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**Mr Dale Seymour
Commissioner
Anti-Dumping Commission
Ground Floor, Customs House Docklands
1010 La Trobe Street
Docklands
Victoria 3008**

commercial+international

By email

Dear Commissioner

Win&P., Ltd – alleged dumping of wind towers Submission in response to Statement of Essential Facts No 221

We are the lawyers for Win&P., Ltd (“Win&P”).

Win&P is an exporter of the goods under consideration in this matter, and has been fully cooperative with the Anti-Dumping Commission (“the ADC”) throughout its investigation.

The dumping margin of 20.4% announced in the Statement of Essential Facts for Win&P is incorrect.

Win&P requests that you and your officials undertake an earnest and reasonable reassessment of the margin calculation, so as to arrive at a finding that is legally compliant.

Indeed, the SEF indicates that a reassessment of the calculations is intended:

Win&P provided submissions shortly before the SEF, copies of which were placed on the public record. The Commission has not addressed those submissions in this SEF but will address them in the final report.

Matters raised in the submissions by Win&P addressed the dumping margin calculations:

- *embeds should not form part of the goods;*
- *date used for currency conversion;*
- *profitability applied in the PAD;*
- *SG&A expenses;*
- *foreign exchange gains and losses;*
- *domestic credit expenses; and*

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- *packing and handling costs.*

It is significant to Win&P that these matters were not able to be addressed for the purposes of the SEF, in that the publication of such an exaggerated margin – which is demonstrably incorrect – has been commercially damaging to Win&P.

For the record we do wish to note that submissions on “embeds”; the date of sale of the goods; and profitability were provided to the ADC during the verification visit in December 2013. As to the other issues, they emanated directly from the visit report, in respect of which Win&P was only given four working days to comment. Win&P complied with this deadline.

We appreciate that ADC officials face significant work pressures in running this and other investigations simultaneously, however this should not be at the expense of the proper recognition of Win&P’s due process rights. We believe that Win&P has a legitimate expectation to be openly consulted on matters such as margin calculations and methodological proposals before any announcements are made, and for its comments to be fairly considered. For example, the intention to add a profit percentage of 3.5% was never discussed with Win&P. It just emerged for the first time in the SEF.

Therefore, the further consideration of these matters is very important to Win&P, and on its behalf we request that proper attention be given to that further consideration. For reasons of consistency, we also request peer review of any proposed findings within the ADC.

In this submission we intend to refer to each of the issues that are identified in the SEF as being subject to further consideration, in the order in which they appear.

1 Embeds are not the goods under consideration

Win&P again submits that the identity of the goods that are the subject of the application has been misconstrued. The ADC has required Win&P to report information concerning foundations (“embeds”) for wind towers, when these are not relevant to any investigation against Win&P.¹

Interested parties have been told by the ADC – in a run of recent cases involving steel products – that the ADC cannot change the scope of the goods under consideration. The provision of the *Customs Act 1901* (“the Act”) that is said to be relevant in this regard states:²

If the Commissioner decides not to reject an application under subsection 269TB(1) or (2) in respect of goods, the Commissioner must give public notice of the decision:

- (a) *setting out particulars of goods the subject of the application;*

The goods the subject of the application in this matter are described by the applicant as follows:

The goods the subject of this application are certain utility scale wind towers, whether or not tapered, and sections thereof (whether exported assembled or unassembled), and whether or not including an embed being a tower foundation section.

Wind towers and sections thereof (whether exported assembled or unassembled) are included within the scope of the goods the subject of this application whether or not they are joined with non-subject merchandise, such as nacelles or rotor blades, and whether or not they have internal

¹ It will be recalled that Win&P did not initially provide information concerning embeds in its Exporter Questionnaire response, on the basis of Win&P’s fair reading of the description of the goods under consideration as being related to wind towers and not embeds.

² *Customs Act 1901*, Section 269TC(4)

or external components attached to the subject goods, or include an embed, being a tower foundation section.

Working out what the goods under consideration actually are is not resolved by asking the applicant. If the ADC cannot change the scope of the goods under consideration, then it must be the case that the goods that are the subject of an application are defined by the words in the application, and not by what the applicant might later clarify or suggest to the ADC was intended.

Win&P has previously made submissions on this point,³ concluding that the words in the application mean that the goods under consideration are “*certain utility scale wind towers, of certain types*” and that:

The reference to the inclusion or exclusion of embeds must be technically and practically interpreted as meaning that the inclusion or exclusion of an embed for a wind tower in a shipment or a project does not take the wind tower that the embed is intended to support outside the scope of the goods under consideration.

In relation to this issue, the SEF states:

The description of the goods states “tower sections... whether or not including an embed being a tower foundation section”. The Commission notes that wind towers for different wind farm projects may or may not require a foundation section depending on the tower specifications. For those projects where wind towers and embeds are specified, the embeds may be shipped and installed at different times to the tower sections. The Commission considers that the different shipment times do not detract from the embeds being part of the goods.

Based on this statement, it appears self-evident that wind towers and the foundations that support them are considered to be commercially separate and distinct products. Otherwise, it could not be the case that some projects could specify towers and embeds, and some not.

The interpretation we have advanced of the description of the goods is entirely and unambiguously supported by the further descriptions of the goods under consideration in the initiation notice for this investigation.⁴ There it is stated that:

Further the applicants detailed that wind towers are designed to support the nacelle (an enclosure for an engine) and rotor blades for use in wind turbines that have electrical power generation capacities equal to or in excess of 1.00 megawatt (MW) and with a minimum height of 50 metres measured from the base of the tower to the bottom of the nacelle (i.e. where the top of the tower and nacelle are joined) when fully assembled.

A wind tower section consists of, at a minimum, multiple steel plates rolled into cylindrical or conical shapes and welded together (or otherwise attached) to form a steel shell, regardless of coating, end-finish, painting, treatment or method of manufacture, and with or without flanges, doors, or internal or external components (e.g., flooring/decking, ladders, lifts, electrical junction boxes, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached to the wind tower section.

Goods specifically excluded from the scope are nacelles and rotor blades, regardless of whether they are attached to the wind tower. Also excluded are any internal or external components which

³ See *Comments on margin calculation methodology adopted by ADC at PAD stage – information note* dated 12 December 2013.

⁴ Anti-Dumping Notice No. 2013/68.

are not attached to the wind towers or sections thereof.

We make the following observations:

- (a) This elaboration of the meaning of the words “wind tower” contains no reference to foundations or embeds.
- (b) Embeds, which typically incorporate one steel plate, cannot satisfy the definition of a “wind tower section” because the description clearly states that a section consists of, at a minimum, multiple steel plates that are rolled, cylindrical and welded together. Embeds do not satisfy that description.
- (c) The specification of the goods under consideration as having a minimum height when fully assembled (and we emphasise the words “fully assembled”) excludes any consideration of embeds. The specification states that the wind towers under consideration have a minimum height of 50 metres measured from the base of the tower to the bottom of the nacelle. In this context the base of the tower is the upper face of its embed or other foundation, meaning that the embed is not included.
- (d) The above description expressly excludes any internal or external components which are not attached to the wind towers or sections thereof. This further confines the goods under consideration to the wind towers or sections thereof.

The goods that are subject to the investigation can only be those goods that are described in the application and that are announced to interested parties under Section 269TC(4). The ADC’s policy is that it is not at liberty to narrow or broaden the scope of an investigation, and that it is restricted to the claim made by the applicant. If that is correct, then we do not know how it can be said that the ADC can correctly state that “*embeds [are] part of the goods*”.

Our primary submission remains that only wind towers can be the subject of this investigation, and that embeds cannot be, because embeds are not wind towers, and the further description of the goods makes this clear. But even if the ADC does not agree with that submission, we would further submit that the words “*wind towers... whether or not including an embed*” could not be read more extensively than to include, as the goods the subject of the application:

- *wind towers including an embed; and*
- *wind towers not including an embed.*

In relation to this reading of the description, we wish to point out that Win&P did not **[CONFIDENTIAL TEXT DELETED – commercial arrangements going to the issue of the separation of wind towers and embeds]** At no point in time did Win&P export “*wind towers including an embed*” to Australian customer/s. The products sold and exported to Australia were wind towers not including an embed, and embeds.

To put it another way, there is no suggestion that embeds are under investigation. On this reading of the description, only wind towers “including” or “not including” an embed are under investigation. Win&P has exported wind towers to Australia, and has separately exported different products called “embeds” to Australia. If the applicant wished to complain about the alleged dumping of embeds, it could have made an application to that effect. However, it has not done so. We respectfully submit that the ADC cannot cure the deficiency by making up its own mind as to what it thinks it should investigate in contradiction to the plain words of the actual description of the goods under consideration.

2 Date of sale

We refer the ADC to Win&P's previous submissions on the conversion of currency at the date of sale.⁵

The date on which the material terms of the export sale of the wind towers exported to Australia were established was the date on which Win&P signed its tender contract with its Australian customer. The contract was provided to the ADC. Evidence was also provided to establish that there was no informality to the contract and that the transaction took place according to the contract. There was no continuing negotiation between Win&P and its customer after the contract date. The ADC's literature states that:

Using the contract date for export sale is most likely to have application in situations where the production process takes a long time - for example manufacturing items of heavy capital equipment, causing delivery to occur well after the sale had taken place.

The importance of the date on which the material terms of sale are established is that the conversion of the foreign currency-denominated export price into Korean won is to take place using the relevant exchange rates on that date. This is a "fair comparison" requirement of the WTO Anti-Dumping Agreement and of Australian law.

Presently, the ADC has used a very much later date as the date of sale. The conversion of the foreign currency-denominated export price into Korean won on that date on its own accounts for a distortion of **[CONFIDENTIAL TEXT DELETED – number]** percentage points in the dumping margin announced by the ADC in the SEF.

In case the ADC needs any specific information in order to adjudge this "fair comparison" requirement then Win&P asks the ADC to indicate what that information is.

Similarly, given that **[CONFIDENTIAL TEXT DELETED – explanation offered for ADC's view, based on notes to Win&P's accounts relating to internal accounting policies]** cannot plausibly relate to the material terms of Win&P's contractual relationship with its customer Win&P requests that the ADC convey any other reasoning that is claimed to support its position so that Win&P can respond before any recommendations are made to the Minister.

3 Profit used in the construction of normal value

No matter what political pressures it is that the ADC feels it needs to respond to, ultimately its actions must comply with law, both statutory and administrative. The inclusion of a positive amount of profit is a case in point.

When Section 269TAC(13) was repealed, it was not substituted with a Section to mandate that a positive "amount realised" should always be added into a constructed normal value, or that this was "desirable", or that it was "to be had regard to" by the Minister.

Our comments about the application of Regulation 181A of the Customs Regulations in this matter are as follows:

- (a) Regulation 181A(2) provides that *"the Minister must, if reasonably possible, 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"*. Despite this clear direction, the data relating to the sales of Win&P's sales of like goods in the ordinary course of trade has not been used. It appears this is

⁵ See *Investigation concerning the alleged dumping of wind towers - Comments on draft margin calculations* dated 24 January 2014, at C.

because the ADC formed the view that “*all sales of wind towers were at a loss and there were no sales made in the ordinary course of trade*”. However this is not the case, because the ADC has not included each of Win&P’s domestic sales in that consideration, and because it has miscalculated Win&P’s costs associated with the production and sale of the goods under consideration (see 4 below).

- (b) Even it was decided not to be possible to work out the profit by using the data relating to Win&P’s sales of like goods – a proposition with which Win&P does not agree – then it is not the case that the methodology referred to in the SEF is a “*reasonable method having regard to all relevant information*” as the words of Regulation 181A(3)(c) would require. With the utmost respect, we say that the adoption of a 2010 profitability statistic, for the metal fabrication *industry*, does not comply with any standard of reasonableness of which we are aware. If resort is had to Regulation 181A(3)(c) – and Win&P does not agree that the application of Regulation 181A(3)(c) is required – then the task must be to adopt a profitability *for the POI* for producers or exporters of *the same general category of goods* as wind towers. 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, the method is not reasonable at all.⁶

4 SG&A expenses

We refer the ADC to Win&P’s previous submissions on the overstatement of selling, general and administrative expenses.⁷ In short, there are mistakes in the margin calculations. These mistakes include either a misinterpretation or a misuse of the SG&A data provided to the ADC, and the attribution of research and development expenses that are unrelated to wind towers.

Win&P fully understands that the data presented is complicated. However it is entirely accurate and was prepared by Win&P in accordance with the instructions of the verification team at the verification.

We again offer to meet with you to go through the data and the manner of its calculation.

5 Foreign exchange gains and losses

We refer the ADC to Win&P’s previous submissions on the inclusion of foreign exchange gains and losses in the margin calculations.⁸

We think those submissions are self-explanatory, and would be happy to discuss them further with the ADC if that is required.

6 Domestic credit expenses

We refer the ADC to Win&P’s previous submissions on the calculation of domestic credit expenses as an adjustment factor.⁹

We think those submissions are self-explanatory, and would be happy to discuss them further with the ADC if that is required.

⁶ 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.

⁷ See *Investigation concerning the alleged dumping of wind towers - Comments on draft margin calculations* dated 24 January 2014, at D.

⁸ *Ibid*, at E.

⁹ *Ibid*, at F.

7 Packing and handling costs

We refer the ADC to Win&P's previous submissions on the duplication of packing and handling costs in the margin calculations.¹⁰

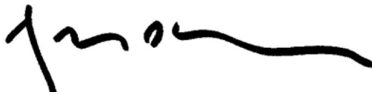
We think those submissions are self-explanatory, and would be happy to discuss them further with the ADC if that is required.

The margin calculations – at both the PAD stage and now at the SEF stage – have been a huge shock to Win&P.

On Win&P's calculations, actionable dumping is not evident.

We request the ADC to duly consider Win&P's submissions and revise the margin calculations accordingly.

Yours sincerely



Daniel Moulis
Principal

¹⁰ *Ibid*, at G.