds as the goods under consideration, or as part thereof"

Win&P notes the ADC's advice that the "*information that is not relevant information as defined"* is *"Nil".*

Win&P notes that the ADC does not dispute any of the factual claims made by Win&P or by Senvion in their applications.

Win&P has no further comment to add to the submissions that it has provided in relation to this issue both during the investigation and in its Application to the Review Panel.

B "Claim 2: Conversion of currency

Win&P notes the ADC's advice that the "*information that is not relevant information as defined"* is *"Nil".*

Win&P notes that the ADC does not dispute any of the factual claims made by Win&P or by Senvion in their applications.

The ADC's comments in relation to this claim largely repeat its findings in Report 221.

The ADC commentary appears to recognise that the issue involves a determination under Section 269TAF(1) of the Act, namely the use of:

> *…the rate of exchange on the date of the transaction or agreement that, in the opinion of the Minister, best establishes the material terms of the sale of the exported goods.*

Paragraph 2.11 of the ADC's comments states:

> *2.11 The Commission has used the date of invoice, the preferred position as stated in the Manual, as the date that best reflects the material terms of sale. The Commission considers that the date that best establishes the material terms of sale is the date of sales revenue recognition in Win&P accounts. This is the date that Win&P recognised the amount as a sale as stated in the audited accounts and reflects the date of invoice.*

This appears to be different to the finding as stated in the ADC's report and recommendation to the Parliamentary Secretary, which was stated as follows:

> *The Commission considers that the date that best establishes the material terms of sale is the date of sales revenue recognition in Win&P accounts. This is the date that WIN&P recognised the amount as a sale as stated in the audited accounts.*[1]

[1] REP221, page 36

It is noticeable that the ADC now seems to have attempted to change its finding in relation to the applicable date of sale to the invoice date in relation to the sale, rather than the date of sales revenue recognition in Win&P accounts, as per its actual finding in Report 221, or the date of contract as submitted by Win&P. The review as has been initiated by the Review Panel is a review of the Minister's (Parliamentary Secretary's) decision. The Parliamentary Secretary's decision was said to have been based – and must have been based - on the findings and recommendations in Report 221. We submit that the commentary that the ADC has offered to the Review Panel does not reflect its position in Report 221, and should be disregarded.

Win&P refers the Review Panel to the submissions that it has provided in relation to this issue both during the investigation and in its Application to the Review Panel.

Moreover, despite the ADC's attempt to now rely on its "default" position as stated in its policy manual (ie to use the invoice date as the date of sale) we note that the findings in relation to "date of sale" in Report 221 in a range of contexts are inconsistent with that position. We draw the Review Panel's attention to these findings:

1 At page 20 of Report 221:

> *The Commission considers that the* ***date that contracts were awarded*** *should be regarded as the effective date of sale as it reflects the date that the buyer and seller agree to the terms of sale.* [emphasis added]

2 At page 22 of Report 221:

> *In Consideration Report 221 the Commission noted that the applicants have used the* ***date the contract*** *was awarded for the supply of the wind towers as the effective date of sale in their estimate of the market.* [emphasis added]

3 At page 39 of Report 221:

> *Credit term adjustment*
>
> *Win&P submitted that domestic credit expenses should be calculated using all sales in the investigation period* ***using the contract date as the date of sale.***
>
> ***The Commission has reviewed the information submitted by Win&P and agrees*** *that the credit calculation should be calculated using all sales relating to the contracts in the investigation period. The credit adjustment has been recalculated.* [emphasis added]

4 At page 43 of Report 221:

> *The Commission has treated the* ***date of awarding the contract for a tender as the effective date of sale*** *in its analysis, as effectively from this date the sales in terms of future revenue and volumes has been awarded to the successful party.*

Yet, despite all of these findings, and despite the clear evidence of the award of a detailed contract pursuant to tender with all of the material terms set out in the purchase order, the ADC made the contrary finding, for exchange rate purposes, that the date that best established the material terms of sale was the date of sales revenue recognition in Win&P accounts.

We submit that the ADC's finding in relation to the currency conversion date for Win&P's exports of wind towers is not only incorrect in light of the information provided to the ADC in this investigation, but is also inconsistent with every other finding it made in relation to the relevant dates of sales in the investigation.

C "Claim 3: SG&A used under section 269TAC(2)(c) of the Act"

In relation to Finding 3, the ADC has advised:

> *The Commission agrees with Win&P that an incorrect methodology was used for the amount of selling, general and administration (SG&A) under section 269TAC(2)(c) of the Act by working out an* ***export*** *SG&A and adding it to the cost of production of the exported goods.*
>
> *…*
>
> *The Commission agrees with Win&P that, in this case, both methods arrive at the same results. The Commission, therefore, considers that the basis on which the reviewable decision was made is unaffected by this error and no further action is required.*

Win&P has no further comments to add in relation to this issue, apart from noting that that in order to achieve the correct and preferable result in the review, the domestic SG&A and export SG&A still need to be correctly determined in terms of their quantum and treatment.

Win&P maintains that the domestic SG&A and export (Australian) SG&A as determined by the ADC in its recommendation to the Parliamentary Secretary are incorrect.

D "Claim 4: Determination of the percentage amount of the selling, general, administration and other expenses (SG&A)"

Win&P notes the ADC's advice that the "*information that is not relevant information as defined"* is *"Nil".*

Win&P notes that the ADC has provided "*Confidential Attachments 7*" and "*Confidential Attachment 8*" to the Review Panel as "*the Commission's assessment of SG&A, research and development (R&D) expenses and foreign exchange gains and loses*". These Attachments were not provided to Win&P. Therefore, Win&P is not in a position to comment upon them or to confirm whether these are the same attachments or assessments provided to Win&P by the ADC during the investigation.

Win&P now provides its comments in relation to each of the three issues mentioned in the ADC's comments.

1 "Issue 1: SG&A (selling and general expenses) calculation"

The ADC states that it disputes the following *"claims"*:

> *4.4 Win&P claims that the Commission incorrectly allocated certain company common expenses to the sale of the wind towers in its SG&A. Win&P also claims that the Commission allocated expenses which are unrelated to the goods under consideration in its SG&A.*
>
> *4.5 The Commission disputes these claims*

Win&P considers that the matter referred to in the first part of paragraph 4.4 of the ADC's comments is not a factual claim. It is a claim in relation to the methodology of the ADC's determination and its correctness. The second part of paragraph 4.4 can be said to be a factual claim.

In support of the ADC's disputation of the claims, the ADC further states:

> *4.7 Win&P allocated common company expenses based on the company business plan.*

This statement once again highlights the ADC's continued ignorance or misconstruction of Win&P's submissions to the ADC during the investigation. Initially, Win&P did provide an SG&A calculation to the ADC on the basis of its company business plan, and allocated "common company expenses" according to that plan. However, Win&P subsequently accepted the ADC's approach towards the allocation of SG&A based on actual revenue, and did not further submit that its company common expenses be allocated in accordance with its business plan. This is as we have stated in the Application to the Review Panel.

Further, the ADC states:

> 4.10 *During the verification visit, Win&P asserted that if the Commission were to allocate costs as a percentage of sales revenue, the Commission would, in effect, include common expenses of another department in the company common expenses.*

We do not know why it is that the ADC continues to refer to the superseded methodology that Win&P first advanced, given that Win&P fully agreed with the sales revenue based allocation method, nor as to why it misconstrues the effect that such an allocation would have. The point is that Win&P did not and does not object to an allocation on the basis of revenue. What it is that Win&P objected to and continues to object to is the ADC's determination that SG&A expenses beyond company common expenses should be allocated to wind towers. The ADC allocated expenses recorded in **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** accounts in respect of its **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** to the SG&A of the goods under consideration. The expenses recorded in the accounts for **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** are not associated to the production and sale of wind towers. They are not any part of the SG&A expenses for wind towers.

Win&P does not accept that these facts can be disputed, and does not accept that it was open to the Review Panel to reject the facts and make up its own mind as to the costs incurred in relation to Win&P's wind towers. **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** financial records as provided to the ADC were as recorded by the companies and are as presented for audit purposes. They were not prepared for the purposes of the investigation.

The ADC also states in Report 221:

> *The Commission calculated SG&A costs based on its understanding of SG&A expenses and the allocation as presented at the visit. The calculation showed that wind towers were allocated what the Commission considers a reasonable share of SG&A costs based on the information available.*
>
> *The Commission notes that the SG&A allocation method preferred by Win&P results in SG&A expenses allocated to the non-wind tower businesses at over double the allocation to that for wind towers.*

> *Win&P did not provide evidence to justify why the allocation was weighted more heavily to one sector of the company than the other. As a result, the Commission considers that the allocation of SG&A expenses as presented by Win&P is not reasonable.*

Win&P advised the ADC time and time again about how the SG&A expenses were recorded in the financial accounts, and to what they pertained. The ADC's statement that it considers its calculation to be "reasonable" is not supported by any reasoning that is apparent on the face of the Report nor is any supporting reasoning alluded to in the Report. Win&P was never requested to provide evidence to justify why the allocation was *"weighted more heavily"* one way or the other, and in any case we reiterate that this is not a question of *allocation* but is a question of the SG&A that *is to be allocated* because it is or is not associated with the goods. In relation to the question of any relativity of SG&A for wind towers **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]**, it was clearly apparent to the ADC – and is reflected in the visit report – that Win&P **[CONFIDENTIAL TEXT DELETED – production arrangements]**. In such cases SG&A for management is reflected in the cost of the **[CONFIDENTIAL TEXT DELETED – production arrangements]**, and the company's costs of management are minimised. And, as we have pointed out, **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** different, complex, products.

Whatever "allocation" method is to be adopted, it does not and cannot change the nature and amount of the company common expenses that were available to be allocated to the wind towers. **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** SG&A expenses are not part of those expenses.

During the investigation, Win&P advised the ADC, unequivocally:

- that the ADC correctly calculated the "direct" SG&A, by using the value recorded in Win&P's SG&A account, and the SG&A account **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]**;

- that the correct "indirect" expenses were **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** company common expenses, and should be included in the cost by way of allocation;[2]

- that **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** company common expenses were recorded separately in its SG&A account, with the amount of company common expenses in 2012 being KRW**[CONFIDENTIAL TEXT DELETED – number]** and in 2013 being KRW**[CONFIDENTIAL TEXT DELETED – number]**. This information finds its source in **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]**and was verified by the ADC; and

- that the ADC's approach of determination (not allocation) of SG&A was incorrect because the ADC allocated the expenses incurred and recorded in relation to **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** expenses were not associated to sales of wind towers, either directly or indirectly.

In light of the confusion and misunderstanding on the ADC's part during the investigation, Win&P provided further explanations and demonstrations of the correct company common expenses. Company executives travelled to Australia to meet with the relevant officials, and they and ourselves carefully explained all of this to the officials.

We note the following statements in the ADC's comments:

---

[2] Win&P submission dated 24 January 2014, at page 4

> *4.12 On page 37 of REP 221, the Commission described its attempts to obtain from Win&P source documents, including verifiable Excel worksheets, that were used in Win&P's calculation of its SG&A. Win&P provided some worksheets to the Commission, however, these could not be verified by the Commission as some data was missing or was not translated into English. Further details relating to the Commission's difficulties in obtaining complete, verifiable data relating to Win&P's SG&A are set out in* ***Confidential Attachment 7****.* [our underlining]

Win&P disputes the underlined factual claim made by the ADC. The facts are as follows:

- Win&P presented the ADC with **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** detailed SG&A account, which indicated that the company common expenses as advised by Win&P were separately recorded, under the account ledger heading "company common";

- the value under the "company common" ledger matched with the company common expenses amount as submitted by Win&P to be the correct amount for allocation;

- the ADC has not at any time indicated to Win&P that it considers that "*some data was missing or was not translated into English*".

Win&P has not been provided with the "Confidential Attachment 7" and cannot verify or comment on the so-called *"further details relating to the Commission's difficulties in obtaining complete, verifiable data relating to Win&P's SG&A"*. However, we submit:

- the ADC did not at any time indicate such "difficulties" to us;

- the information that was provided by Win&P was in the nature of source documents, from audited financial statements;

- Win&P's information was successfully verified, over a full five days at its company premises, and we find it to be unacceptable that the ADC should now think up *"further details"* about *"claimed difficulties"* in an apparent attempt to defend a position that we, with respect, find to be indefensible; and

- Win&P respectfully submits that if it is true that the ADC faced *"difficulties"* these were as a result of the ADC's own misunderstanding, or confusion, or inexplicable denial, of the information provided by Win&P, and that these failings cannot justify an incorrect and not-to-be-preferred decision.

The matter subject to this review in this regard is the ADC's allocation of SG&A expenses that were unrelated to the goods under consideration. The information which indicates the expenses which were to be allocated, on the basis that they were associated with the goods under consideration – namely, the company common expenses - is readily available to the Review Panel as it was to the ADC. The information which indicates that the ADC allocated expenses which are unrelated to the goods under consideration - which were other expenses, incurred by and recorded against **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** - is also readily available to the Review Panel, as it was to the ADC.

Win&P respectfully submits that the Review Panel should direct and recommend that those expenses unrelated to the goods under consideration are not to be allocated to the SG&A for the goods under consideration. This results in the allocation of only the **[CONFIDENTIAL TEXT DELETED – intercompany arrangements]** company common expenses, being KRW**[CONFIDENTIAL TEXT**

DELETED – number] in 2012 and KRW[CONFIDENTIAL TEXT DELETED – number] in 2013, by actual revenue.

Although that should dispose of the matter in Win&P's favour, Win&P does wish to respond to the following statements in the ADC's comments:

At paragraph 4.13 the ADC states:

> *4.13 Win&P was unable to demonstrate to the Commission that a different allocation methodology should be applied:*
>
> - *The Commission found that Win&P's SG&A calculations were not linked to supporting worksheets and therefore, the Commission could not verify the supporting data;*
> - *During the verification visit in December 2013, Win&P provided worksheets that were untranslated;*
> - *During a meeting on 26 February 2014, the Commission explained to Win&P that it had not provided linked worksheets with its spreadsheets. The Commission also pointed out that its spreadsheets were still untranslated; and*
> - *At the conclusion of the investigation, spreadsheets with the requested links to the other worksheets had still not been provided to the Commission*. [our underlining]

With due respect, we advise that the underlined text does not reflect the facts. These are claims based on the confusion, misunderstanding, or imagination, of the ADC.

The spreadsheet provided to the ADC during the meeting on 26 February 2014 had all the relevant information – namely the account ledger headings – translated. Win&P then offered to provide the ADC with a copy of the accounts with those translations. The ADC accepted the offer and asked Win&P to provide a copy of the accounts with ledger headings translated. The ADC did not *"point out that its spreadsheets were still untranslated*". We dutifully complied with that request.

At no time before the publication of Report 221 did the ADC ask Win&P to provide "*spreadsheets with requested links to the other worksheets*". This is not information that was known to Win&P before now.

We recall our submission that, after receiving the [CONFIDENTIAL TEXT DELETED – intercompany arrangements] accounts with account headings translated - as had been offered by Win&P - the response from the ADC was *"thank you"*. No other comments, requests, or complaints were made by the ADC.

In fact, when Win&P initiated contact with the ADC after having provided the translated documents, in order to see if any further assistance was required and to ask for the revised margin calculation spreadsheets, the ADC case manager made no indication of any difficulties that needed to be addressed by Win&P.

In relation to the claim about an inability to verify supporting data, Win&P was not made aware of any such inability and is still not aware of such inability.

Win&P submits that the [CONFIDENTIAL TEXT DELETED – intercompany arrangements]accounts clearly provide the company common expenses that are to be allocated in the calculation of SG&A

for the goods under consideration. Win&P does not consider that any other "links" or "calculations" needed to be provided. The ADC did not indicate at any time during the investigation that it was not satisfied that the cost or other financial information was inaccurate, incomplete or unverifiable.

Finally, Win&P categorically wishes to reject the following statement of the ADC:

> *4.14 Given Win&P's failure to provide complete and verifiable data relating to the allocation of SG&A expenses, the Commission formed the view that SG&A expenses should be allocated based on actual revenue. As a result, the Commission calculated these expenses to reflect actual turnover for the investigation period.*

As already mentioned above, this statement highlights the ADC's failure to understand the issues and its continued ignorance or denial of the information provided by Win&P during the investigation. We advise again that the key error in the ADC's determination of this issue relates to the ADC allocation of expenses *not associated with the sales of the goods under consideration* by Win&P, and not because the allocation was *"based on actual revenue"*.

Further, we note that the ADC's statement in the cited paragraph regarding its decision to allocate costs not associated with the sales of wind towers in the calculation of SG&A appears to represent different reasoning to that provided in Report 221, which reads:

> *The Commission considers that SG&A expenses based on an allocation of actual revenue share and the Commission's understanding of such expenses as presented at the verification visit reasonably reflects the SG&A expenses for wind towers.*

Win&P submits again that so long as the SG&A as calculated by the ADC contains an allocation of expenses not associated with the sales of wind towers it cannot be said to reasonably reflect the SG&A expenses for wind towers.

Win&P respectfully requests that the Review Panel conclude that the SG&A as determined by the ADC in its recommendation to the Parliamentary Secretary was incorrect. Further the Review Panel should direct that the [CONFIDENTIAL TEXT DELETED – intercompany arrangements] part of the SG&A in respect of the goods under consideration is to be calculated by allocating the company common expenses [CONFIDENTIAL TEXT DELETED – intercompany arrangements], being KRW[CONFIDENTIAL TEXT DELETED – number] in 2012 and KRW[CONFIDENTIAL TEXT DELETED – number] in 2013, as shown in [CONFIDENTIAL TEXT DELETED – intercompany arrangements]accounts, based on actual revenue.

2 "Issue 2: research and development (R&D) expense"

Win&P has no further comments to add in relation to this issue, and respectfully refers the Review Panel to its submission in the Application and other information Win&P provided during the investigation.

Again, Win&P notes that it has not been provided with access to the "*greater detail*" of the ADC's "*assessment of Win&P's R&D expenses*", that is said to be set out in "*Confidential Attachment 7*". Therefore Win&P is unable to either confirm, reject or comment on that information.

3 "Issue 3: Foreign exchange gains and losses"

Win&P respectfully refers the Review Panel to its submission in the Application and other information Win&P provided during the investigation.

Further, Win&P wishes to provide its view in relation to the following statement in the ADC's comments:

> *4.21 Win&P reasons that three 2012 foreign exchange gains and losses had no relevance to the SG&A for wind towers exported to Australia.*
>
> *4.22 The Commission disputes this claim.*
>
> *4.23 On page 39 of REP 221, the Commission stated:*
>
> > *"It is clear that not all imported raw material for 2012 have been provided that would be clearly relevant to domestic and exported goods. Additionally, Win&P provided no explanation for how relevant expenses have been allocated".* [our underlining]

In relation to the underlined text, Win&P submits again that *it is clear* that all imported raw material for 2012 that would be relevant to the wind towers exported to Australia – being the information relevant to the Commission's determination of the foreign exchange gains and losses proportion of the Australian SG&A – was provided to the ADC. The ADC does not dispute this. The information can be found in:

- 20140124 Mt Mercer project – raw material purchase list; and
- 20140124 [CONFIDENTIAL TEXT DELETED – intercompany arrangements]foreign exchange gains and losses for tower – December 2012.

Both documents were provided to the ADC as attachments to Win&P's submission dated 24 January 2014.

Further, as advised in the Application:

> *For the purpose of identifying what was relevant to the exported wind towers, Win&P provided information showing that all raw material purchases in 2012 occurred in December 2012. Therefore the* [CONFIDENTIAL TEXT DELETED – intercompany arrangements] *December 2012 foreign exchange gain and losses provides the only relevant information for the calculation of any amount of foreign exchange-related SG&A to be allocated to the Australian sales. In relation to the rest of 2012, it is enough to say that they are not relevant to the Australian sales. Win&P does not object to the method of allocating such costs to the domestic SG&A according to actual revenue.*

E "Claim 5: Profit used in the construction of normal value"

Win&P notes the ADC's advice that the "*information that is not relevant information as defined"* is *"Nil".*

The ADC states in its comments that it disputes the following claims:

> *5.2 Win&P claims that if the Commission's SG&A calculations were corrected, the Commission would not need to determine a rate of profit in the constructed normal value as there would be sufficient domestic sales for the calculation of normal value.*
>
> *5.3 However, if the Commission was required to determine a rate of profit, Win&P asserts that the amount of profit used, based on the Korean Statistical Information Service from 2010,*

> *was not reasonable as the profitability data was three years old and included manufacturers of doors, boilers, reservoirs, nuclear reactors and steam generators.*
>
> *5.4 Finally, Win&P claims that it was not clear whether the requirements of Regulation 181A(4) of Customs Regulations 1926 had been considered.*

It is not clear to us which aspect of the *"Win&P claims"* as summarised in 5.2 is being disputed by the ADC.

In relation to 5.3 and 5.4, it appears that the ADC's dispute is based on its interpretation of Regulation 181A of the *Customs Regulations 1926* ("the Regulations").

The ADC does not dispute that it determined an amount of profit at the rate of 3.5%, using 2010 profitability statistics for the metal fabrication industry. The ADC claims that such determination was made in accordance with Regulation 181A(3)(c). The ADC quoted its own statement at paragraph 5.6 that:

> *The Commission calculated a profit under regulation 181A(3)(c) which allows for a profit using any other reasonable method. The Commission considers that the profit calculated using data from the Korean Statistical Information Service is reasonable as it applies to the manufacture of fabricated and processed metal products. The information is the most relevant and recent information available to the Commission*

Further, at 5.7, the ADC quotes other statements from Report 221:

> *The Commission downloaded from the site a table of Korean Statistical Information Service Indicators of profit and productivity and stability for 2010. Within the table was data relating to the manufacture of Fabricated and Processed Metal Products (excludes machinery and furniture).*
>
> *…*
>
> *The data used is the most up to date information that the Commission found on that was relevant to the industry segment that the Commission considers would apply for manufacturers of wind towers. The Commission considers that the profit calculated is reasonable as it applies to the manufacture of fabricated and processed metal products. The Commission considers this category would apply to the manufacturer of wind towers*

The ADC's comments to the Review Panel continue:

> *5.8 Furthermore, Regulation 181A(4)(c) requires that where a method is used under regulation 181A(3)(c) such an amount worked out should not exceed the amount of profit normally realised by other exporters or producers on sales of the same general category of goods in the domestic market, and on this basis, the Commission calculated a weighted average profit from the data.*

Win&P submits that the statement from the ADC is confusing. The weighted average profit from the data as calculated by the ADC is not and cannot be said to be based on Regulation 181A(4), nor Regulation 181A(4)(c) (there is no regulation 181A(4)(c)). The original statement in Report 221 was as follows:

> *The Commission has calculated a weighted average profit from the data. Regulation 181A(4)(c) notes that where a method is used under regulation 181A(3)(c) such an amount*

> *worked out should not exceed the amount of profit realised by other exporters and producers on sales of the same general category of goods.*
>
> *The Commission does not have information to identify such amounts and considers that calculating a weighted average profit from the data is reasonable.*

Win&P considers that none of the statements provided by the ADC in Report 221 or in 5.6 reflect any consideration of the requirement under Regulation 181A(4). Regulation 181A(4) provides that any method used under Regulation 181A(3)(c) must not exceed:

> *the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export*

Win&P maintains that it is not clear whether the requirements of Regulation 181A(4) of the Regulations were considered, and that even if they were indeed considered they were clearly not met.

Win&P notes that the ADC now *"restates its view that the profitability data relating to the manufacture of Fabricated and Processed Metal Products was the closest category to manufacturers of wind towers."* Win&P submits that such a view was not known to any party before now, nor was it stated in the ADC's recommendation to the Parliamentary Secretary in Report 221. The view stated in Report 221 is simply that the 3.5% profit from the 2010 Korean Statistical Information Service relating to the manufacture of fabricated and processed metal products was *"reasonable"*:

> *The Commission considers that the profit calculated is reasonable as it applies to the manufacture of fabricated and processed metal products. The Commission considers this category would apply to the manufacturer of wind towers.*

We recall our submission that:

> *Given that the KOSIS metal fabrication industry data is three years old, and that the classification includes manufacturers of doors, central heating boilers, reservoirs, nuclear reactors and steam generators, we submit that the method is not reasonable.*[38]
>
> ———
>
> [38] *Please be reminded that this is not an exercise in seeking out what is euphemistically referred to as "relevant information" in other parts of the legislation. In our experience the "relevant information" permission is adversely and unreasonably applied. Also, we see no indication that the applicants have made any submissions on this matter at all.*

The Report clearly states the ADC's finding that "*The Commission does not have information to identify such amounts*". No further reference is made to the requirement under Regulation 181A(4). With respect, it seems to us that the ADC's comments now attempt to re-make its finding, by labelling the "*manufacture of Fabricated and Processed Metal Products"* as *"the closest category to manufacturers of wind towers"* which is itself unsubstantiated and is not information that formed part of its finding in Report 221. It could not have formed the basis of the Parliamentary Secretary's decision to impose dumping duties against Win&P, which is the subject of this review.

The ADC further attempts to justify this new decision as follows:

> *5.12 The Commission considers that calculating a weighted average profit from the Korean Statistical Information Service is reasonable pursuant to Regulation 181A(3)(c). The calculation of a weighted average profit from the data in effect yields a rate of profit that the*

Commission considers would not exceed the amount of profit normally realised by other producers of the same general category of goods in the domestic market.

5.13 The Commission considers that the data used is relevant and the method of calculation complies with Regulations 181A(4)(c) [sic].

We note that these statements do not exist and are not supported in Report 221. Also, they continue to fall short of the requirement under Regulation 181A(4), which, as we have already stated, require that any method used under Regulation 181A(3)(c) must not exceed *"the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export"*.

The ADC's comments at paragraph 5.12 appear to suggests that the ADC did make a finding in relation to Regulation 181A(4), and found that the "*the amount of profit normally realised by other exporters or producers on sales of goods of the same general category in the domestic market of the country of export"* is or is more than 3.5%.

With due respect, Win&P notes that the ADC never made such finding during the investigation. Indeed, it openly acknowledged that it could not make the determination required under Regulation 181A(4) because it *"[did] not have information to identify such amounts"*. If the situation has changed since the making of Report 221, then Win&P can reasonably expect that it must be due to discovery or new information after the conclusion of the investigation. If this is the case, such information must be disregarded. If the situation has not changed, and the ADC still does not have the information required to make its determination under Regulation 181A(4), then this "new finding" would appear to be unsubstantiated.

Therefore, Win&P respectfully submits that, the Review Panel should find, based on the relevant information as defined in s.269ZZK(6), that:

- the amount of profit realised by fabricated and processed metal manufacturers, including manufacturers of doors, central heating boilers, reservoirs, nuclear reactors and steam generators, cannot be said to be, or not to exceed, the amount of profit normally realised by other exporters or producers on sales of goods of the same general category as wind towers the subject of this investigation in the domestic market of Win&P;

- therefore, the profit amount of 3.5% as said to have been worked out pursuant to Regulation 181A(3)(c) cannot be used, as it has not been found to satisfy the condition, and does not satisfy the condition, prescribed in Regulation 181A(4);

- the amount of profit should be worked out under Regulation 181A(3)(a), being the information that was verified by ADC and that is most relevant to Win&P's dumping margin.

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Yours sincerely

Daniel Moulis

Principal

Charles Zhan
Lawyer